EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

. 83-2004-CFX
atus: GRANTED

Title: Matsushita Electric Industrial Co., Ltd., et al., Petitioners
v.
Zenith Radio Corporation, et al.

cketed:
ne 7, 1984

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Zoeller, Donald J.

Counsel for respondent: Rome, Edwin P.

try	Date	Note	Proceedings and Orders
1	Jun 7 1984	G	Petition for writ of certiorari filed.
2	Jun 7 1984		Appendix of petitioner Matsushita Elec. Co., et al. filed.
3	Jul 6 1984		Brief of respondents Zenith Radio Corp., et al. in opposition filed.
6	Jul 17 1984		Supplemental brief of respondent Zenith Radio Corp., et al. filed.
7	Jul 18 1984		Reply brief of petitioners Matsushita Elec. Co., et al. filed.
8	Jul 13 1984		DISTRIBUTED. September 24, 1984
9	Jul 23 1984		Supplemental brief of petitioner Matsushita Elec. Co., et al. filed.
2	Oct 1 1984	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
3	Jul 6 1984	G	Motion of Government of Japan for leave to file a brief as amicus curiae filed.
4	Jul 7 1984	G	Motion of American Association of Exporters, et al. for leave to file a brief as amici curiae filed.
5	Oct 1 1984		Motion of Government of Japan for leave to file a brief as amicus curiae GRANTED.
6	Oct 1 1984		Motion of American Association of Exporters, et al. for leave to file a brief as amici curiae GRANTED.
7	Jan 4 1985		Brief amicus curiae of United States filed.
8	Jan 4 1985		LODGINGS received.
9	Jan 9 1985		REDISTRIBUTED. February 15, 1985
0	Jan 14 1985	X	Brief of respondents Zenith Radio Corp., et al. in response to the brief of the U.S. as amicus curiae. filed.
1	Jan 23 1985	X	Supplemental brief of petitioners Matsushita Elec. Co., et al. filed.
3	Mar 25 1985		REDISTRIBUTED. March 29, 1985
4	Apr 1 1985		Petition GRANTED. limited to Questions 1 and 2 presented by the petition.
			**
6	May 3 1984		Order extending time to file brief of petitioner on the merits until June 16, 1985.
7	May 10 1985	G	Motion of petitioners to dispense with printing the joint appendix filed.
8	May 16 1985		Opposition of respondents to motion of petitioners to dispense with printing the joint appendix filed.
9	May 21 1985		Reply of petitioners to respondents' opposition to disperse with printing the joint appendix filed.
0	May 24 1985		DISTRIBUTED. May 30, 1985. (Motion of petrs. to dispense

try	Date	Note	Proceedings and Orders
			with printing joint appendix).
1	May 31 1985		REDISTRIBUTED. June 6, 1985. (Motion to dispense with printing joint appendix).
2	Jun 4 1985	G	Motion of Government of Japan for leave to file a brief as amicus curiae filed.
3	Jun 1 1985	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
4	Jun 7 1985		DISTRIBUTED. June 13, 1985. (Motion to dispense with printing joint appendix & motion of Solicitor General).
5	Jun 17 1985		Motion of Government of Japan for leave to file a brief as amicus curiae GRANTED.
6	Jun 14 1985		Brief of petitioners Matsushita Elec. Co., et al. filed.
7	Jun 14 1985	G	Motion of Governments of Australia, et al. for leave to file a brief as amici curiae filed.
8	Jun 17 1985	G	Motion of American Association of Exporters and Importers, et al. for leave to file a brief as amici curiae filed.
9	Jun 17 1985		Brief amicus curiae of United States filed.
0	Jun 14 1985		Lodging received.
1	Jun 24 1985		Motion of Governments of Australia, et al. for leave to file a brief as amici curiae GRANTED.
3	Jun 21 1985		DISTRIBUTED. June 27, 1985. (Motion of Solicitor General and motion to dispense with printing joint appendix).
5	Jul 1 1985		Motion of petitioners to dispense with printing the joint appendix GRANTED. and counsel shall file with the Clerk nine copies of the record that was before the United States Court of Appeals for the Third Circuit.
6	Jul 1 1985		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
8	Jul 3 1985		Order extending time to file brief of respondent on the merits until August 28, 1985.
9	Jul 11 1985	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
0	Jul 18 1985		Opposition of respondents to motion of The Solicitor General filed.
1	Aug 6 1985		Application for leave to file the respondents' brief on the merits in excess of the page limitation filed
2	Aug 6 1985		(A-107), and order granting same by Brennan, J., on Aug. 7, 1985. The brief may not exceed 100 pages.
4	Aug 21 1985		Order extending time to file brief of respondent on the merits until September 7, 1985.
5	Sep 6 1985		Brief of respondents Zenith Radio Corp., et al. filed.
6	Sep 6 1985		Brief amicus curiae of Semiconductor Industry filed.
7	Sep 11 1985		SET FOR ARGUMENT. Tuesday, November 12, 1985. (4th case).
8	Sep 12 1985		CIRCULATED.
9	Sep 13 1985		Motion of American Association of Exporters and Importers, et al. for leave to file a brief as amici

try	Date	Note	Proceedings and Orders
			curiae GRANTED.
0	Sep 18 1985		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
1	Oct 4 1985		Record filed.
2	Oct 4 1985		Certified partial proceedings received.
3	Oct 17 1985		Application for leave to file a reply brief in excess of the page limits filed (A-304), and order granting
4	Oct 17 1985		same by Brennan, J., on Oct. 21, 1985. The brief may not exceed 30 pages.
5	Oct 24 1985	X	Reply brief of petitioners Matsushita Elec. Co., et al. filed.
6	Oct 24 1985	G	Motion of the Solicitor General to permit Charles F. Rule, Esquire, to present oral argument pro hac vice filed.
7	Nov 4 1985		Motion of the Solicitor General to permit Charles F. Rule, Esquire, to present oral argument pro hac vice GRANTED.
8	Nov 12 1985		ARGUED.

84-2004

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

IRA M. MILLSTEIN
A. PAUL VICTOR
WEIL GOTSHAL & MANGES
New York, N.Y.
Counsel for the
Matsushita Petitioners

CARL W. SCHWARZ
METZGER, SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the
Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.
Counsel for the
MELCO Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, N.Y.
Counsel for the
Mitsubishi Petitioners

DONALD J. ZOELLER
Counsel of Record
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
(212) 510-7000
Counsel for the
Toshiba Petitioners

PETER J. GARTLAND
WENDER, MURASE & WHITE
New York, N.Y.
Counsel for the
Sharp Petitioners

KEVIN R. KEATING
WHITMAN & RANSOM
New York, N.Y.
Counsel for the
Sanyo Petitioners

June 7, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether, in an antitrust conspiracy case based upon "parallel" acts and other circumstantial evidence, summary judgment for the defendants may be reversed when the District Court has found that all of the evidence is entirely consistent with the independent economic self-interest of each defendant, and the Court of Appeals has neither rejected that finding nor even considered whether defendants' actions were more consistent with an inference of conspiracy than with an inference of independent action?

2. Whether a court of the United States may: (i) disregard the duly issued statement of a friendly foreign government attesting that certain export controls observed by its nationals were compelled by that government; (ii) permit a trier of fact to adjudicate the veracity of such an official government statement; or (iii) hold such government-mandated conduct to constitute or be a "feature" of a conspiracy in violation of the antitrust laws of the United States?

3. Whether a district court is powerless to exclude proffered expert testimony that it finds to be based upon false or unsupported factual assumptions, once it is found that the data upon which the expert's testimony is based are "of the type" upon which other experts in the field reasonably rely?

PARTIES TO THE PROCEEDING

Petitioners are Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Matsushita Electronics Corporation, Toshiba Corporation, Toshiba America, Inc., Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, Hitachi Sales Corporation of America, Mitsubishi Electric Corporation, Mitsubishi Electric Sales America, Inc., Mitsubishi Corporation, Mitsubishi International Corporation, Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric, Inc., Sanyo Manufacturing Corporation, Sharp Corporation, and Sharp Electronics Corporation.[1]

Respondents are Zenith Radio Corporation and National Union Electric Corporation.[2]

[1] The statements required by Rule 28.1 of this Court are contained in the Appendix to this Petition (1a-5a). The Appendix to this Petition is, in part, bound together with the Petition and, in part, bound in two additional volumes. References to the Appendix are cited herein as "____a."

[2] The Court of Appeals affirmed the District Court's grant of summary judgment in favor of defendants Sony Corporation, Sony Corporation of America, Motorola, Inc., and Sears Roebuck & Co. (183a-185a). These companies are designated as respondents pursuant to Rule 19.6 of this Court. Unless indicated otherwise, however, references to "respondents" in the Petition do not include these former defendants.

TABLE OF CONTENTS

Table of Contents, Continued

Table of Contents, Continued

TABLE OF AUTHORITIES

Table of Authorities, Continued

Table of Authorities, Continued

Table of Authorities, Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

Petitioners respectfully request that writ of certiorari be issued to review the decisions and judgments of the United States Court of Appeals for the Third Circuit, entered on December 5, 1983, which reversed the decisions of the United States District Court for the Eastern District of Pennsylvania granting summary judgment in favor of petitioners against respondents' antitrust and antidumping claims.

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 723 F.2d 238 (34a-197a) and 723 F.2d 319. (198a-223a). Upon petition for rehearing in banc, and motion requesting that said petition be acted upon by all circuit judges in regular active service, the Court of Appeals issued separate unreported orders. (234a and 235a). The opinions of the District Court granting summary judgment are reported at 494 F. Supp. 1190 (1111a-1214a) and 513 F. Supp. 1100. (236a-667a). The District Court's evidentiary opinions are reported at 505 F. Supp. 1125, 505 F. Supp. 1190 and 505 F. Supp. 1313. (668a-776a; 777a-987a; and 988a-1109a).

JURISDICTION

The judgments of the Court of Appeals were entered on December 5, 1983. (224a-228a and 229a-233a). Timely petitions for rehearing and rehearing in banc were denied on March 9, 1984. This Court has jurisdiction to review the judgments of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents' complaints allege violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, section 73 of the Wilson Tariff Act, 15 U.S.C. § 8, the Revenue (Antidumping) Act of 1916, 15 U.S.C. § 72, section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and section 7 of the Clayton Act, 15 U.S.C. § 18. (27a-32a).

STATEMENT OF THE CASE

At the core of this enormous case is the allegation of plaintiff-respondents National Union Electric Corp. ("NUE") and Zenith Radio Corp. ("Zenith") that petitioners and almost one hundred other foreign and domestic firms participated in a twenty-year "unitary" conspiracy to drive U.S. manufacturers of consumer electronic products ("CEPs") out of business by selling television receivers and other CEPs at artificially high prices in Japan for the purpose of creating a "warchest" to fund an agreement to sell the same products at artificially low prices in the United States.[3] (45a-46a; 258a).

[3] Respondents brought suit in the District Court pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and section 801 of the Revenue (Antidumping) Act of 1916, 15 U.S.C. § 72, against twenty-four named defendants: seven Japanese manufacturers of television receivers (including Sony Corporation); four Japanese trading companies; one Japanese component manufacturer; ten American subsidiaries of the Japanese defendants; a former American television manufacturer (Motorola); and an American retailer which purchased Japanese television receivers for resale (Sears Roebuck & Co.). Additionally, respondents identified seventy-three other organizations as "co-conspirators," including almost every corporation in Japan, the United States and throughout the world that manufactured or sold CEPs in or to the U.S. market during the 1950's, 1960's and 1970's—except, of course, NUE and Zenith.

1. *The District Court Proceedings.* The thirteen-year history of this litigation, in which billions of dollars in alleged damages are being sought by the respondents (665a), is amply described in the District Court and Court of Appeals decisions. (45a-56a; 243a-285a). The huge volume of documents, interrogatory answers and deposition transcripts generated by this litigation, led then District (now Circuit) Judge Edward R. Becker—the seventh district court judge to sit on the case—to implement a series of widely heralded case management procedures in an attempt to narrow and focus the issues being pressed. (64a). Pursuant to such procedures, respondents' entire case was set forth with preclusive effect in their Final Pretrial Statement ("FPS"), filed in the wake of more than eight years of discovery. (269a-273a).

After the filing of motions for summary judgment by all defendants, the District Court held five weeks of evidentiary hearings that resulted in the issuance of three separate evidentiary opinions. (668a-776a; 777a-987a; 988a-1109a). In one of these opinions, the District Court excluded significant portions of the expert testimony proffered by respondents on the ground that, among other things, it was based upon factual assumptions which the District Court found to be unsupported or false. (1058a-1060a; 1065a-1077a).

Thereafter, following two weeks of summary judgment arguments, and after combing the record for all possible evidence in support of respondents' claims, the District Court granted petitioners' motions for summary judgment, concluding that there was no evidence from which a fact finder might either directly find or reasonably infer the conspiracy alleged. (621a-622a).[4] This conclusion was in complete accord with the

[4] The District Court's conclusion that there was no evidence from which a fact finder might find or infer the conspiracy alleged was not dependent upon its opinions concerning the admissibility of respondents' evidence. Instead,

views of the Antitrust Division of the Department of Justice, which, at respondents' request, spent six months reviewing respondents' "best evidence," only to conclude that there was "no evidence of concerted predatory conduct [by petitioners] intended to destroy and supplant the U.S. color TV industry, either at an earlier period or at the present time."[5]

With regard to the home-market aspect of the alleged conspiracy, the District Court concluded that some evidence of a limited agreement to stabilize prices in Japan for a two-year period (1964 to 1966) did not, absent *any* evidence of a connection between petitioners' home-market behavior and petitioners' export sales, permit the inference necessary to support respondents' unitary conspiracy theory, *i.e.*, that the purpose and effect of the alleged home-market agreement was to fund a twenty-year "low price" export conspiracy. (385a-386a; 462a-463a; 608a; 615a-616a).

The District Court next turned to the "parallel" pricing behavior and other circumstantial evidence relied upon by respondents as a basis for inferring the "export side" of the alleged conspiracy. Respondents argued that, despite the uncontested fact that the alleged conspirators sold at every price level in the United States, "ranging from the lowest to the highest" (476a n.202), a "low price" export conspiracy could be inferred from petitioners' purported charging of lower prices in the United States than in Japan, from the granting of "secret

giving respondents the benefit of every reasonable doubt, the District Court reached its summary judgment decision only after it either assumed the admissibility of respondents' proffered evidence, or considered substantially equivalent evidence in support of each of respondents' key factual propositions (402a; 418a; 436a n.167; 438a n.168; 442a-443a; 447a; 453a; 456a; 473a-474a; 488a-489a n.211; 496a n.221; 523a-524a; 605a-608a).

[5] Statement by John H. Shenefield, Assistant Attorney General, Antitrust Division, before the Senate Judiciary Committee, 3-4 (April 12, 1978). (21a-24a at 23a).

rebates," and from other allegedly "parallel" behavior in the United States.

Applying the established standard for determining when an inference of conspiracy is permissible from parallel acts and other circumstantial evidence, as set forth by this Court in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) ("*Cities Service*"), as well as in the decisions of other federal courts, the District Court found that there was no evidence that petitioners had acted contrary to their independent economic interests. (475a-480a; 495a-498a; 522a; 610a). Moreover, the District Court found that there was no evidence to support a rational motivation by any of the petitioners to enter into the unique "low price" export conspiracy alleged by respondents—to sell CEPs in the United States, not at any particular "low price" or level, but at whatever "low prices" were "necessary to get the business." (478a n. 204). "[C]ompanies do not need to conspire to sell at [low] prices 'necessary to get the sale'," the District Court concluded, because that is exactly the individual motivation and result one would expect from free and unfettered competition *without any agreement.* (479a).[6]

The District Court further held that no agreement to charge artificially low United States prices could be inferred from petitioners' participation in Japanese government-mandated export control arrangements prohibiting them from selling below specified *minimum* prices and, according to respondents, limiting the number of petitioners' United States export customers, since such arrangements could only have had the effect of *raising* export prices—the exact opposite of respondents' "low price" conspiracy claims. (303a-385a). Consequently, the District Court did not determine whether the act of

[6] The District Court also found that there was no evidence to support a rational motivation by petitioners to enter into a conspiracy to attempt to monopolize the United States television receiver market, because it was plain from the record that any such conspiracy would have been recognized as futile. (484a).

state and sovereign compulsion doctrines prevent a United States court from holding a Japanese company's participation in such export controls to constitute or be a feature of a violation of United States antitrust law. It did, however, note the existence of the official pronouncement of the Ministry of International Trade and Industry of the Government of Japan ("MITI"), transmitted to the District Court through diplomatic channels in 1975 (the "MITI Statement," 6a-14a). That statement attested to the fact that petitioners' participation in such controls was *mandated* by MITI as an integral part of Japanese foreign trade policy. (387a-390a).

In sum, the District Court concluded that there was nothing in the record that made petitioners' "parallel" business behavior more consistent with an inference of the alleged conspiracy than with an inference of independent action. (478a). The district court therefore granted summary judgment in favor of petitioners on all of respondents' antitrust claims.[7]

2. *The Court of Appeals Proceedings.* On appeal, all but two of the Third Circuit judges apparently recused themselves. A panel consisting of the remaining two judges, plus one circuit judge from the Second Circuit, reversed.

a. The panel created a new legal standard under which plaintiffs alleging an antitrust conspiracy based upon parallel acts and other circumstantial evidence can survive a motion for summary judgment without satisfying the standard set forth by this Court in *Cities Service* for inferring a conspiracy from such evidence. In particular the panel held that because, as part of respondents' mix of circumstantial evidence, there was "direct evidence of some kinds of concert of action" (*i.e.*, two years of alleged price stabilization in Japan and the MITI-mandated export control arrangements), although not of the "unitary" conspiracy alleged to be unlawful, the normal

[7] The District Court also granted summary judgment in favor of petitioners with respect to respondents' claims under the 1916 Antidumping Act. (1111a-1214a; 632a n.372).

"limitations of the inference-drawing process" do not apply to this case. (165a-166a; 172a-175a). Consequently, the panel held that the export side of the alleged unitary conspiracy could be inferred from petitioners' "parallel" behavior and other circumstantial evidence despite the fact that the panel did not reject (or even review) the express finding of the District Court that petitioners' U.S. market behavior was completely consistent with rational independent action and far more consistent with an inference of competition than with the requested inference of conspiracy.

b. The panel disregarded the official statement of the Government of Japan (the MITI Statement, 6a-14a) attesting to the fact that the export control arrangements relied upon by the panel to reverse summary judgment were mandated by the Japanese Government acting within its sovereign powers.[8] In holding that a fact finder could consider such government-mandated conduct to constitute a central "feature" of a U.S. antitrust law violation, the Court of Appeals decision did not even mention the MITI Statement. (166a-168a; 177a-179a; 188a-189a).

c. The panel also reversed the District Court's exclusion of significant portions of respondents' expert testimony. According to the panel, the District Court was without discretion to exclude this testimony despite its finding that, among other things, it was based upon demonstrably false and unsupported factual assumptions. The panel did not reverse or review these findings by the District Court. Instead, it held that the District Court was obliged to accept respondents' expert testimony as

[8] Thus, the panel premised its conclusion that a fact finder might infer an actionable conspiracy in violation of U.S. law on petitioners' participation in: (i) regulations of the Japan Machinery Exporters Association ("JMEA") requiring the registration, and limiting the number, of United States customers to whom Japanese television exporters were permitted to sell (the so-called "five-company rule") (178a; 180a); and (ii) arrangements establishing the minimum prices at which Japanese television manufacturers were permitted to export certain products to the United States. (179a).

admissible to defeat summary judgment—regardless of its findings concerning the truth of the factual assumptions upon which the testimony was based—so long as the experts stated that the data relied upon in forming their opinions were "of a type" reasonably relied upon by other experts in their respective fields and there was no contrary expert testimony on this issue. (102a-106a).

d. Finally, in a separate opinion handed down on the same day, the panel also reversed the District Court's dismissal of respondents' claims under the Antidumping Act of 1916. Applying its unprecedented standard for inferring a conspiracy to the 1916 Act, the panel held that respondents had established a *prima facie* case of concerted action that would satisfy the specific predatory intent requirement of that Act. (219a-221a). If this Court reverses the antitrust judgment of the Court of Appeals, it would thus necessarily reverse the Antidumping Act judgment as well.

e. Apparent recusals by every member of the Third Circuit, other than the two who sat on the panel, precluded in banc review. Petitioners' request to the Third Circuit judges to reconsider their recusals in ruling upon petitioners' request for an in banc rehearing was denied, as was their petition for a rehearing by the panel. (234a; 235a).

This Court thus provides the *only* opportunity for petitioners to obtain review of the panel's decision before this case is remanded for years more of unnecessary, costly and burdensome litigation.

REASONS FOR GRANTING THE WRIT

The clear-cut legal questions presented by this closely followed, precedent-setting litigation are precisely the type of controlling issues—which are both "fundamental to the further conduct of the case" and of paramount public policy concern—that warrant interlocutory review by this Court. *See, e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 643-44 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 725-27 (1975); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

In particular, the decision below warrants immediate review because: (i) it signals a significant retreat from the increasingly effective use of summary judgment in unmeritorious antitrust conspiracy cases and thus threatens to encourage antitrust actions brought by competitors for the purpose of frustrating competition, rather than preserving it; and (ii) it is in sharp conflict with the standard established by this Court and by other courts of appeals for inferring a conspiracy from parallel business conduct and other circumstantial evidence. (Point I).

In addition, by permitting a fact finder to consider the government-mandated participation of Japanese nationals in export control arrangements a critical "feature" of a U.S. antitrust law violation, and by ignoring an official statement of the Japanese Government, the Third Circuit panel has failed to give effect to the act of state and sovereign compulsion doctrines. The opinion of the Court of Appeals intrudes upon the conduct of U.S. foreign relations and raises serious policy issues that require prompt review by this Court. (Point II).

Finally, the decision of the Third Circuit panel eliminates the discretion of federal trial judges to exclude from evidence, for purposes of summary judgment or trial, expert testimony that they find to be based upon false or unsupported factual assumptions. If permitted to stand, this ruling will make it virtually impossible for district courts to grant summary judgment in any case, large or small, in which expert testimony plays a material role. (Point III).

I.

Certiorari Should Be Granted To Review The Unwarranted Exception That The Court Of Appeals Has Created To This Court's Controlling Standard For Inferring An Antitrust Conspiracy From Parallel Acts And Other Circumstantial Evidence

The Third Circuit has created an elastic exception to this Court's standard for inferring an antitrust conspiracy in cases resting upon parallel conduct and other circumstantial evidence. This exception poses a serious threat to competition policy. It would empower the lower courts to dispense with this Court's clear rule in *Cities Service* for inferring an antitrust conspiracy from such evidence and would thus make it considerably more difficult to dispose of unfounded antitrust conspiracy claims prior to trial. Moreover, the panel's ruling cannot be reconciled with the decisions of this Court, as well as those of other circuits, making review by this Court necessary to provide uniformity in this important area of antitrust policy.

1. The actionable conspiracy that the Third Circuit would permit a fact finder to infer in this case is a unitary conspiracy in which the participants agreed to stabilize prices in Japan, "coupled" with an agreement by the conspirators to allocate among themselves customers in the United States, so as to permit the conspirators to "concentrate their predatory tactics [*i.e.*, their alleged agreement to sell at artificially low prices] on separate selected" customers in the United States, while "insulated from price competition at home and from Japanese competition here." (168a). As the District Court and the Court of Appeals both concluded, the fact finder in this case must infer the above conspiracy from "parallel" acts and other circumstantial evidence (including "direct evidence of some kinds of concert of action," but not of the conspiracy alleged). (165a-166a; 257a-263a).

To avoid the risk of impermissible speculation, this Court has held that antitrust plaintiffs seeking to infer a conspiracy from parallel acts and other circumstantial evidence must demonstrate that the challenged conduct is contrary to the

independent self-interest of the defendants, and therefore *more* consistent with an inference of the alleged conspiracy than with an inference of independent behavior. *See, e.g., Cities Service*, 391 U.S. at 280; *Theatre Enterprises, Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537 (1954).[9] The District Court applied this test with painstaking care to respondents' evidence below. For reasons which were meticulously set forth in its opinion, the District Court concluded that petitioners' alleged "parallel" acts (*e.g.*, the charging of lower prices in the United States than in Japan, the granting of secret rebates) were precisely the kind of independent behavior in each firm's economic self-interest that would be expected as a result of *competition*, not conspiracy. (478a-479a; 497a-502a). This conclusion was not even reviewed by the Court of Appeals.

Instead, the Third Circuit panel announced a new rule of law in which the presence of "direct evidence of some kinds of concert of action," although not of the conspiracy alleged, renders inapplicable this Court's established standard for inferring an antitrust conspiracy from parallel acts and other evidence. (165a-166a; 172a-175a). Indeed, in reversing the summary judgment decision, the Court of Appeals did not even consider whether the alleged "parallel" behavior was in each of the petitioners' individual economic self-interest, as the District Court had found, or whether an inference of conspiracy was more compelling than an inference of unilateral action.

This new interpretation of antitrust conspiracy law directly conflicts with the decision of this Court in *Cities Service* (which was not even mentioned in the panel's opinion). Specifically, in *Cities Service*, this Court set forth the controlling standard for inferring an antitrust conspiracy not only from parallel acts, but from the combination of those acts with other

---

[9] *See also Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1473 (1984) (plaintiffs seeking to infer a vertical price fixing conspiracy must produce evidence "that tends to exclude the possibility of independent action").

circumstantial evidence—including, in that case, an agreement between Cities Service and one of its alleged co-conspirators relating to Kuwait oil, negotiations between Cities Service and the other alleged co-conspirators to join an oil consortium, and various other kinds of "direct evidence" of concert of action, but not of the conspiracy alleged. 391 U.S. at 263-64, 276, 283-85, 286-87. Indeed, after expressly noting that the petitioner in *Cities Service* did "attempt to point to *other evidence* besides the simple [parallel] failure to deal as showing the conspiracy," *id.* at 280 (emphasis added), this Court affirmed summary judgment in favor of Cities Service, holding that:

> the inference that Cities' failure to deal was the product of factors other than conspiracy [was] at least equal to the inference that it was due to the conspiracy, thus negating the probative force of the evidence showing such a failure . . . .

Id.

As recently explained by this Court in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1470 (1984), if an inference of concerted price fixing may be drawn from ambiguous evidence, there is a considerable danger that lawful and pro-competitive conduct will be deterred or penalized. For this reason, it is particularly important that the *Cities Service* standard be given consistent application to prevent innocent and pro-competitive "parallel" pricing behavior from being condemned.

The Third Circuit's opinion also conflicts with decisions in other circuits that have applied the *Cities Service* inference standard in cases such as this. *See, e.g.*, *Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (affirming summary judgment despite proof not only of parallel interest rates, but also of opportunities to conspire, periodic discussions of rates, an agreement among the alleged conspirators establishing a compatible credit card system, and other direct evidence of some kinds of concert of action, where collusion was not the "compelling . . . rational inference" and where legitimate business

reasons explained the pricing practices); *Proctor v. State Farm Mut. Auto Ins. Co.*, 675 F.2d 308, 334-35 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982) (affirming summary judgment where, despite claims of "direct evidence" of collusion, including meetings and communications among the defendants, the challenged parallel acts were found to be "in the economic self-interest of each of the individual [defendants]").[10]

The "direct evidence of some kinds of concert of action" relied upon by the panel (*i.e.*, the minutes of meetings and other documents relating to alleged price stabilization in the Japanese domestic market for the two-year period 1964-66, and the MITI-mandated minimum price arrangements and "five-company" rule) is not "direct evidence" of the alleged twenty-year conspiracy to destroy United States competitors by selling at artificially low export prices. Rather, as the Third Circuit itself conceded, such "concert of action" is merely another category of circumstantial evidence, combined with the evidence of asserted "parallel" acts, from which a fact finder would be asked to infer the conspiracy alleged. (165a-166a). Thus, none of this "direct evidence" supports the Third Circuit's conclusion that the normal "limitations of the inference-drawing process" do not apply to respondents' claims. (165a).

Indeed, neither of the categories of "direct evidence" of concert of action relied upon by the panel provides *any* support for respondents' claims of a "low price" export conspiracy. The MITI export controls, aside from being government-mandated, set *minimum* prices and, according to respondents, allocated customers—practices which, as the District

---

[10] *See also Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 884 (9th Cir. 1982) (affirming summary judgment where the plaintiff could not show that the "allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment"); *Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 110 (2d Cir. 1975) (affirming summary judgment where "parallel conduct is consistent with independent competitive decisions or at most reflects a non-consensual decision not to compete").

Court found, could have led only to *higher* export prices. (324a-329a).

As for the alleged home-market price stabilization, it is well established that evidence of participation in one agreement cannot be utilized to infer participation in another agreement, at least in the absence of any independent probative evidence to connect the two. *See, e.g., Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 435 (5th Cir. 1977); *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173, 186 (D.C. Cir. 1965); *International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, 459 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963). The District Court's express finding that there was no evidence of such a connection between the alleged home market price stabilization and petitioners' exports to the United States (385a-386a; 460a-463a; 608a; 615a-616a) was not questioned by the Court of Appeals.

Moreover, as explained in greater detail below (pp. 15-16 *infra*), there is no rational basis for inferring the existence of a money-losing, "low price" export conspiracy from an alleged "high-price" conspiracy in Japan. The Third Circuit apparently would permit the trier of fact to draw such an inference by speculating that the additional profits generated by a price-stabilizing conspiracy in one market might induce the participants to agree to fix artificially low prices and incur losses in another market. (176a-177a). Such conduct, however, would make no sense. A rational business firm will not throw away money on a losing venture that it could profitably invest elsewhere merely because it has accumulated profits in another market. 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 719a (1978).

The Third Circuit's reliance upon the above so-called "direct evidence" of "concert of action" thus cannot justify its new exception to the *Cities Service* standard. The panel's ruling, which permits the fact finder to *speculate* that companies that allegedly agreed to stabilize prices in their home market would also agree to fix artificially low export prices for more than twenty years—*without any evidence of export conduct inconsistent with vigorous competition or against economic self-interest*—cannot be reconciled with this Court's decisions in *Cities Service, Theatre Enterprises* and *Monsanto*.

2. The need to adhere to the *Cities Service* rule is particularly compelling in a case, such as this, involving competitors' allegations of a "*low price*" conspiracy. Competition resulting in sales at "low prices" is the ultimate goal of our antitrust policy. That goal should not be undermined by exceptions to this Court's clear standard for inferring an antitrust conspiracy.

Claims of conspiracies to sell at "low prices" require particular scrutiny by the courts. Unlike price-elevating schemes, which confer direct and immediate benefits upon sellers, putative "predatory" pricing schemes, which impose substantial costs upon sellers, provide no such incentives.[11] Here, respondents are competitors whose basic complaint is that they have been injured by "low" pricing from foreign manufacturers seeking to enter the United States market. In such circumstances, there is no rational basis for inferring a conspiracy from the so-called "parallel" act of each Japanese competitor in charging lower prices in the U.S. than in Japan. Indeed, as the District Court found, this is precisely what any new entrant would be expected to do in order to get established in a new market. (478a-480a).

Moreover, the panel's conclusion that normal "limitations of the inference drawing process" do not apply to this case (165a) made it unnecessary for the panel to consider whether there could ever be any rational motive by petitioners to enter into the alleged conspiracy to charge artificially low prices in order

[11] *See* R. Bork, *The Antitrust Paradox*, 148-54 (1978) ("A firm contemplating predatory price warfare will perceive a series of obstacles that make the prospect of such a campaign exceedingly unattractive. . . . [P]redation by such techniques is very improbable."); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 711b (1978) ("The prospects of an adequate future payoff . . . will seldom be sufficient to motivate predation."); *see also* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 336 (1981); McGee, *Predatory Pricing Revisited*, 23 J. Law & Econ. 289, 294, 300 (1980).

to drive all American manufacturers of television receivers out of business and then charge monopoly prices to recoup their losses. The District Court, which did examine the record on this issue, concluded that:

> [T]he defendants, new entrants with still relatively small market shares, could not rationally hope to recoup their alleged losses in the United States in view of the dominant market positions held by RCA and Zenith and the ability of the European manufacturers, other far eastern companies, and major American firms swiftly to increase their United States CEP sales if higher monopoly prices were ever charged.

(611a). The Court of Appeals did not review this conclusion. Instead, it simply permitted the fact finder to speculate that petitioners would have entered into a conspiracy with such an irrational objective—a result directly contrary to the *Cities Service* standard. Indeed, the conspiracy alleged by respondents would have been an especially irrational endeavor for foreign competitors, like petitioners, who could hardly have hoped to achieve a monopoly of U.S. markets in light of the political and legislative restraints and other barriers to imports that have been and can be so readily erected.

Acceptance of the panel's inference standard would encourage protectionist-minded U.S. competitors to bring treble damage actions whenever a number of foreign manufacturers attempt to compete in the United States with prices claimed to be lower than their prices in the home market. If antitrust plaintiffs are able to defeat summary judgment on the basis of such conduct, there is a serious risk that competition will be affirmatively *suppressed*. *See, e.g.*, *Monsanto*, 104 S. Ct. at 1470; *United States v. United States Gypsum Co.*, 438 U.S. 422, 456-58 (1978).[12] Indeed, as the District Court found (478a-

[12] *See also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (courts must "be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition"); *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition.").

479a; 609a-610a), the alleged "low price" conspiracy in this case is sought to be inferred from the very type of pro-competitive "parallel" behavior that the antitrust laws are designed to encourage, rather than condemn (low prices, secret rebates, etc.). Providing for the uniform application of the *Cities Service* inference standard to this type of case is thus all the more important to the competition policy embodied in our antitrust laws.

3. Finally, the Third Circuit's unprecedented exception to the *Cities Service* standard unravels in one stroke what years of case law and scholarly work have only recently accomplished—the use of summary judgment as a meaningful tool for managing large and complicated antitrust cases.[13] This result directly undermines the decisions of this Court, and those of other circuits, which have recognized that because of the enormous burden that complex antitrust cases often place on the judiciary, and the chilling effect which vexatious treble damage actions can have on competition, such cases need to be carefully managed by the district courts—and that summary disposition may often be the best tool for achieving this end. *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); *Cities Service*, 391 U.S. at 289-90.[14] Unless this Court grants

[13] *See, e.g.*, 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 316 at p. 57; Schwarzer, J. (N.D. Cal.), *Techniques for Identifying and Narrowing Issues in Antitrust Cases*, 51 Antitrust L.J. 223, 226 (1982); Statement of the American College of Trial Lawyers, 90 F.R.D. 207, 226 (1981); Report of the National Commission for Review of Antitrust Law and Procedures, 80 F.R.D. 509, 565 (1979); Rogers, *Summary Judgment in Antitrust Conspiracy Litigation*, 10 Loy. U. of Chi. L.J. 667, 689 (1979).

[14] *See also Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 464 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) ("The very nature of antitrust litigation would encourage summary disposition . . . when permissible. . . . The statutory remedy of treble damages creates a special temptation for vexatious litigation. Also, antitrust actions have been proven to be especially protracted and difficult for jury consideration."); *Comet*

certiorari to review the Third Circuit's erroneous legal ruling, district courts will almost certainly be encouraged to conclude that they should forego the massive effort that is generally required to bring large antitrust conspiracy cases under control in order to determine whether summary judgment is appropriate.

The Department of Justice repeatedly has urged this Court to adopt rigorous standards for inferring an antitrust conspiracy and to avoid what the Third Circuit panel has wrought here—a rule that a price-fixing conspiracy may be inferred from parallel acts without any evidence that the "behavior is inconsistent with individual self-interest and thus unlikely to occur without collusion." Brief for the United States as Amicus Curiae at 8-10, 11, *Weyerhaeuser v. Lyman Lamb Co.*, 456 U.S. 971 (1982), *granting cert. to* 655 F.2d 627 (5th Cir. 1981), *cert. dismissed*, 103 S. Ct. 3100 (1983).[15] Just last Term, this Court granted certiorari in *Weyerhaeuser* to address this very issue, but was deprived of the opportunity to do so by the settlement of that case. Before the parties in this case—and the judicial system—are consigned to years more of

---

Mechanical Contractors, Inc. v. E.A. Cowen Constr., Inc., 609 F.2d 404 (10th Cir. 1980); *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107 (5th Cir. 1979); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977); *Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102 (2d Cir. 1975).

[15] *See also* Brief for the United States as Amicus Curiae at 7-10, *Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 455 U.S. 988 (1982), *denying cert. to* 641 F.2d 457 (7th Cir. 1981) (summary judgment was appropriate in an antitrust conspiracy case where there was no proof of conduct against individual economic self-interest, even though the plaintiff offered evidence of identical pricing behavior, close personal ties, opportunities to conspire, discussion of prices and other forms of concert of action among the alleged conspirators); Brief for the United States as Amicus Curiae in Support of Petitioner at 9-10, *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984) ("To infer concerted action [in the absence of direct evidence of collusion] requires a showing that the conduct is not in the individual self-interest of the participants, acting independently, and is in their collective and self-interest only when they coordinate their actions.").

unnecessary and costly litigation under an erroneous legal standard, certiorari should be granted to resolve this controlling issue.

II.

Certiorari Should Be Granted To Provide Prompt Review Of The Court Of Appeals' Failure To Give Effect To An Official Statement Of The Japanese Government Attesting That Certain Conduct Of Petitioners Relied Upon By The Court To Reverse Summary Judgment Was Mandated By The Government Of Japan

The panel's decision also requires immediate review because it conflicts with numerous decisions of this Court, and other federal courts, applying the act of state and sovereign compulsion doctrines. The panel below treated this case as if it involved no inter-governmental or foreign policy ramifications at all. Yet, in reversing the District Court's summary judgment decision, the panel held that a fact finder could infer an unlawful conspiracy from, among other things, petitioners' participation in minimum price and customer registration arrangements (*i.e.*, the "five-company" rule) (176a-177a; 178a-179a) which the Japanese Government has attested were carried out pursuant to its sovereign mandate. (6a-14a).

The Court of Appeals' opinion would permit the fact finder to conduct a broad scale inquiry into the truthfulness of the Japanese Government's official diplomatic representations and, if so inclined, to disregard such representations in their entirety in order to conclude that conduct which the Japanese Government has stated that it mandated was actually a "feature" of a conspiracy in violation of U.S. law. The opinion represents a serious encroachment by the judiciary into issues of foreign relations reserved to the Executive Branch. It is imperative that this Court grant certiorari so that this issue can be reviewed prior to the time the District Court, on remand, is required to conduct the very inquiry into the validity and effect of foreign governmental pronouncements and policies that the act of state doctrine is intended to prevent.

1. As discussed below (pp. 21-24 *infra*), the sovereign compulsion and act of state doctrines preclude actions under United States law against the participation of Japanese nationals, in Japan, in export control arrangements mandated by the Japanese Government. Indeed, even the Third Circuit panel recognized this fundamental principle. (188a).

The Third Circuit did not apply this principle to bar respondents' challenge to the export control arrangements at issue because, in disregard of the decisions of this Court and other federal courts, it found that a fact finder could conclude that these arrangements were, in fact, not mandated by the Government of Japan. (178a; 188a-189a). Specifically, the panel postulated that a fact finder could conclude that: (i) these arrangements had only been "sponsored" or "encouraged" by the Government of Japan, rather than mandated (177a-178a); (ii) there is some doubt "that the minimum prices [contained in the manufacturers' agreements and referred to in the exporters' regulations] . . . were in fact determined by the Japanese Government" (188a-189a); (iii) "the Government of Japan merely provided an umbrella under which the defendants . . . fixed their own export prices" (189a); and (iv) the "five-company rule was the result of non-governmental action." (178a).

In order to reach these conclusions, however, the Court of Appeals had to ignore—indeed, it did not even mention—the Japanese Government's official pronouncement attesting to the mandatory nature and governmental character of all of the export control arrangements challenged by respondents. The MITI Statement conclusively established that:

> [T]he [minimum price] agreements entered into among the Japanese defendants, as well as certain regulations of the Japan Machinery Exporters Association [*i.e.*, the so-called five-company rule] . . . have come into existence pursuant to the direction of MITI

(8a); and that MITI gave the defendants:

> no alternative but to establish the agreement[s] and regulation[s] in compliance with the said direction.

(12a).

The panel's failure to give any effect to the MITI Statement is inexplicable. Not only did the panel fail to follow the long-established rule that an official pronouncement of a foreign sovereign attesting to the effect of governmental activities in which it was engaged must be accepted by a United States court as *conclusive* proof of the representations contained therein,[16] but it gave no weight to the MITI Statement at all.

In *United States v. Pink*, 315 U.S. 203 (1942), this Court considered whether an expropriation decree of the Russian government would be given extraterritorial effect over property located in New York. The Soviet Commissariat of Justice filed a statement with the Court explaining that the expropriation decree at issue was intended to have such an effect. The Court held that the representations contained in this official government statement were entitled to be given "*conclusive*" effect. *Id.* at 220 (emphasis added).

The policy behind this ruling can be found in the act of state doctrine.[17] The rationale of the doctrine—leaving the conduct of foreign affairs to the Executive Branch—would be frustrated if courts were permitted to determine whether or not to accept the official statements of a foreign government as

[16] *See, e.g.*, *United States v. Pink*, 315 U.S. 203, 218-21 (1942); *Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438, 443-44 (2d Cir. 1940); *The Claveresk*, 264 F. 276, 280 (2d Cir. 1920); *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919); *D'Angelo v. Petroléos Mexicanos*, 422 F. Supp. 1280, 1283-85 (D. Del. 1976), *aff'd mem.*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *United States v. Melekh*, 190 F. Supp. 67, 87 (S.D.N.Y. 1960); American Bar Association, Section of Antitrust Law, Antitrust Law Developments (Second) 562 n.272 (1984).

[17] *See Banco de Espana*, 114 F.2d at 443 ("It would seem to follow [from the act of state doctrine] that the statement that such [governmental] acts had taken place made to our courts officially on behalf of the friendly foreign government by its accredited representative, must be accepted as proof of

truthful. As explained long ago by the Second Circuit Court of Appeals in *The Claveresk*, 246 F. at 280, the official pronouncement of a foreign government "describing a certain act and avowing it as governmental, is to be taken as a verity."

Had the Third Circuit properly accorded conclusive effect to the MITI Statement's attestations that the challenged minimum price agreements and JMEA regulations were mandated by the Japanese Government as an integral part of its foreign trade policies, it could not have authorized a fact finder to consider such conduct to be a central "feature" of the alleged unlawful conspiracy.

2. Petitioners' participation in the MITI-mandated export controls is clearly protected under the sovereign compulsion doctrine. In recognition of the impropriety and unfairness of applying United States law to punish conduct undertaken at the direction of a foreign government, "sovereign compulsion" has been recognized as an absolute defense to an antitrust claim.[18] This principle, of course, is merely an international corollary to the well-established rule that the United States antitrust laws do not apply to private conduct compelled by state governments. *See, e.g., Hoover v. Ronwin*, 52 U.S.L.W. 4535, 4538-39 (May 14, 1984) (No. 82-1474); *Bates v. State Bar*, 433 U.S. 350, 359-63 (1977).

---

that fact . . . ."); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. at 110 (inquiry into the validity of a decree by the Trucial State of Sharjah held barred by the act of state doctrine because it would breed "the very sources of diplomatic friction and complications that the act of state doctrine aims to avert.").

[18] *See, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976) ("corporate conduct . . . compelled by a foreign sovereign is protected from antitrust liability, as if it were an act of the state itself"); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F.Supp. 1291, 1296-98 (D. Del. 1970). This Court has also recognized the doctrine. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962). *See also* J. Atwood & K. Brewster, *Antitrust and American Business Abroad* §§ 8.14, 8.17-8.22 (2d ed. 1981); Restatement (Revised) of the Foreign Relations Law of the United States § 419 (Tent. Dr. No. 3 1982).

The Government of the United States has given its assurances to the Government of Japan that Japanese automobile manufacturers complying with export controls directed by MITI, similar to the MITI-mandated export controls challenged by respondents herein, would be protected from the United States antitrust laws under the sovereign compulsion doctrine.[19] As stated by Attorney General Smith to Japanese Ambassador Okawara: "compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese Government, acting within its sovereign powers" and thus "would not give rise to violations of United States antitrust laws."[20] The Assistant Attorney General in charge of the Antitrust Division has taken precisely the same position with respect to the very export control arrangements at issue in this case.[21]

3. The act of state doctrine prevents a United States court from entertaining an action that calls into question the validity of conduct or policies of a foreign government acting within its sovereignty.[22] Under established principles of separation of powers, the judiciary is not the appropriate branch of the government to adjudicate such "acts of state." *See Banco*

---

[19] *See* Letter from Attorney General William French Smith to Ambassador Yoshio Okawara of Japan (May 7, 1981), *reprinted in* 1981-1 Trade Cas. (CCH) ¶ 63,998. (25a-26a).

[20] *Id.* at 26a.

[21] *See* Letter from Donald I. Baker, Assistant Attorney General, Antitrust Division, to Senator Edward M. Kennedy (February 16, 1977). (15a-23a).

[22] *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-03 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *International Ass'n of Machinists & Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S 1163 (1982); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). In circumstances such as those presented here, where the Third Circuit panel would permit a fact finder to disregard an official pronouncement of the Japanese Government and conclude that the participation of petitioners in mandatory export controls of the Government of Japan constitutes a "feature" of a United States antitrust law violation (176a-179a), the foreign trade policies of the Japanese Government itself are being challenged. This is precisely the type of judicial proceeding, involving an inquiry into the validity and effect of Japanese governmental policies, that the act of state doctrine is intended to prevent.

The United States and Japan have for over thirty years been engaged in negotiations to balance their competing trade interests. On many occasions, these negotiations have produced government-imposed controls on private citizens. The Third Circuit's ruling, permitting a fact finder to inquire into and treat conduct mandated by a foreign government as if it were private conduct subject to United States law, threatens the future course of this bilateral trade diplomacy. Certiorari should be granted to assure friendly foreign nations, like Japan, that the export conduct they compel by their own nationals, in their own territories, often at the request of the United States government, will not be made the basis for private treble damage actions under United States law, and to prevent the potential affront to the Japanese Government which will occur if a fact finder is permitted to ignore the MITI statement.

III.

Certiorari Should Be Granted To Preserve The Power Of Trial Courts To Manage Complex Cases Involving Expert Testimony

In reversing the District Court's exclusion of significant portions of respondents' expert testimony, the panel held that expert opinion which the trial court finds to be based upon false or unsupported factual assumptions must nevertheless be

admitted into evidence, and considered on a motion for summary judgment, so long as the expert states that the data he relied upon are "of a type" upon which other experts in his field reasonably rely, and there is no contrary expert testimony on this issue. (102a-106a). In so ruling, the Third Circuit has: (i) erected still another improper obstacle to the use of summary judgment in antitrust conspiracy cases; (ii) seriously undermined the ability of the federal courts to effectively manage trials involving expert testimony; and (iii) placed itself in direct conflict with the decisions of other circuits.

1. The District Court found that critical portions of respondents' expert testimony were based upon false or unsupported factual assumptions and therefore excluded that testimony from evidence. (1058a-1059a; 1065a-1076a).[23] Although the Third Circuit recognized that the District Court had made such findings (114a), it made no attempt to review them. Instead, it held that once an expert has filed a conclusory affidavit stating that the data upon which he relied in forming his opinion were of a type relied upon by other experts in his field, and no other expert has testified to the contrary on this issue, then the district court loses its power to exclude the expert testimony even if it finds it to be based upon factual assumptions that are indisputably false. (102a-105a, 114a).

The Third Circuit's error apparently stems from its belief that the "type of data" requirement of Fed. R. Evid. 703 is the only prerequisite to the admission of an expert opinion, and

[23] For example, Dr. DePodwin, one of respondents' experts, based a purported study of petitioners' price/cost relationships on what the District Court found to be a series of false factual assumptions flatly contradicted by the *only* record evidence on these points (including the expert affidavit of one of petitioner's executives). (1065a-1076a). Such assumptions, the District Court found, ignored the record evidence in order to "put the rabbit in the hat" and to "pre-ordain" the results of the study. (1070a). Indeed, in one instance, Dr. DePodwin's reliance upon demonstrably false assumptions caused him to conclude that one of the petitioners suffered massive "losses" on exports from two of its factories in Japan, even though the undisputed record showed that these factories *never* manufactured *any* products for export during the relevant period. (1065a n.58).

that this requirement is satisfied whenever an expert files an affidavit on this point that is not contradicted by an opposing affidavit. This ruling, however, conflicts with the decisions of other courts of appeals which have consistently held that expert testimony based upon false or unsupported factual assumptions must be excluded from evidence.

Even prior to the adoption of the Federal Rules of Evidence, federal courts were required to reject expert opinions based upon unsupported factual assumptions. *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 911-13 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). The Federal Rules did not change this requirement. To the contrary, Fed. R. Evid. 104(a) and 703 require district courts to make a factual inquiry into the bases of an expert's opinion, and decisions by courts of appeals subsequent to the adoption of the Federal Rules of Evidence have routinely excluded expert testimony when they have found it to be based upon false or unsupported factual assumptions. *See Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 208 (2d Cir. 1984); *Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983); *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 364 (6th Cir. 1978); *Scheel v. Conboy*, 551 F.2d 41, 43-4 (4th Cir. 1977).

In *Shatkin v. McDonnell Douglas Corp.*, for example, the Second Circuit (per Judge Mansfield for a unanimous panel joined in by Judges Friendly and Kearse) affirmed the District Court's "discretionary right under Fed. R. Evid. 703 to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony." 727 F.2d at 208. Similarly, in *Soden v. Freightliner*, the Fifth Circuit held that although experts have wide latitude in choosing the bases of their opinions, trial judges still must determine independently if the experts' underlying factual assumptions are reasonable. 714 F.2d at 505.[24]

[24] *See also Drayton v. Jiffee Chemical*, 591 F.2d at 364 (although an expert economist may generally base an opinion as to future earnings on factors such as "rates of interest, amounts and returns on investments, present earnings values, previous existing rates of inflation or deflation and change in the

In holding that a district court has the discretionary power to exclude expert testimony based upon false or unsupported factual assumptions, both the Second and Fifth Circuits directly relied upon the District Court's opinion herein. Thus, the Third Circuit's reversal of that opinion, and its creation of a different rule of admissibility, presents a square conflict among the circuits. This Court should grant certiorari to resolve this conflict and to rule on these important issues concerning the admissibility of expert testimony, which it has not addressed in the ten years since the adoption of the Federal Rules of Evidence. If the filing of a mere conclusory affidavit, stating that the data utilized by the expert is of the type reasonably relied upon by other experts in his field, can strip a district court of its discretion to prevent experts from testifying on the basis of false factual assumptions, trials involving complex economic or other expert testimony will become hopelessly unmanageable and unjust.

2. Not only did the Third Circuit permit expert opinions based on demonstrably false or unsupported assumptions to be admitted into evidence, it relied upon such opinions to create genuine issues of fact for purposes of reversing the summary judgment granted in favor of petitioners. (171a-175a). This ruling also conflicts with the decisions of other courts of appeals. *See United States v. Various Slot Machines*, 658 F.2d 697, 700-01 (9th Cir. 1981); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977).

In *Merit Motors*, the D.C. Circuit, in holding that the existence of an expert opinion based upon "unsupported assumptions" was insufficient to create a genuine issue of material fact to defeat summary judgment, stressed that Rule 703 "was intended to broaden the acceptable bases of expert opinion, but it was not intended, as appellants seem to argue, to make summary judgment impossible whenever a party has produced

purchasing power of the dollar," it was error for a district court to receive an opinion based on such data "which well outran any reasonable predictions."

an expert to support its position." 569 F.2d at 673. Similarly, in *Various Slot Machines*, the Ninth Circuit held that summary judgment was properly granted notwithstanding an unsupported expert opinion that would have otherwise created a genuine issue of material fact. 658 F.2d at 700-01.

This further conflict between the Third Circuit and other courts of appeals should also be resolved. After more than eight years of discovery, and in a case in which the District Court has specifically found that the allegedly anticompetitive conduct of petitioners was actually far more consistent with an inference of competition than with an inference of conspiracy, respondents should not be permitted to defeat summary judgment on the basis of expert testimony premised upon false and unsupported factual assumptions. This Court should grant certiorari to prevent the Third Circuit's erroneous interpretation of the Federal Rules of Evidence from destroying all proper limitations on the use of expert testimony.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue writ of certiorari to review the judgments of the Court of Appeals for the Third Circuit.

Dated: June 7, 1984

Respectfully submitted,

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
KENNETH STEINTHAL
MARTIN S. HYMAN
MINDY J. SPECTOR
ELIZABETH A. JAFFE

WEIL GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
Tel.: (212) 310-8000

RAYMOND T. CULLEN

MORGAN LEWIS & BOCKIUS
123 South Broad Street
Philadelphia, Pa. 19109
Tel.: (215) 481-9500

Attorneys for Matsushita Electric Industrial Co., Ltd.; Matsushita Electric Corporation of America; Matsushita Electric Trading Co.; and Matsushita Electronics Corporation

DONALD J. ZOELLER
Counsel of Record

JOHN L. ALTIERI, JR.
ROBERT A. CANTOR
HAROLD G. LEVISON
ROBERT A. JAFFE
SHELLEY B. O'NEILL

MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
Tel.: (212) 510-7000

PATRICK T. RYAN

DRINKER BIDDLE & REATH
1100 Phila. Nat. Bank Bldg.
Philadelphia, Pa. 19107
Tel.: (215) 925-2700

Attorneys for Toshiba Corporation and Toshiba America, Inc.

Carl W. Schwarz
Michael E. Friedlander
William H. Barrett
Stephen P. Murphy
Paul J. Pantano, Jr.

Metzger Shadyac & Schwarz
1275 K Street, N.W.
Washington, D.C. 20005
Tel.: (202) 289-4520

H. William Tanaka
Lawrence R. Walders
B. Jenkins Middleton

Tanaka Walders & Ritger
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Tel.: (202) 223-1670

Charles J. Bloom

Conrad Kerr Bloom Hitchner & O'Brien, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Hitachi, Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; and Hitachi Sales Corporation of America

Jiro Murase
Peter J. Gartland
Gene Y. Matsuo
Peter A. Dankin
Lance Gotthoffer

Wender Murase & White
400 Park Avenue
New York, New York 10022
Tel.: (212) 832-3333

Matthew J. Broderick

Dechert Price & Rhoads
1500 Market Street
Philadelphia, Pa. 19102
Tel.: (215) 972-3400

Attorneys for Sharp Corporation and Sharp Electronics Corporation

Hoken S. Seki
Robert J. Lynch
David A. Dopsovic

Seki Jarvis & Lynch
520 Madison Avenue
New York, N.Y. 10022
Tel.: (212) 759-2303

Henry T. Reath
Frank A. Luchak

Duane Morris & Heckscher
1500 One Franklin Plaza
Philadelphia, Pa. 19102
Tel.: (215) 554-6300

John T. Dolan
Arnold B. Calmann

Crummy, Del Deo, Dolan & Purcell
Gateway One
Newark, N.J. 07102
Tel.: (201) 522-2235

Donald F. Turner

Wilmer Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 872-6000

Attorneys for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

Charles F. Schirmeister
Peter C. Williams

Reid & Priest
40 West 57th Street
New York, N.Y. 10005
Tel.: (212) 608-2000

Stephen W. Armstrong

Montgomery McGraken Walker & Rhoads
Three Parkway
Philadelphia, Pa. 19102
Tel.: (215) 563-0650

Attorneys for Mitsubishi Corporation and Mitsubishi International Corporation

Patrick H. Sullivan
James S. Morris
Kevin R. Keating
Michael S. Press

Whitman & Ransom
522 Fifth Avenue
New York, N.Y. 10036
Tel.: (212) 575-5800

Charles J. Bloom

Conrad Kerr Bloom Hitchner & O'Brien, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Sanyo Electric Co., Ltd.; Sanyo Electric Trading Co., Ltd.; Sanyo Electric, Inc.; and Sanyo Manufacturing Corporation

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

Appendix To
Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit
(1a-33a)

IRA M. MILLSTEIN
A. PAUL VICTOR
WEIL GOTSHAL & MANGES
New York, N.Y.
Counsel for the
Matsushita Petitioners

CARL W. SCHWARZ
METZGER, SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the
Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.
Counsel for the
MELCO Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, N.Y.
Counsel for the
Mitsubishi Petitioners

DONALD J. ZOELLER
Counsel of Record
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
(212) 510-7000
Counsel for the
Toshiba Petitioners

PETER J. GARTLAND
WENDER, MURASE & WHITE
New York, N.Y.
Counsel for the
Sharp Petitioners

KEVIN R. KEATING
WHITMAN & RANSOM
New York, N.Y.
Counsel for the
Sanyo Petitioners

June 7, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

APPENDIX TABLE OF CONTENTS

Appendix Table of Contents, Continued

Rule 28.1 Statement of Petitioners Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., and Matsushita Electronics Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., and Matsushita Electronics Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., and/or Matsushita Electronics Corporation: Matsushita Communication Industrial Co., Ltd.; Matsushita Reiki Co., Ltd.; Victor Company of Japan; Kyushu Matsushita Electric Co., Ltd.; Matsushita Seiko Co., Ltd.; Matsushita Kotobuki Electronics Industries, Ltd.; Matsushita Electric Works, Ltd.; Miyata Industry Co., Ltd.; National House Industrial Co., Ltd.; Asahi National Lighting Corporation Ltd. Wakayama Precision Company; Precision Electronics Corporation; Matsushita Electric Co., (Malaysia) Bhd; Panasonic Hawaii, Inc.; and Quadracast Systems, Inc.

Rule 28.1 Statement of Petitioners Toshiba Corporation and Toshiba America Inc.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Toshiba Corporation and Toshiba America Inc. submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Toshiba Corporation and/or Toshiba America Inc.: Toshiba Shoji Co., Ltd.; Toshiba Machine Co., Ltd.; Toshiba Ceramics Co., Ltd.; Toshiba Steel Tube Co., Ltd.; Tokyo Optical Co., Ltd.; Toshiba Glass Co., Ltd.; Toshiba Tungaloy Co., Ltd.; Maroon Electronics Co., Ltd.; Tokyo Electric Co., Ltd.; Toshiba Medical Systems Co.,

Ltd.; Nishishiba Electric Co., Ltd.; Shibaura Engineering Works Co., Ltd.; Kitashiba Electric Co., Ltd.; Toshiba Engineering & Construction Co., Ltd.; Onkyo Corporation; Toshiba Electronic Systems Co., Ltd.; Toshiba Components Co., Ltd.; Toshiba Silicone Co., Ltd.; Semp Toshiba Amazonas S.A. (Brazil); Toshiba Anand Batteries Ltd. (India); Ceylon Bulbs & Electricals Ltd. (Sri Lanka); Thai Toshiba Electric Industries Co., Ltd. (Thailand); Thai Toshiba Fluorescent Lamp Co., Ltd. (Thailand); Thai Toshiba Lighting Co., Ltd. (Thailand); Toshiba (Malaysia) Bhd. (Malaysia); Pars Tousheh Holding Co., Ltd. (Iran); Taiwan Television Enterprise Ltd. (Taiwan); Korea Electronics Co., Ltd. (Korea); Orion Electric Co., Ltd. (Korea); Han Kwang Electric Co., Ltd. (Korea); Leechun Electric Co., Ltd. (Korea); Tatung Co. (Taiwan); Taiwan Fluorescent Lamp Co., Ltd. (Taiwan); Toshiba de Panama S.A. (Panama); Toshiba Medical do Brasil Ltda. (Brazil); Toshiba International Company Ltd. (United Kingdom); Toshiba Medical Systems Ltd. (United Kingdom); Toshiba Medical Systems nv/sa (Belgium); Toshiba Medical Systems G.m.b.H. (West Germany); Toshiba (Schweiz) AG (Switzerland); Toshiba Medical Systems AG (Switzerland); Toshiba Medical Systems SrL (Italy); Toshiba Medical Systems S.A. (Spain); Man On Toshiba Limited (Hong Kong); Toshiba Electronics Taiwan Corp. (Taiwan); Toshiba Thailand Company Ltd. (Thailand); Toshiba Sales and Services Sdn. Bhd. (Malaysia); Toshiba International Corporation Pty., Ltd. (Australia); Toshiba Semiconductor Inc. (U.S.A.); Industria Mexicana Toshiba S.A. (Mexico); Toshiba do Brasil S.A. (Brazil).

Rule 28.1 Statement of Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and/or Hitachi Sales Corporation of America; Hitachi Cable, Ltd.; Hitachi Metals, Ltd.; Hitachi Chemical Co., Ltd.; Hitachi Construction Machinery Co., Ltd.; Hitachi Maxell, Ltd.; Babcock-Hitachi, K.K.; Hitachi Denshi, Ltd.; Japan Servo Co., Ltd.; Hitachi Kiden Kogyo, Ltd.; Hitachi Medical Corporation; Nippo Tsushin Kogyo Co., Ltd.; Asahi Kogyo Co., Ltd.; Hitachi Credit Corporation; Hitachi Plant Engineering & Construction Co., Ltd.; Hitachi Express Co., Ltd.; Nissei Sangyo Co., Ltd.; Nippon Business Consultant Co., Ltd.; Hitachi Printing Co., Ltd.; Hitachi Electronic Devices (Singapore) Pte., Ltd.; Hitachi Consumer Products (S) Pte., Ltd.; Hitachi Semiconductor (Malaysia) Pte., Ltd.; Tokyo Hitachi Katei Pomp Kabushiki Kaisha; Nagoya Higashi Hitachi Kaden Kabushiki Kaisha; Higashi Yasaguchi Hitachi Kaden Kabushiki Kaisha; Atago Sangyo Kabushiki Kaisha; Hitachi Sales Australia Pty., Ltd.; Hatsco, Ltd.; High Voltage Breakers, Inc.; Hitachi Instruments, Inc.; Hitachi Cable America, Ltd.; Hitachi Sales Corp. of Hawaii, Inc.; Hitachi Chemical Co. (America) Ltd.; American Magnetics, Inc.; Concise Casting Corp.; Hitachi Metals International Ltd.; HMI Export Corporation; Maxell America Inc., Maxell Corp. of America; Nissei Sangyo America, Ltd.; HISL, Inc.; HMSI, Inc.

Rule 28.1 Statement of Petitioners Mitsubishi Electric Corporation (MELCO) and Mitsubishi Electric Sales America, Inc.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc., submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Mitsubishi Electric Corporation and/or Mitsubishi Electric Sales America, Inc.: Nagoya Mitsubishi Electric Equipment Sales (Inc.); Kansai Mitsubishi Electric Products Sales (Inc.); Hokuriku Mitsubishi Electric Products Sales (Inc.); Bingo Electronic Computation Center (Inc.); Ryoei Facilities Service

(Inc.); Sowa (Inc.); Meldas System Engineering (Inc.); Shinbishi Electric (Inc.); Melco Overseas Service (Inc.); Kodensha (Inc.); Shimada Rika Industry (Inc.); Toyo Electric (Inc.); Nakayama Machinery (Inc.); Ryowa Trade and Industry (Inc.); Ryoden Elevator Facilities (Inc.); Mitsubishi Space Software (Inc.); Taku Industry (Inc.); Mecom Okitac Systems (Inc.); Toyo Machinery Industry Works (Inc.); Ryoko Computation Center (Inc.); Melcom Service (Inc.); Tanto Kosan (Inc.); Daito Industry (Inc.); Tyoden Industrial Machinery; Service Engineering (Inc.); Mitsubishi Industrial Software (Inc.); Sanwa Electric (Inc.); Melco de Mexico S.A. de C.V.; Ascenseurs Mitsubishi France S.A.; United Electronic Engineering Corp. (pte) Ltd.; Ryoden (Singapore) Pte. Ltd.; Ryoden Merchandising Co., Ltd.; Melco de Colombia Ltda.; Mitsubishi Electric Saudi Ltd.; Kanagawa Electric (Inc.); Daiichi Electric Industry (Inc.); Shizuki Electric Works (Inc.); Ryoden Trading (Inc.); Nippon Kentetsu (Inc.); Shin Yeong Electric Corporation.

Rule 28.1 Statement of Petitioners Sharp Corporation and Sharp Electronics Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Sharp Corporation and Sharp Electronics Corporation submit the following statement. The following companies are the parents, non-wholly owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Sharp Corporation and/or Sharp Electronics Corporation: Hycom, Inc.; Sampo Corp.; Sharp Electronics Consumers Corp.; and Sharp Finance Corp.

Rule 28.1 Statement of Petitioners Mitsubishi Corporation and Mitsubishi International Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Mitsubishi Corporation and Mitsubishi International Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Mitsubishi Corporation and/or Mitsubishi International Corporation: B&H Corporation; MIC Petroleum, Inc.; Non-Ferrous International Corporation; Palmco, Inc.; AGPEX, Inc.; El Vic Farm Corporation; Japan Aircraft Maintenance (America), Inc.; Mitsubishi International Warehouse Corporation; Petro Diamond, Inc.; The R.J.M. Company; Sunstar Rubber Industries Corporation; Dahlia Mining Co., Ltd.; MC Minerals Corporation; Chino Mines Company; Diamond Vision Inc., U.S.A.; Mitsubishi Motor Sales of America, Inc.; Machiney Distribution, Inc.; Dosanko Foods Inc.; Caribe Isoprene Corporation; MCF Footwear Corporation; Nitto Seifun K.K.; Chuukyoo Coca Cola Bottling; G.S. Steel Co., Ltd.; Mitsubishi Motors Australia, Ltd.; Crestbrook Forest Industries, Ltd.

Rule 28.1 Statement of Petitioners Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric, Inc., and Sanyo Manufacturing Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., and Sanyo Manufacturing Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., and/or Sanyo Manufacturing Corporation: Fisher Corporation; Sanyo E & E Corporation; Sanyo Industries (America) Corporation; Sanyo Business Systems Corporation; Tokyo Sanyo Electric Co., Ltd. (Japan); Sanyo Industries (Malaysia) Bhd. (Malaysia); Autocrat Sanyo Holdings (New Zealand). In addition, Respondent Sears, Roebuck and Co. owns a 25.4% share of the stock of Petitioner Sanyo Manufacturing Corporation.

Letter From the Department of State to the United States District Court for the Eastern District of Pennsylvania, June 9, 1975

Department of State
Washington, D.C.

June 9, 1975

Clerk
United States District Court
U.S. District Court House
9th and Market Street
Philadelphia, Pennsylvania 19107

Dear Sir:

The Embassy of Japan has requested in a diplomatic note that the Department of State transfer to the court a statement of the Ministry of International Trade and Industry (MITI) of the Government of Japan in connection with two cases before the court, namely, *National Union Electronic Corp.* v. *Matsushita Electric Industrial Co., Ltd. et al.* (Civil Action *No. 74-3247) and Zenith Radio Corp.* v. *Matsushita Electric Co., Ltd. et al.* (Civil Action *No. 74-2451)*. Copies of MITI's statement and the diplomatic note received from the Japanese Embassy are enclosed.

In carrying out this request of the Embassy of Japan, neither the Department of State nor the United States Government takes any position on the content of the statement or on any other aspect of the litigation in question.

Sincerely,
/s/ *Phillip R. Trimble*
Phillip R. Trimble
Assistant Legal Adviser for
Economic and Business Affairs

Enclosures:

(1) Statement of the Japanese Ministry of International Trade and Industry

(2) Diplomatic Note from the Embassy of Japan dated April 25, 1975.

Letter From the Embassy of Japan to the Department of State, April 25, 1975

April 25, 1975

E—21

The Embassy of Japan presents its compliments to the Department of State and has the honor to ask the latter to transfer to the United States District Court for Eastern District of Pennsylvania the attached statement concerning the two lawsuits between National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd. et al. (Civil Action No. 74-3247); and Zenith Radio Corporation v. Matsushita Electric Co., Ltd. et al. (Civil Action No. 74-2451).

Attachment

Statement of the Ministry of International Trade and Industry (MITI Statement)

The Ministry of International Trade and Industry of the Japanese Government ("MITI") has become aware that a number of Japanese television manufacturers and exporters are being sued by National Union Electric Corporation and Zenith Radio Corporation in the United States District Court for the Eastern District of Pennsylvania for alleged violations of various United States antitrust and antidumping laws in connection with their sales of television sets for export to the United States. (National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd., et al., Civil Action No. 74-3247 and Zenith Radio Corporation v. Matsushita Electric Co., Ltd., et al., Civil Action No. 74-2451.) In these lawsuits, questions have been raised concerning certain agreements entered into among the Japanese defendants, as well as certain regulations of the Japan Machinery Exporters Association, both such agreements and regulations have come into existence pursuant to the direction of MITI.

MITI has the honor to express its deep interest and serious concern regarding these lawsuits which involve issues related to its foreign trade policy and to call your attention to the following:

1. In order that Japanese exports do not cause unnecessary disruptions in the national economies of Japan's trading partners, one of the basic trade policies is to assure that Japanese exporting is carried on in as orderly a manner as possible. MITI is the government organ empowered and responsible for the detailed implementation of the said basic trade policy. Thus, Article 3 of the Law Concerning the Establishment of MITI (Law No. 275, 1952) sets forth the following administrative activities as being under the responsibility of MITI:

(1) Promotion and adjustment of international trade and control of foreign exchange relating to international trade (Article 3, Paragraph 1);

(2) Promotion of international cooperation in international trade and economic relations (Article 3, Paragraph 1-2).

Further, Article 4 of the Establishment Law defines the role of MITI as follows:

(1) Planning and programing of basic policies concerning production, distribution, consumption, trading, etc. of goods (included is electric power) under its jurisdiction (Article 4, Sub-section 1, Paragraph 13);

(2) To export and import (Article 4, Sub-section 1, Paragraph 16);

(3) To restrict or prohibit export or import (Article 4, Sub-section 1, Paragraph 17);

(4) To take the steps necessary to execute agreements and arrangements concerning international trade (Article 4, Sub-section 1, Paragraph 18);

(5) To prohibit or restrict transactions, etc. in foreign exchange relating to international trade (Article 4, Sub-section 1, Paragraph 20);

(6) To sanction exporters' agreements, importers' agreements and agreements of either manufacturers or distributors concerning export products, to sanction matters to be complied with members of export associations or import associations (hereinafter referred to as "Association Regulations"), to sanction collective agreements among the said members and matters to be complied with members of export-import associations, and to supervise designated agencies. (Article 4, Sub-section 1, Paragraph 24);

(7) To exercise such powers, other than those mentioned in the above items, as are placed under the jurisdiction of MITI by law (including orders issued thereunder) (Article 4, Sub-section 1, Paragraph 51).

2. Endowed with the said responsibilities and powers, MITI has developed under the law two basic procedures to achieve the aims of trade policy of the Government of Japan. The first procedure relates to MITI's regulatory powers provided for under the Export and Import Trading Law (Law No. 299, 1952) and the second relates to regulatory powers under the

Foreign Exchange and Foreign Trade Control Law (Law No. 228, 1949). The purpose of the Export and Import Trading Law is to promote the sound development of foreign trade by preventing unfair export trading and by establishing an orderly system for export and import trading. The purpose of the Foreign Exchange and Foreign Trade Control Law is to promote the proper development of foreign trade by providing for the control of foreign exchange, foreign trade and other foreign transactions.

In order to promote the sound development of foreign trade MITI applies both laws as follows: If some measures are deemed necessary to achieve the purposes mentioned above, MITI will generally first direct the relevant Japanese industry or trade association to enter into Arrangements (which include both manufacturers' agreements and association regulations) pursuant to the Export and Import Trading Law.

Where this procedure is deemed to be insufficient for the purpose of achieving these trade policy objectives (for example, where there is insufficient time to complete the contemplated arrangements), MITI will exercise its powers provided for in the Export Trade Control Order (Cabinet Order No. 378, 1949) under the Foreign Exchange and Foreign Trade Control Law, without prior direction to the industry or trade associations to enter into such Arrangements.

As stated above, such Arrangements concluded under the Export and Import Trade Law and carried out under the direction of the Minister of International Trade and Industry in order to assure orderly Japanese exportation activities are the actual implementation of MITI's trade policy itself. And since such direction by MITI, if disregarded, can be enforced by the power pursuant to the said Cabinet Order, it has in fact a compulsory power equivalent to law.

Once MITI has decided upon the trade policy measures to be taken and has directed the establishment of appropriate Arrangements under the Export and Import Trading Law for this purpose, the Japanese industries involved have in fact no

alternative but to establish them. Therefore the Arrangements entered into under the Export and Import Trading Law in compliance with the direction of MITI are not private agreements in effect and are no less than the implementation of the foreign trade policy of MITI, despite their form as agreements made among private parties.

3. With respect to the export of television sets to the United States, in 1962 MITI accurately recognized, in view of the importance of televisions as one of Japan's export products, the need for assuring their orderly exportation to avoid the possibility of trade conflicts.

Thus, MITI directed Japanese television manufacturers including the present Japanese defendants to enter into an agreement under Article 5-3 of the Export and Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States, and further, directed the exporters to establish a new regulation to be observed by the members of the export association with respect to filing of export prices and other related matters, pursuant to the association's functions under Article 11, Sub-paragraph 2 of the same law regarding the same exports. MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected. Such direction and supervision concerning minimum prices at which televisions could be sold for exportation to the United States and other matters were exercised continuously from 1963 until February 28, 1973 when such exporting arrangements were terminated.

4. Had the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy.

Therefore, when MITI decided the above-mentioned policy with respect to such sales and directed the television manufacturers and exporters to conclude, under the Export and Import Trade Law, such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction.

Certification by the Embassy of Japan, April 23, 1979

EMBASSY OF JAPAN
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008
(202) 234-2266

April 23, 1979

I Toshihiko Tanabe, Counselor, Embassy of Japan, hereby certify that the attached document is a true and correct copy of the official statement that was transmitted by the Embassy of Japan to the Department of State on April 25, 1975.

/s/ *T. Tanabe*
Toshihiko Tanabe
Counselor
Embassy of Japan
Washington, D.C.
April 23, 1979

Letter from the Embassy of Japan to the United States District Court for the Eastern District of Pennsylvania, July 11, 1980

EMBASSY OF JAPAN
WASHINGTON, D.C.

July 11, 1980

The Honorable
Edward R. Becker
United States District Court
for the Eastern District of
Pennsylvania
United States Courthouse
601 Market Street
Room 16614
Philadelphia, Pennsylvania 19106

Dear Sir:

I have the honor, on behalf of the Government of Japan, to inform you, Sir, of the views of the Government of Japan as *amicus curiae* in reference to the proceedings IN RE: Japanese Electronics Products Antitrust Litigation, M.D.L. 189.

This letter is to certify and reaffirm that the Ministry of International Trade and Industry ("MITI") has been, since at least 1960, and continues to be the government organ empowered and responsible for the detailed implementation of the basic trade policies of the Japanese Government.

As such, MITI was and is empowered and authorized to act for the Government of Japan in making the statement as attached to the Note Verbale dated April 25, 1975 which was delivered to the Department of State of the United States by the Embassy of Japan.

Accept, Sir, the assurances of my highest consideration.

Sincerely yours,
/s/ *Yoshio Okawara*
Yoshio Okawara
Ambassador Extraordinary
Plenipotentiary of Japan

Letter From Donald I. Baker, Assistant Attorney General, Antitrust Division, to Senator Edward M. Kennedy, February 16, 1977

Department of Justice
Washington, D.C. 20530

16 FEB 1977

Honorable Edward M. Kennedy
Chairman
Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of January 17, 1977 which inquires about the enforcement policy of the Antitrust Division in regard to international cartels affecting the U.S., and requests specific information concerning our position in regard to joint export of color television sets to the U.S. by Japanese manufacturers. We welcome the interest of your committee in this important subject. It seems particularly appropriate now since this is a period in which international economic questions, especially ones involving competition and cartels, have come to have great importance and urgency.

In response to these developments, the Antitrust Division has itself become increasingly active in the international field. Since 1973, we have increased the size of our Foreign Commerce Section from eight attorneys to twenty. We have filed over a dozen international antitrust cases in the last three years. These prosecutions have involved the Arab boycott, potash, the DeBeers diamond cartel, market allocation between British and American publishers, lithium, mink, persulfates and, most recently, unauthorized international airline fare increases. The Justice Department has recently become a member of an interagency task force on international commodity agreements, so the Antitrust Division will be able to cor-

tribute its expertise in that developing area. The Antitrust Division, as mandated by Congress in the 1974 Trade Act, now consults regularly with the ITC in regard to the competitive issues which arise in the enforcement of amended Section 337 of the Tariff Act. Also, we issued on January 26, 1977 an Antitrust Guide for International Operations to assist U.S. businessmen in understanding the antitrust rules governing their conduct in foreign commerce.

In all these efforts, we view our primary mission to be ensuring that the American consumer receives the full benefits of free and open competition from both U.S. and foreign suppliers. Our second goal is to try to ensure that all firms competing in American export or import trade are not subjected to illegal competitive tactics which injure the competitive process itself. We attempt to achieve these goals by means consistent with well-established U.S. policies favoring the freest possible international trade and the avoidance of any discrimination between firms based on nationality. In all matters of significance in this area, we are in continual consultation with the U.S. Department of State, which not only provides assistance in the conduct of international investigations but also keeps us informed of foreign policy obstacles which can hamper the investigation, prosecution or relief aspects of an international antitrust case.

With the background of these general observations, let me turn to the specific inquiries contained in your letter. Your letter quotes a 1970 document which indicates that there has been an export agreement for Japanese television sets. You then raise six questions in regard to the policy of the Antitrust Division in this matter. This letter will deal with the questions in the order in which you raise them.

The first inquiry you make is why the Antitrust Division opposed ITC action in this area while also declining to investigate the matter ourselves. As we stated in our letter to the ITC, we opposed action by them on a number of grounds, the first of which was that the issues raised had already been considered in a Treasury dumping proceeding or were cognizable in a countervailing duty proceeding. Therefore, we concluded that an ITC 337 proceeding would be largely duplicative of antidumping and countervailing duty proceedings, a result which Congress opposed and which might amount to anticompetitive harassment of Japanese firms. Our second difficulty with the complaint made to the ITC was that it charged the Japanese firms with "conspiring" jointly to solicit export subsidies from their Government. We pointed out that U.S. Supreme Court rulings in the *Hoerr* and *Pennington* cases hold that such joint solicitation is protected activity not subject to the antitrust laws. We argued that it would neither be fair nor legal to try the Japanese firms for joint solicitation of a type which their American rivals would be allowed to undertake. We noted also, during oral argument, that there is no evidence of export agreements after 1973, while Section 337 is clearly aimed at remedying current problems rather than redressing old grievances. We also pointed out the puzzling inconsistency between the complainants' charge that the Japanese have injured American firms with low prices and the fact that the export agreement shown at the hearing sets a *minimum* price which is required to be at least as high as the Japanese domestic price. We believe that it would be an unwise and excessively protectionist policy for the ITC to permit Section 337 to be employed so as to give firms which lose dumping or countervailing duty cases a "second shot" at keeping out foreign competition or heaping legal costs on foreign sellers. Similarly, we questioned whether Section 337 should be interpreted to allow major investigations or protectionist remedies in situations where the complainant is unable to advance even a prima facie case which fulfils the substantive standards of the anti-dumping, countervailing duty or antitrust laws.

The second part of your first question concerns the policy reasons which led us not to initiate our own investigation of this matter. There are quite a number of reasons, which we believe should be considered in combination with each other: First, no American TV firm has ever asked us to undertake an investigation and supplied us with evidence indicating a possible violation

tion of the Sherman Act. On the contrary, they have chosen to seek relief by means of antidumping and Section 337 complaints. Second, two of the American television manufacturers have brought their own antitrust action against the Japanese, which action has been in process for at least five years. The Antitrust Division, given its limited resources, has often made the decision not to duplicate a private antitrust action in a complex and controversial area, particularly when it appears that the parties are all represented by competent counsel and are exploring the facts and the law quite thoroughly. Third, it is clear from a Japanese diplomatic note dated April 25, 1975 that the export agreement among Japanese firms was fully authorized by the Japanese Ministry of Trade and Industry, and it is claimed in that letter that the Japanese Ministry *directed* the firms to enter into and comply with such an arrangement. If the conduct were directed by the Japanese Government in a legitimate exercise of its power to control exports leaving Japan, our courts would be highly likely to uphold the arrangement against antitrust challenge on the grounds of a "foreign compulsion" or "act of state" principle. Fourth, it appears that certain aspects of the "check-price" or minimum price agreement were suggested or imposed by the Japanese Government in order to avoid or respond to antidumping charges in the U.S. There seems to be some possible anomaly in charging the Japanese with dumping if they price cut in the U.S. and with Sherman Act violations if they do not. Fifth, it also appears that a major portion of Japanese penetration of the American market has been accounted for by Sony and Panasonic, which apparently were not members of the export association in its later years, which were not named as defendants in the § 337 proceeding, and which sell their sets at higher prices than those charged for competing American sets.

Your second question concerns whether our position at the ITC and our decision not to investigate were reached on a unilateral basis. The answer to that question is unequivocally yes. We learned after we had prepared our advice letter to the ITC that the State Department, the Treasury, the Office of the Special Trade Representative, and the Federal Trade Commission were all going to send letters opposing the investigation on grounds somewhat similar to those we advanced; but we did not know this before our position was formulated and it had no influence on our position. Our decision not to conduct an antitrust investigation of the matter has been made entirely unilaterally, and there has been no consultation with anyone else about it.

Your third question concerns whether spokesmen for Japanese television exporters or for the Japanese Embassy have approached us or tried to influence us concerning our position at the ITC or in regard to an investigation. The answer is no. Japanese diplomats have on occasion asked us to explain the relationship between Treasury, ITC and private antitrust actions, but have made no attempt to influence our positions. Staff members of the Antitrust Division have occasionally inquired of counsel for both sides in the TV-set private antitrust case about the issues in the case and its progress. This has been at our initiative, and reflects our usual policy of trying to keep abreast of major private antitrust cases.

Your fourth question concerns whether the Japanese export agreement would violate the Sherman Act if engaged in by Americans. The answer appears to be no. Congress has provided in the Webb-Pomerene Act that registered export associations of American firms are fully exempted from operation of the Sherman Act. Such export associations are allowed to fix prices, allocate quotas and allocate customers. Our courts have held that American exporters lose their exemption if they combine or conspire with foreign rivals (*United States v. Alkali Export Assn.*, 86 F.Supp. 59 (S.D.N.Y. 1949)). It appears that the Japanese export association is entirely national and has never been accused of conspiring with its foreign rivals.

Your fifth and sixth questions concern whether our reluctance to investigate the Japanese TV set export association reflects a general policy in regard to foreign export agreements and whether such policy has had specific application in

the past. Of course, the basic approach of the Antitrust Division is to judge any transaction on its individual merits in light of all relevant facts and policy considerations. Nevertheless, the most accurate general answer to your question is that we have generally followed for some years a policy against suing members of a foreign export association for conduct which the U.S. would permit under the Webb-Pomerene Act. We have on a number of occasions investigated whether foreign exporters have engaged in conduct, such as international market allocation or customer allocation within the U.S., which would be beyond our Webb-Pomerene exemption and might also be in excess of what they were specifically authorized to do or could be legitimately authorized to do by their governments. Besides the obvious policy and equity factors favoring this approach, we have also been influenced by questions of practicality and efficient resource allocation. It has seemed likely to us that if a foreign government is committed to the idea of controlled exports, it could probably achieve such control through direct state involvement, a liberal merger or joint venture policy, or some form of mandatory system. In light of this, it seems quite probable that if we were to sue a foreign export association, arguing that governmental authorization was an insufficient defense, the ultimate result of such a suit might well be continuation of the same conduct in even a more rigid form, as well as foreign policy controversy.

We hope that this discussion makes clear our thinking in regard to this complex and difficult issue. We welcome further discussion of either this particular matter or of the general policy question. Let me again emphasize that our approach to both this case and the broader issue remains one of great interest and constant reexamination.

Sincerely yours,
/s/ *Donald I. Baker*
Donald I. Baker
Assistant Attorney General
Antitrust Division

Statement by John H. Shenefield, Assistant Attorney General, Antitrust Division, Before the United States Senate Committee on the Judiciary, April 12, 1978

STATEMENT BY

JOHN H. SHENEFIELD
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE

THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

DEPARTMENT OF JUSTICE AUTHORIZATION
(SUPPLEMENTARY TESTIMONY)

ON

APRIL 12, 1978

Shortly after I assumed my duties, about a year ago, representatives of Zenith and National Union Electric (NUE) Corporations came to me and complained that several Japanese color television receiver manufacturers were engaged in a concerted program to fix prices and predatorily destroy the American TV industry. I was aware that my predecessor, Don Baker, in a letter to Senator Kennedy, had communicated his decision not to conduct any investigation of these charges at that time.

The complainants assured me that if the Antitrust Division reviewed the pretrial discovery in the private antitrust litigation they had begun in the Eastern District of Pennsylvania 8 years before, we would conclude that a full investigation and probably prosecution of these Japanese enterprises was warranted.

Given the seriousness of the charges and the assurance that the evidence to back them up was accessible, I agreed to take a fresh look—to have the Antitrust Division undertake a preliminary investigation to determine if there was any reasonable basis for proceeding with a full investigation through compulsory process.

We quickly learned that there was in the pending litigation a sweeping pretrial protective order, which prohibits any person not designated by the parties as "qualified" to have *any* access to *any* information discovered from *any* party without that party's express permission.

The defendants, potential targets of a Justice Department investigation, were understandably reluctant to give their permission to what they saw as simply further harassment, given the six separate government investigations of their export practices that had taken place in the previous seven years. Nevertheless, after four months of difficult negotiations, we were able to pierce the protective order, with the permission of the parties, and get access to the evidentiary material relating to the allegations. One of the conditions to our obtaining this access is that Antitrust Division officials are under the same limitations of non-disclosure as other persons subject to the protective order. Therefore, I may not, by order of the court, disclose to you or anyone else, either in open or executive session, the specific facts accumulated in that pretrial record.

For the past 6 months, we have inspected approximately 35,000 pages of documents, fully 5,000 untranslated from the original Japanese. More than half of these were shown to us by Zenith and NUE. We are assured that we have seen the best evidence the complainants have so far gathered. About 10,000 of these documents were made available for inspection by third parties in the litigation; and we reviewed approximately 4,000 documents shown to us by Japanese defendants. We have committed substantial resources to this matter. The professional time along has exceeded 200 full person work days. This investigation has been conducted with the cooperation of both

plaintiffs and defendants in the Pennsylvania litigation and without any pressure from or intervention by any other agency of the United States Government or any official or representative of the Japanese Government.

I recently concluded a detailed review of the evidence examined. I have agreed with the investigative staff's unanimous conclusion that it does not provide any reasonable basis for conducting a full-scale Antitrust Division investigation of predatory activity by the Japanese color TV industry. In short, we found no evidence of on-going concerted activity by Japanese enterprises aimed at the United States market.

As you are, I am aware of the check price agreements of an earlier period. However, we have no evidence that these agreements continued beyond 1973. In addition, we found no evidence that, even in earlier periods, any concerted activity was intended to or did serve a predatory purpose. In any event, at the present time an orderly marketing agreement is in place, the effect of which will be to reduce the percentage of Japanese color TV sales in the United States in 1978 to approximately 16% of the U.S. market.

Most importantly, in view of the charges made by Zenith and NUE, we found no evidence of concerted predatory conduct intended to destroy and supplant the U.S. color TV industry, either at an earlier period or at the present time. Given this finding after careful investigation, I find no basis for proceeding further.

I understand that pre-trial discovery in the Pennsylvania litigation is not complete. It may be that at a trial, the plaintiffs will persuade a fact finder that there has been a violation of the antitrust laws but at this point, based on all the available evidence, we have no basis to justify commencement of a full scale investigation.

Let me assure you that we will continue, as we have in the past, to watch closely the American television industry and the practices in our markets of Japanese and other export cartels. For example, we currently are reviewing a proposed joint

venture to manufacture color televisions by General Electric and Hit[a]chi. In addition, we have other related matters under consideration that I cannot discuss at this time. The Antitrust Division is always watchful for foreign cartel activity that impacts on United States markets. While our Webb-Pomerene Act exemption from antitrust laws is occasionally embarrassing to us when we talk tough about foreign cartels, we will not tolerate or ignore evidence of anticompetitive activities by foreign export cartels in United States markets. Where we find such a cartel, even if organized and supervised with the approval of a foreign government, imposing anticompetitive restraints in United States markets, we will investigate and, if warranted, prosecute.

Next month, I will be visiting in Tokyo with Japanese officials, at their invitation, to discuss antitrust competition issues. I have already requested that the practices of Japanese export cartels as they may affect United States markets, and how they may impinge upon U.S. antitrust laws, be placed on the agenda.

Letter From Attorney General William French Smith to Ambassador Yosiho Okawara of Japan, May 7, 1981

Department of Justice
Washington, D.C. 20530

May 7, 1981

His Excellency
Yoshio Okawara
Ambassador of Japan
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Dear Mr. Ambassador:

This letter is in response to the request of the Government of Japan, set forth in its letter of May 7, and the two enclosures thereto, for the views of the Department of Justice on antitrust questions regarding measures now being considered by the Government of Japan to unilaterally restrain the export of passenger cars to the U.S. so as to cooperate with the U.S. Government's domestic automobile industry recovery program.

The Government of Japan has advised us that the Ministry of International Trade and Industry (MITI), which it represents has legal authority and responsibility in the Government of Japan for carrying out basic trade policy, including authority to take the measures described in your letter and its two enclosures, and has authority to maintain orderly exports, will establish at its discretion the maximum number of passenger cars which may be exported to the U.S. by individual Japanese companies. MITI will issue a written directive to each company stating the maximum number of cars that company may export to the U.S. in a specified period.

Further, MITI will direct individual companies to submit accurate monthly reports on passenger car exports to the U.S. so as to assure the implementation of the export limitation directive. It is understood, and the directive will state that, in any case in which it becomes clear that any company threatens

to exceed the limits set forth by MITI, the Government of Japan will promptly make the export of cars to the U.S. subject to export licensing, in accordance with Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law, (Law No. 228 of 1949), and Article One (1) of the Export Trade Control Order (Cabinet Order No. 378 of 1949 as amended), by amending the Export Trade Control Order. MITI will then enforce the export maximums it established for each company by refusing to license exports in excess of those maximums. The Government of Japan has advised us that MITI has the authority to impose this requirement, that it would be a violation of Japanese law to export cars without an export license in that situation, and that such violation would be punished pursuant to Japanese law by fines, penalties or other sanctions.

In these circumstances, we believe that the Japanese automobile companies' compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese government, acting within its sovereign powers. The Department of Justice is of the view that implementation of such an export restraint by the Government of Japan, including the division among the companies by MITI of the maximum exportable number of units, and compliance with the program by Japanese automobile companies, would not give rise to violations of United States antitrust laws. We believe that American courts interpreting the antitrust laws in such a situation would likely so hold.

Further, in response to your inquiry regarding exports of passenger cars to Puerto Rico and the exports of automobiles which are classified under "commercial vehicles" in JAMA statistics but classified under "passenger cars" in the U.S., we would like to state that if export limitations are achieved through the same measures and authorities previously described, the sovereign compulsion defense to any antitrust action that might be brought under United States laws would be equally available.

Sincerely,
/s/ *William French Smith*
William French Smith
Attorney General

Section 1 Of The Sherman Act, 26 Stat. 209, 15 U.S.C. § 1 (1970):

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 Of The Sherman Act, 26 Stat. 209, 15 U.S.C. § 2 (1970):

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction therof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 73 Of The Wilson Tariff Act, 28 Stat. 570, 15 U.S.C. § 8 (1970):

§ 8. Trusts in restraint of import trade illegal; penalty

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less that $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Section 801 of the Revenue (Antidumping) Act of 1916, 39 Stat. 798, 15 U.S.C. § 72 (1970):

§ 72. Importation or sale of articles at less than market value or wholesale price.

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a) (1970):

§ 13. Discrimination in price, services, or facilities.

(a) Price; selection of customers.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained

shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Section 7 Of The Clayton Act, 38 Stat. 731, 15 U.S.C. § 18 (1970):

§ 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof,

or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or make illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Federal Rules Of Evidence, 28 U.S.C.:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

83-2004

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

Appendix To
Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit
(34a-667a)

IRA M. MILLSTEIN
A. PAUL VICTOR
WEIL GOTSHAL & MANGES
New York, N.Y.
Counsel for the
Matsushita Petitioners

CARL W. SCHWARZ
METZGER, SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the
Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.
Counsel for the
MELCO Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, N.Y.
Counsel for the
Mitsubishi Petitioners

DONALD J. ZOELLER
Counsel of Record
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
(212) 510-7000
Counsel for the
Toshiba Petitioners

PETER J. GARTLAND
WENDER, MURASE & WHITE
New York, N.Y.
Counsel for the
Sharp Petitioners

KEVIN R. KEATING
WHITMAN & RANSOM
New York, N.Y.
Counsel for the
Sanyo Petitioners

June 7, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

637 pp

APPENDIX TABLE OF CONTENTS

Appendix Table of Contents, Continued

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2331

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D.C. MDL No. 189)

ZENITH RADIO CORPORATION,
Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D.C. Civ. No. 74-2451)

No. 81-2332

In Re:
JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D.C. MDL No. 189)

NATIONAL UNION ELECTRIC
CORPORATION,
Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D.C. Civ. No. 74-3247)

No. 81-2333

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D.C. MDL No. 189)

ZENITH RADIO CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D.C. Civ. No. 74-2451)

NATIONAL UNION ELECTRIC CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D.C. Civ. No. 74-3247)

Mitsubishi Electric Corporation
("MELCO")
Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued: October 21 and 22, 1983
Before: SEITZ, *Chief Judge*, GIBBONS
and MESKILL*, *Circuit Judges*

(Opinion Filed: December 5, 1983)

---

*Hon. Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

EDWIN P. ROME, ESQ. (Argued)
MORRIS L. WEISBERG, ESQ.
WILLIAM H. ROBERTS, ESQ.
ARNOLD I. KALMAN, ESQ.
KATHLEEN HERZOG LARKIN, ESQ.
NORMAN E. GREENSPAN, ESQ.
MARGARET B. DARDESS, ESQ.
BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103

Of Counsel:

PHILIP J. CURTIS, ESQ.
JOHN BORST, JR., ESQ.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Appellants,
Zenith Radio Corporation and
National Union Electric Corporation

ASA D. SOKOLOW, ESQ. (Argued)
RENEE J. ROBERTS, ESQ.
BRIAN G. LUSTBADER, ESQ.
ROSENMAN COLIN FREUND LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

JOSHUA F. GREENBERG, ESQ.
RANDOLPH S. SHERMAN, ESQ.
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022

FRANKLIN POUL, ESQ.
WOLF, BLOCK, SCHORR & SOLIS-COHEN
Packard Building
Philadelphia, Pennsylvania 19102

Attorneys for Appellees,
Sony Corporation and Sony Corporation of America

LOUIS A. LEHR, JR., ESQ. (Argued)
STANLEY M. LIPNICK, ESQ.
JOHN L. ROPIEQUET, ESQ.
CAROL R. KANTER, ESQ.
ARNSTEIN, GLUCK & LEHR
7500 Sears Tower
Chicago, Illinois 60606

HARRY SHORT, ESQ.
LIEBERT, SHORT, FITZPATRICK & LAVIN
Suite 1200
One Franklin Plaza
Philadelphia, Pennsylvania 19103

Of Counsel:

PHILIP M. KNOX, JR., ESQ.
CHARLES A. TAUSCHE, ESQ.
ANN M. COONS, ESQ.
Law Department
Sears, Roebuck and Co.
Sears Tower
Chicago, Illinois 60684

Attorneys for Appellee,
Sears, Roebuck and Co.

THOMAS P. COFFEY, ESQ. (Argued)
E. HOUSTON HARSHA, ESQ.
KARL F. NYGREN, ESQ.
200 East Randolph Drive
Chicago, Illinois 60601

Of Counsel:

KIRKLAND & ELLIS
Chicago, Illinois 60601

Attorneys for Appellee,
Motorola, Inc.

HENRY T. REATH, ESQ. (Argued)
TERRY R. BRODERICK, ESQ.
DUANE, MORRIS & HECKSCHER
One Franklin Plaza
Philadelphia, Pennsylvania 19102

HOKEN S. SEKI, ESQ.
SEKI, JARVIS & LYNCH
Three First National Plaza
Suite 717
70 West Madison Street
Chicago, Illinois 60602

JOHN T. DOLAN, ESQ.
ARNOLD B. CALMANN, ESQ.
CRUMMY, DEL DEO, DOLAN & PURCELL
Gateway One
Newark, New Jersey 07102

Attorneys for Appellee,
Mitsubishi Electric Corporation

CHARLES F. SCHIRMEISTER, ESQ. (Argued)
CHARLES Z. KRUEGER, ESQ.
REID & PRIEST
40 Wall Street
New York, New York 10005

THOMAS N. O'NEILL, JR., ESQ.
MONTGOMERY, McCRACKEN, WALKER & RHOADS
Three Parkway, 20th Floor
17th & Benjamin Franklin Parkway
Philadelphia, Pennsylvania 19102

Attorneys for Appellees,
Mitsubishi Corporation and
Mitsubishi International Corporation

DONALD J. ZOELLER, ESQ. (Argued)
MUDGE ROSE GUTHRIE & ALEXANDER
20 Broad Street
New York, New York 10005

DRINKER BIDDLE & REATH
1100 Philadelphia National Bank
Building
Broad & Chestnut Streets
Philadelphia, Pennsylvania 19107

Liaison Counsel for Appellees,
Attorneys for Toshiba Defendants

WHITMAN & RANSOM
522 Fifth Avenue
New York, New York 10036

HUNT KERR BLOOM HITCHNER O'BRIEN
& CONRAD
The Drexel Building, 14th Floor
15th & Walnut Streets
Philadelphia, Pennsylvania 19102

Attorneys for Sanyo Appellees

KIRKLAND & ELLIS
Standard Oil Building
200 East Randolph Drive
Chicago, Illinois 60601

OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Building
Philadelphia, Pennsylvania 19102

Attorneys for Motorola Appellee

WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022

DECHERT PRICE & RHOADS
3400 Centre Sq. West
1500 Market Street
Philadelphia, Pennsylvania 19102

Attorneys for the Sharp Appellees

MORGAN, LEWIS & BOCKIUS
2100 The Fidelity Building
123 South Broad Street
Philadelphia, Pennsylvania 19109

IRA M. MILLSTEIN, ESQ. (Argued)
A. PAUL VICTOR, ESQ.
JOEL B. HARRIS, ESQ. (Argued)
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153

Attorneys for Matsushita Appellees

WILLIAM H. BARRETT, ESQ.
CARL W. SCHWARZ, ESQ.
METZGER, SHADYAC & SCHWARZ
One Farragut Square South N.W.
Washington, D.C. 20006

Attorneys for Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha and Hitachi Sales Corp. of America

H. WILLIAM TANAKA, ESQ.
TANAKA, WALDERS & RITGER
1919 Pennsylvania Avenue, N.W.
Suite 303
Washington, D.C. 20006

Attorneys for Hitachi, Ltd., et al.

INDEX

INDEX

OPINION OF THE COURT

GIBBONS, *Circuit Judge*.

The plaintiffs, National Union Electric Corporation (NUE) and Zenith Radio Corporation (Zenith), appeal from an order of the District Court for the Eastern District of Pennsylvania granting summary judgment in favor of all twenty-four defendants on their respective complaints. The NUE complaint, filed in the District of New Jersey in December 1970, names as defendants seven Japanese television manufacturers, nine of their subsidiaries, and one Japanese trading company. The Zenith complaint, filed in the Eastern District of Pennsylvania in September 1974, names as defendants all of those named in the NUE complaint, a few additional subsidiaries, and two American companies: Motorola, Inc., a manufacturer of consumer electronic products, and Sears Roebuck & Co., a retailer. On January 10, 1975, the Judicial Panel on Multidistrict Litigation transferred the NUE case to the Eastern District of Pennsylvania, pursuant to 28 U.S.C. § 1407 (1976 & Supp. V 1981), for coordinated or consolidated pre-trial proceedings with the Zenith case.[1] The defendants and the charges made against them are described more particularly hereafter. Although counterclaims filed by several of the defendants are pending unresolved in the district court, we have jurisdiction over the grant of summary judgment on the

1. In re Japanese Elec. Prod. Antitrust Litig., 388 F. Supp. 565 (Jud. Pan. Mult. Lit. 1975). Both of the New Jersey judges to whom the NUE case was assigned died before any substantial progress was made toward its disposition. In Pretrial Order No. 182 the transfer was made permanent, and the cases were consolidated for trial in the Eastern District. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1119 (E.D. Pa. 1981).

NUE and Zenith claims because that court, pursuant to Fed. R. Civ. P. 54(b), directed the entry of a final judgment as to fewer than all claims.[2] We conclude that as to most of the defendants the record discloses material issues of disputed fact which made the entry of summary judgment improper. Thus we reverse, except as hereafter noted.

I. The Parties and the Charges

NUE is the corporate successor to Emerson Radio Co., a manufacturer of radio and television receivers, which ceased production of television receivers in February 1970 when it could no longer conduct that activity profitably. NUE claims that it was forced from the market by the unlawful activities of the defendants. Zenith is still a major manufacturer of television receivers. It claims that it has incurred operating losses and lost profits because of the unlawful activities of the defendants.

Both plaintiffs allege a conspiracy to drive all American manufacturers of television receivers out of business by a "scheme to raise, fix and maintain artificially *high* prices for television receivers sold by defendants in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States." Preliminary Pretrial

2. That direction resulted in a final order dismissing charges based on the Sherman Act, sections 1 and 2, the Wilson Tariff Act, the Robinson-Patman Act and the Clayton Act, section 7, and the Antidumping Act of 1916. There is also pending in this court at No. 80-2080, an appeal pursuant to 28 U.S.C. § 1292(b) (1976), from an order granting partial summary judgment for the defendants on charges that they violated the Antidumping Act of 1916. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190 (E.D. Pa. 1980). The opinion of the court deciding plaintiffs' appeals from the dismissal of all their claims under the Antidumping Act of 1916 will be filed simultaneously with this opinion.

Memorandum, App., vol. 3, at 712. Both plaintiffs charge that such activity violates sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), and section 73 of the Wilson Tariff Act, 15 U.S.C. § 8 (1982). Both complaints also charge that the pricing activity complained of violates the Antidumping Act of 1916, 15 U.S.C. § 72 (1982). Zenith's complaint alleges sales at depressed prices not only of television receivers, but of radios, phonographs, tape and audio equipment, and electronic components. Zenith also alleges price discrimination among purchasers in violation of section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982), and as to two Japanese defendants, a violation of section 7 of the Clayton Act, 15 U.S.C. § 18 (1982), by acquiring interests in American manufacturers of consumer electronic products formerly owned by Motorola, Inc. and Sears, Roebuck & Co. Both NUE and Zenith seek treble damages and injunctive relief.

Of the twenty-four defendants, fifteen are named in both suits, seven in the Zenith action only, and two in the NUE action only. Among the principal Japanese defendants, Mitsubishi Corporation is a trading company, Matsushita Electric Industrial Co., Ltd. (MEI), Toshiba Corporation, Hitachi, Ltd., Sharp Corporation, Sanyo Electric Co., Ltd., Sony Corporation[3] and Mitsubishi Electric Corporation (MELCO) are manufacturers of television receivers and other consumer electronic products. Many of the subsidiaries of these Japanese corporations are also joined as defendants.[4] The section 7 Clayton Act charge

3. Sony Corporation and its sales subsidiary, Sony Corporation of America, were originally named in both suits, but settled with Zenith in 1977.

4. The subsidiaries include Mitsubishi International Corp., Matsushita Electronics Corp. of America, Matsushita Electric Corp.,

addresses two transactions engaged in by Sears Roebuck & Co. and Motorola, Inc., respectively, with individual Japanese defendants. Sears Roebuck & Co., one of this country's largest retailers of consumer electronic products, at one time was a twenty-five percent owner of Warwick Electronics, Inc., a manufacturer of television receivers for private label retail customers. Warwick, in 1976, was acquired by a Sanyo Electric Co. subsidiary in which Sears retained a twenty-five percent interest. Motorola, Inc., a manufacturer of consumer electronic products, sold its television manufacturing business and its trademark "Quasar" to MEI in 1974.

We deal in this opinion with charges based on the Sherman Act, section 1, and the Wilson Tariff Act, both of which are directed at combinations or conspiracies, and which, in granting summary judgment, the district court treated as co-equal in scope.[5] We also deal with the charges that the defendants monopolized and attempted to monopolize in violation of section 2 of the Sherman Act. We deal as well with the charges that some defendants violated the Robinson-Patman Act by giving or receiving price discriminations. Finally, we deal with the charge that the Warwick and Motorola transactions violated section 7 of the Clayton Act. Only the section 1 Sherman Act and the Wilson Tariff Act charges require proof of a combination or conspiracy. Evidence bearing on those conspiracy charges, however, is relevant to the non-conspiracy charges in many instances. As described in the plaintiffs' Preliminary Pretrial

Matsushita Electric Trading Co., Quasar Electronics Corp., Toshiba America, Inc., Hitachi Sales Corp. of Japan, Hitachi Sales Corp. of America, Sharp Electronics Corp., Sanyo Electric, Inc., Sanyo Electric Trading Co., Sanyo Electric Manufacturing Co., Sony Corp. of America, and Melco Sales, Inc.

5. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1162-64 (E.D. Pa. 1981).

Memorandum and noted above, "the conspiracy involved an unlawful, concerted scheme to raise, fix and maintain artificially *high* prices for television receivers sold by defendants in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States." App., vol. 3, at 712.

II. Proceedings to Date

The summary judgment which we review was entered only after a series of preliminary rulings, some of which serve as the predicates for that judgment. Others rejected certain defenses which are now tendered as alternative grounds for affirmance. Thus a complete understanding of the proceedings to date is necessary for the disposition of this appeal.

A. *Preliminary Substantive Rulings*

In 1975, shortly after the NUE case was transferred to the Eastern District of Pennsylvania, Judge Higginbotham granted motions by the defendants to dismiss Count V of the NUE complaint and Count IV of the Zenith complaint. Both counts charged that by selling electronic consumer products of like grade and quality in Japan at prices higher than those charged to customers in the United States the Japanese manufacturers violated section 2(a) of the Robinson-Patman Act.[6] Judge Higginbotham held that

6. Section 2(a) provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially

these counts failed to state a claim on which relief could be granted because the Robinson-Patman Act required that both of the discriminatory sales take place in the United States.[7] In the order appealed from, Judge Becker, to whom the case was assigned when Judge Higginbotham was appointed to this court, directed that the dismissal of the Robinson-Patman claim be made final.[8] The NUE notices of appeal are from the entire order, and thus Judge Higginbotham's Robinson-Patman Act ruling is before us.[9]

Judge Higginbotham next addressed the defendants' motions to dismiss Count I of the NUE and Count VII of the Zenith complaint, which charged violations of the Antidumping Act of 1916. The motions were predicated on the theory that the statute was void for vagueness. The court denied those motions.[10] At a later stage in the proceedings Judge Becker granted

> to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them . . . .

15 U.S.C. § 13(a) (1982)

7. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 244 (E.D. Pa. 1975).

8. In so ruling he also disposed of Zenith's alternative claim that there were price discriminations among American purchasers. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. at 1323-29.

9. Perhaps because of the limitations on brief size imposed by this court in proceedings under Fed. R. App. P. 33, the NUE-Zenith brief does not address the Robinson-Patman Act claim. At oral argument, however, counsel for NUE and Zenith represented that he was abandoning none of their claims.

10. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 251 (E.D. Pa. 1975), *petition denied*, 521 F.2d 1399 (3d Cir. 1975).

summary judgment on those counts.[11] Judge Higginbotham's ruling on the vagueness challenge is before us in appeal No. 80-2080 from that ruling. *See* note 2 *supra*.

In May of 1975 Judge Higginbotham addressed a series of motions by various defendants to dismiss for lack of personal jurisdiction, improper venue, and insufficient service of process. These rulings were made on affidavits and exhibits after extensive discovery on jurisdictional and venue issues. The court held that venue was proper under section 12 of the Clayton Act, 15 U.S.C. § 72 (1976), in the districts in which each action was originally filed, and that there was pendent venue over the Antidumping Act claim even if section 12 did not apply. Judge Higginbotham also held that there were sufficient defendant contacts with those districts to support personal jurisdiction, and that each defendant had been properly served.[12]

Discovery and other pretrial proceedings in the case went forward under the supervision first of Judge Higginbotham and later of Judge Becker. When discovery was substantially complete, Judge Becker, in June of 1979, considered the motion by certain defendants to strike the NUE and Zenith demands for jury trial. Those motions were denied, but the court certified, pursuant to 28 U.S.C. § 1292(b), that the order denying them presented a controlling question of law as to which there was substantial ground for difference of opinion, the pre-trial resolution of which would materially advance the litigation. The district court held

11. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190 (E.D. Pa. 1980) (granting partial summary judgment); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1316 n.372 (E.D. Pa. 1981) (granting summary judgment on Zenith's remaining claims under 1916 Act).

12. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 262 (E.D. Pa. 1975).

that a jury trial could not be denied on the ground that the issues in the case were too complex for juror comprehension.[13] This court granted the petition for leave to appeal, and held, one judge dissenting, that the seventh amendment guarantee of the right to jury trial does not prevent the striking of a jury demand when the lawsuit is so complex that the jury would be unable to perform the task of rational decision-making with a reasonable understanding of the factual and legal issues. We remanded for reconsideration of the jury trial demand.[14] Without reconsidering the jury trial issue, the trial court eventually granted the summary judgment from which this appeal was taken. While the section 1292(b) appeal on the jury trial issue was under consideration by this court, the district court went forward with the consideration of other motions and with other pre-trial proceedings.

In April of 1980 the trial court considered the motion by MELCO to dismiss the antitrust claims against it on the ground that as a matter of international law it lacked subject matter jurisdiction to impose antitrust liability on a Japanese corporation for activities taking place entirely in Japan. The court denied that motion, holding that as a matter of law those activities would, if proved, support antitrust liability for conduct intended to affect interstate or foreign commerce of the United States.[15] MELCO argues here that the district court erred, and that its subject matter jurisdiction contention, based on international law, is an alternative ground for affirmance. Thus we must address it.

13. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979).

14. In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980).

15. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161 (E.D. Pa. 1980).

Also in April of 1980 the court considered defendants' motions for summary judgment on the NUE and Zenith claims under the Antidumping Act of 1916. Holding that because of technical differences the products sold in Japan and the United States were not sufficiently similar to support liability under that Act, the court granted partial summary judgment dismissing all of NUE's claims under the 1916 Act and most of Zenith's. It certified, however, that its interpretation of the Act was a controlling question of law as to which there is a substantial ground for a difference of opinion and that an interlocutory appeal might materially advance the ultimate disposition of the litigation.[16] We granted leave to appeal, but before that appeal was decided summary judgment was granted on the balance of the plaintiffs' case. Thus that interlocutory appeal was held for disposition by the same panel to which the instant appeal is assigned. As noted above, that appeal and the dismissal of Zenith's remaining 1916 Act claims are being decided simultaneously.

In May of 1980 the trial court considered the motion by certain defendants for summary judgment against Zenith on the ground that Zenith could not recover damages under section 4 of the Clayton Act because it was only indirectly injured, since all its sales were made through wholesalers, with whom the defendants competed. That motion was predicated on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The court denied it, holding that in the circumstances of this case the administrative difficulty of proving a pass-on defense was not a ground for dismissing the complaint.[17]

16. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1243 (E.D. Pa. 1980).

17. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1246 (E.D. Pa. 1980).

In June of 1980 the trial court denied the motion of defendant Sharp Electronics Corporation for summary judgment on plaintiffs' claim based on the Antidumping Act of 1916. Sharp urged that Zenith's claim against it is barred by Article XVI(1) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953). The court held that the treaty did not bar plaintiffs' claims under the Antidumping Act.[18] Sharp urges that the court erred, and relies on the Treaty as an alternative ground for affirming the dismissal of plaintiffs' 1916 Act claims. The opinion addressing those claims disposes of Sharp's contention.

In June of 1980 the trial court also considered the motion by the defendants for summary judgment on NUE's complaint because in 1974 all of NUE's stock was acquired by Aktiebolaget Electrolux (Electrolux), a Swedish corporation. Relying on *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974), the defendants contended that the complaint should be dismissed because Electrolux, the real party in interest, having suffered no injury from defendants' conduct, lacked standing to sue. The court suggested that the *Bangor Punta* rule was inapplicable as a matter of law, but held that if it was applicable there were genuine fact issues with respect to such application which would in any event bar summary judgment.[19] Defendants do not on appeal contend that the denial of summary judgment on the *Bangor Punta* ground was an error which, if considered by us, would be an alternative ground for affirmance of the summary judgment.

18. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1263 (E.D. Pa. 1980).

19. National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 498 F. Supp. 991 (E.D. Pa. 1980).

On June 30, 1980 the trial court, without opinion, denied the motion of Sears, Roebuck & Co. for summary judgment on statute of limitations issues, holding that there were genuine issues of material fact on questions of fraudulent concealment and due diligence.[20] Sears does not on appeal urge that any applicable statute of limitations affords an alternative ground for affirming the summary judgment.

B. *Preliminary Procedural and Evidentiary Rulings*

Throughout this protracted case the parties were before the trial court on numerous occasions on discovery matters, a circumstance which resulted in many pretrial orders and at least one reported opinion.[21] The product of all of that discovery amounts to several hundred thousand documents, many of which were furnished by the defendants pursuant to Fed. R. Civ. P. 33(c) in lieu of specific answers to interrogatories.[22] Prior to the trial court's ruling denying defendants' motions to strike the NUE and Zenith jury trial demands, it also entered a case management order, Pretrial Order No. 154, governing the further progress of the litigation.[23] That order regulated completion of discovery and directed the preparation by each party of a final pretrial statement (FPS). Its key provision is that

20. Pretrial Order No. 263.

21. National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257 (E.D. Pa. 1980) (NUE must cause its computer experts to create a computer-readable tape containing data furnished by NUE in answers to interrogatories).

22. Rule 33(c) is discussed in Part V G, *infra*.

23. Pretrial Order No. 154 is reproduced in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 946-60 (E.D. Pa. 1979).

"[e]xcept for good cause shown, the parties are precluded from offering at trial any facts or evidence supporting such facts which have not been disclosed in the FPS." 478 F. Supp. at 949-50. Pretrial Order No. 154 required the inclusion in the FPS of lists of all public records, reports or data compilations of public officers or agencies, of all documents from private sources, of all depositions, of charts, graphs, models, and reports of experts which the parties intended to offer in evidence. It also dealt with translation of documents. The effect of Pretrial Order No. 154 was to require that each party make, before trial, with preclusive effect, a complete offer of proof on each issue it intended to prove. The order directed that NUE and Zenith file their FPS first, and fixed a schedule during which the defendants could make objections to the admissibility of any of the evidence referred to.

Pursuant to Pretrial Order No. 154, NUE and Zenith, on October 15, 1979, filed their FPS containing factual contentions with cross references to a large number of documents. Because so many documents were involved, the court in Pretrial Order No. 219 ordered the creation of a document depository in the courthouse in which the documents referred to in the NUE and Zenith FPS were to be deposited. The order also required deposit of all documents referred to by the defendants in any motions for summary judgment. By the spring of 1980 the deposit of documents was substantially completed. At that point the court ordered NUE and Zenith to submit a list of documents which constituted independent evidence of the existence of the alleged conspiracy, and which linked each defendant as a member. NUE and Zenith filed such a list, referring to some 250,000 documents in the document depository.

The defendants contended that none of the evidence relied on by NUE and Zenith to establish the

existence of the alleged conspiracy, or to establish that they were members of it, was admissible. Objections were made on grounds of authenticity, hearsay, and relevancy. The trial court held an *in limine* hearing on these objections in order to determine what evidence should be considered on defendants' pending motions for summary judgment. This *in limine* hearing produced three opinions dealing with the admissibility of evidence. The first of them dealt with the admissibility of public records and reports from various governmental sources in the United States and Japan. The court held that almost all of them were inadmissible and thus would not be considered in opposition to defendants' summary judgment motions.[24] A second opinion dealt with a series of documents from non-governmental sources -- mostly from defendants in response to discovery requests -- which NUE and Zenith offered under various hearsay exceptions. The court held that a limited number of these documents were admissible, but that most, for one reason or another, did not qualify for admission.[25] Finally the court considered plaintiffs' proffered expert testimony, holding that most of it was inadmissible.[26]

C. *The Summary Judgment Ruling*

Having in Pretrial Order No. 154 required that NUE and Zenith make a complete offer of proof with preclusive effect, and having in the *in limine* hearing on

---

24. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125 (E.D. Pa. 1980).

25. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190 (E.D. Pa. 1980).

26. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313 (E.D. Pa. 1980).

admissibility of evidence excluded a substantial part of the proof so offered, the court next turned to the defendants' summary judgment motions. On the section 1 Sherman Act and Wilson Tariff Act claims the court held that there was no admissible evidence raising an issue of fact as to the existence of the alleged conspiracy to raise, fix and maintain artificially high prices of consumer electric products in Japan while at the same time fixing and maintaining low prices for such products exported to the United States. Since the existence of concerted action is an essential element of those claims, summary judgment was granted on them in favor of the defendants.[27]

The court then addressed the NUE and Zenith section 2 Sherman Act claims. At the hearing on the motion for summary judgment counsel for NUE and Zenith made clear that this claim was not addressed to attempts by individual defendants to monopolize the American market in consumer electronics products but rather to the behavior of the defendants in the aggregate, a theory of monopolization for which NUE and Zenith claim support in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). While expressing doubt that even in the aggregate the defendants' American market share was sufficient to support a monopolization claim, the court held that the aggregate-share theory required proof of concert of action. Since in disposing of the section 1 Sherman Act claim, the court found no admissible evidence from which concert of action could be found, summary judgment was entered on the section 2 claim as well.[28]

Next the court turned to Zenith's Robinson-Patman Act claim that the defendants discriminated in price not

---

27. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1180-1318 (E.D. Pa. 1981).

28. *Id.* at 1318-23.

only between the Japanese and American markets, but also among American customers. The court read this charge to be inseparable from the conspiracy charge. Thus it, too, fell with the section 1 Sherman and Wilson Tariff Act claims. In addition the court held that Zenith had produced no evidence of injury to competition from the alleged price differential. Since injury to competition is an element of a Robinson-Patman Act violation, summary judgment was entered on this claim as well.[29]

Finally, the trial court addressed Zenith's charge that the Motorola sale of its Quasar division to MEI, and Sanyo's acquisition of a seventy-five percent interest in Warwick's television manufacturing business violated section 7 of the Clayton Act. Summary judgment was granted on this claim because Zenith had failed to show any injury traceable to those transactions.[30]

These four rulings disposed of all the NUE and Zenith claims not already disposed of in the substantive preliminary rulings described in Part II A. The court therefore directed the entry of a final judgment in favor of the defendants, deferring its consideration of their counterclaims pending the disposition of the anticipated appeal.

Our description of the proceedings to date is only a summary. The trial court's consideration both of the procedural and evidentiary issues, and of the substantive issues, was comprehensive and detailed. Indeed the reported opinions written by Judges Higginbotham and Becker in advancing the cases to their present posture total over 800 pages in the Federal Supplement. We will, to the extent possible considering the scope of our review, attempt to avoid duplication of their impressive efforts.

---

29. *Id.* at 1323-29

30. *Id.* at 1329-31.

III. Scope of Review

An appellate court reviewing the grant of a motion for summary judgment exercises plenary review. Our task is to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and [whether] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *E.g.*, *Coastal States Gas Corp. v. Department of Energy*, 644 F.2d 969, 978-79 (3d Cir. 1981). That task is complicated in this instance by the method by which the trial court determined what would be considered in ruling on defendants' summary judgment motions. Relying on the "preclusive effect" language in Pretrial Order No. 154 the court made its ruling without requiring the defendants to complete their own final pretrial statements and, in the case of most defendants, without the filing of detailed affidavits. NUE and Zenith contend that this procedure was improper, in that it imposed on them a higher burden than Rule 56 requires, or relieved the defendants of a burden which that rule imposes on the moving parties. As to this essentially procedural objection our review involves two aspects: whether the method of fixing the record to be considered on summary judgment by requiring a final pretrial statement with preclusive effect is legally permissible, as to which our review is plenary; and whether, if it is permissible in this instance, it was proper, as to which we review for abuse of the trial court's discretion. A further complication arises from the fact that the trial court made *in limine* rulings on admissibility of evidence. Those must be reviewed in order to determine whether or not some evidence which was disregarded would raise a material fact issue. Scope of review over these rulings depends in each instance on the nature of

the ruling. In some instances the trial court's ruling under Fed. R. Evid. 104 was essentially factual, and as to these our review is by the clearly erroneous standard. In other instances rulings on admissibility of evidence call for the application of a legally set standard, and as to these our review is plenary. Finally, some of the Federal Rules of Evidence, such as Rule 403, recognize that the trial court must exercise discretion in weighing competing considerations. These rulings are reviewed by an abuse of discretion standard. Because the trial court made a large number of evidence rulings it will be necessary to address the question of scope of review separately as to each.

Until we have satisfied ourselves about what evidence should be considered we cannot turn to our principal task, the plenary review of the record to determine whether or not summary judgment should have been granted. If, however, we were to accept the NUE and Zenith argument that the court in its basic approach misconstrued Rule 56 that alone would require a reversal. Thus we will first consider that question.

IV. The Trial Court did Not Err in Considering the Summary Judgment Motions on This Record.

NUE and Zenith urge that the trial court violated every principle of Rule 56 because it imposed on the respondents to the motions the initial burden of producing significant probative evidence of the existence of material fact issues, while relieving the moving defendants of the burden of showing initially the absence of such a genuine issue. As a corollary to this argument they contend that the court, in relieving defendants of the obligation to file their FPS's, compounded its erroneous application of Rule 56. According to NUE and Zenith, either detailed affidavits

in support of defendants' motions, or FPS's complying with Pretrial Order No. 154 were mandatory. Principal reliance in support of this argument is placed on language in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970):

> Because respondent did not meet its initial burden of establishing the absence of a policeman in the store, petitioner here was not required to come forward with suitable opposing affidavits. . . . "[T]he party moving for summary judgment has the burden to show that he is entitled to judgment under established principles: and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required."

Id. at 160-61 (footnote omitted) (quoting 6 J. Moore, Moore's Federal Practice ¶ 56.22[2], at 2824-25 (2d ed. 1966)). The entire NUE-Zenith argument in this respect, however, is built upon an unfortunate semantical confusion. It is true that the Supreme Court, and even the commentators, have sometimes referred to the "burden," under Rule 56, "of showing the absence of any genuine issue as to all the material facts . . . ." 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3], at 56-463 (2d ed. 1983) (footnote omitted). But the term "burden" is one that lends itself readily to confusion because it is used with different meanings in different contexts. In the Rule 56 context it does not refer to the quantum of evidence necessary to establish the existence or nonexistence of facts which as a matter of law are material. In the civil context that quantum is usually a preponderance of the evidence, and such preponderance cannot be resolved under Rule 56. Rather the Rule 56 inquiry is whether the admissible evidence, in the record in whatever form, from whatever

source, considered in the light most favorable to the respondent to the motion, fails to establish a prima facie case or defense. *E.g., Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir. 1974). Where, as here, the plaintiffs have produced a preclusive FPS, the ruling is closely analogous to that presented in a motion for a directed verdict at the end of a plaintiff's case. 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3], at 56-479 (2d ed. 1983). "If the state of the pretrial record would justify a directed verdict if nothing more were shown at trial, the Rule 56(c) test is satisfied." 2 P. Areeda & D. Turner, Antitrust Law ¶ 316, at 61 (1978). Moreover, in the Rule 56 context the reference to "burden" is not to which side has the duty to come forward with affidavits or evidence. The court may consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, *if any* . . . ." Fed. R. Civ. P. 56(c) (emphasis supplied). Rule 56(c) does not exclude the grant of summary judgment on the basis of materials originating entirely with the opponent of the motion. Such material alone may be sufficient to establish that on the basis of the undisputed facts no reasonable inference could be drawn in favor of the respondent with respect to the ultimate facts. Rule 56(b) is explicit on this point. "A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Fed. R. Civ. P. 56(b). The movant may chose not to submit any evidentiary materials supporting his summary judgment motion. *Hubicki v. ACF Industries, Inc.*, 484 F.2d 519, 522 (3d Cir. 1973). If, however, there is any evidence in the record from any source from which a reasonable inference in the respondent's favor may be drawn, the moving party simply cannot obtain a summary judgment, no matter how many affidavits are filed. *E.g., Coastal States Gas

Corp. v. Department of Energy*, 644 F.2d 969, 979 (3d Cir. 1981). The "burden" then is insurmountable.

Properly understood, that is all the "burden" language in *Adickes v. S.H. Kress & Co.* stands for. In that case a critical element of the plaintiff's cause of action was state action, which could be found only if the private defendant acted in concert with the local police to deny her service because she was at a lunch counter in the company of black students. In her complaint and at her deposition plaintiff alleged that a policeman walked through the store and subsequently arrested her on the street. There were contrary depositions and affidavits, but since plaintiff's deposition contradicted them she could rest on it, for "[i]f a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." 398 U.S. at 158. Thus *Adickes v. S.H. Kress & Co.* actually supports the approach taken by the district court in this case, because it recognizes that a party -- either party -- can rely in a Rule 56 proceeding on the contents of the entire record.

A court may not, of course, by a premature resort to a Rule 56 order, deprive the party resisting it of a fair opportunity to present facts essential to justify his opposition. Fed. R. Civ. P. 56(f). One may conceive of situations in which requiring a pretrial statement with preclusive effect might do so even though such orders are expressly authorized by Fed. R. Civ. P. 16. This case, however, does not present that situation. Pretrial Order No. 154 was entered only after years of discovery. It gave NUE and Zenith ample time to outline their entire case, and adequate notice that, with limited exceptions, they must do so by the date specified or forever hold their peace. Paragraph X of the order expressly contemplated summary judgment motions. App., vol. 2, at 675. Thus

for all practical purposes, except perhaps the opportunity to observe the credibility of witnesses, the trial court had before it the same record that it would have had at trial at the end of the plaintiffs' case. There was no violation of either the spirit or the letter of Rule 56(f). We explicitly approve, for protracted cases, the trial court's determination embodied in Pretrial Order No. 154 which required preparation of a FPS with preclusive effect, permitted *in limine* rulings on evidence issues, and created a record to which summary judgment motions might then be addressed. That action is entirely consistent with the provisions of Fed. R. Civ. P. 56(d) directing that the court "shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted" and "shall thereupon make an order specifying the facts that appear without substantial controversy . . . ."

Thus we reject the contentions advanced in Point I of the NUE-Zenith brief that the summary judgment should be reversed because the defendants' affidavits were insufficient to meet some affirmative burden imposed by Rule 56, or because the trial court ruled on the summary judgments before the defendants' FPS's were filed.

V. Evidence Issues

We noted in Part III B above that the court filed three separate opinions making *in limine* rulings on evidence issues, dealing separately with public records and reports, with other hearsay exceptions, and with expert testimony. Most of those rulings dealt with evidence tendered in the FPS in support of the plaintiffs' conspiracy allegations. The alleged conspiracy had two aspects: concert of action to maintain high prices in Japan, and concert of action to sell at low prices in the United States to the detriment of American manufacturers of televisions and other consumer electronic products. The trial court identified thirteen

categories of evidence, and as to each made a ruling on authenticity or admissibility under one or more of the Federal Evidence Rules, and on relevancy. *See* 505 F. Supp. at 1138-39. Some evidence was held to be admissible, and thus for purposes of summary judgment must be taken into account. That evidence will be referred to in our discussion of the merits of the summary judgment, *see* 505 F. Supp. at 1138-39, since none of the defendants has urged that the rulings admitting evidence were error. In this Part V, therefore, we address only the evidence which was for one reason or another excluded.

A. *The Propriety of In Limine Rulings.*

Before turning to that task in detail, it is appropriate to note that although neither the Federal Rules of Civil or Criminal Procedure, nor the Federal Rules of Evidence, explicitly authorize pre-trial rulings on admissibility of evidence, we agree completely with those commentators who urge that *in limine* ruling on evidence issues is a procedure which should, in a trial court's discretion, be used in appropriate cases. *See* 21 C. Wright & K. Graham, Federal Practice and Procedure § 5037, at 193-95 (1977); Federal Judicial Center, Manual for Complex Litigation § 4.22 (1981) (*reprinted in* 1 Moore's Federal Practice (2d ed. 1982)); Rothblatt & Leroy, *The Motion in Limine in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence*, 60 Ky. L.J. 611, 614 (1972). This was an appropriate case, not only because the court's *in limine* consideration was far more efficient than if the rulings were deferred until the trial, with consequent interruptions, but also because the *in limine* procedure permitted more thorough briefing and argument than would have been likely had the rulings been deferred. That was particularly so with respect to those rulings requiring district court fact findings under Rule 104.

We recognize that there are countervailing considerations, especially with respect to relevancy rulings under Rule 403 which may be made pre-trial without the benefit of the flavor of the record developed at trial. Nevertheless we hold that the trial court has discretion to make even relevancy rulings pre-trial, subject to review for abuse of such discretion. In this instance, because under the provisions of the FPS the plaintiffs' entire case was before the trial court, no conceivable prejudice occurred from making *in limine* rulings, and thus there was no abuse of discretion.

B. *Standards for Admission of Coconspirator Statements*

Another preliminary matter which should be addressed before turning to the court's rulings on exclusion of evidence is the contention by NUE and Zenith that the trial court erred in ruling on the admissibility of statements by one coconspirator against the others. They advance three separate objections to the trial court's treatment of coconspirator statements.

The court held that in determining admissibility of such statements it could consider only independent evidence of the existence of and membership in a conspiracy. 513 F. Supp. at 1179. The first NUE-Zenith contention is that under Rules 801(d)(2)(E) and 104(a) it is not necessary, at least in civil cases, to produce independent evidence of the existence of and membership in the conspiracy before admitting statements made during the course of and in furtherance of it. NUE and Zenith concede that in *Glasser v. United States*, 315 U.S. 60, 74 (1942), the Supreme Court held that declarations of one conspirator made to a third party in furtherance of the objects of the conspiracy are admissible against an alleged coconspirator, not present when they were

made, "only if there is proof *aliunde* that he is connected with the conspiracy." They urge, however, that with the enactment of the Federal Rules of Evidence the *Glasser* rule no longer applies. In their view, the statements are no longer hearsay because a statement is not hearsay if "[t]he statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). *Glasser*, they contend, was predicated on the assumption that if such statements were admissible without proof *aliunde* then "hearsay would lift itself by its own bootstraps to the level of competent evidence." 315 U.S. at 75. Since under Rule 801(d)(2)(E) the statements are not hearsay, they reason, the *Glasser* rule no longer has vitality. NUE and Zenith reinforce their interpretation of Rule 801(d)(2)(E) by reference to Rule 104(a), which provides that in making its determination on admissibility the court is not bound by the rules of evidence.

We reject the contention that the trial court erred in this respect. Neither rule relied upon was intended to change the settled law that there must be independent proof *aliunde* of the existence of and membership in a conspiracy before coconspirator statements are admissible against a party. We recognize that *United States v. Martorano*, 561 F.2d 406, 408 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978), suggests in dicta that Rule 104(a) casts doubt on the *Glasser* rule and that the Court of Appeals for the Sixth Circuit has rejected *Glasser*, *see James R. Snyder Co. v. Associated General Contractors*, 677 F.2d 1111, 1117 (6th Cir.), *cert. denied*, 103 S. Ct. 374 (1982). Since the Federal Rules of Evidence were adopted, however, all other courts of appeal have assumed that in deciding whether to admit coconspirator statements the judge may only consider evidence independent of them. 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 104[05], at 104-45-46

(1982). Since the effective date of the Evidence Rules, this court has continued to apply the *Glasser* rule. *United States v. Ammar*, 714 F.2d 238, 246 n.3 (3d Cir. 1983); *United States v. Continental Group, Inc.*, 603 F.2d 444, 457 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *United States v. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977); *United States v. Trotter*, 529 F.2d 806, 811 (3d Cir. 1976). Arguably these decisions do not bind this panel because they do not specifically address the question whether the Federal Evidence Rules overruled *Glasser*. But if the question is open, we believe that neither the language of the rules relied upon nor sound policy supports the NUE-Zenith position.

Rule 801(d)(2)(E) says that a coconspirator statement is not hearsay, but says nothing about how coconspirator status is established. That status requires a preliminary factual inquiry, to which Rule 104(a) undoubtedly applies. But the fact that Rule 104(a) permits the trial court to resort to hearsay does not speak to the *Glasser* rule requirement of independent evidence. Granting that the court can rely on hearsay in making the determination of coconspirator status, the evidence relied on must still be independent of the statement. Otherwise all parties to a lawsuit, civil or criminal, may be exposed to the risk of admission against them of "idle chatter of criminal partners as well as inadvertently misreported and deliberately fabricated evidence." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(E)[01], at 801-171 (1981) (footnote omitted).

The trial court held that before it could admit coconspirator statements under Rule 801(d)(2)(E) it must find, by a preponderance of the independent evidence that the conspiracy relied upon for admissibility existed, and that each party against whom the statement is offered was a member of it. 513 F. Supp.

at 1179. NUE and Zenith urge that the trial court erred in requiring that the independent evidence of coconspirator status satisfy him by a preponderance of the evidence. They concede that, at least in criminal cases, the law in this circuit is settled. In criminal cases we require that the trial court apply a preponderance of the evidence standard, *e.g.*, *United States v. Ammar*, 714 F.2d at 249-51; *United States v. Trowery*, 542 F.2d at 627, although other courts require a different standard.[31] It is true that no opinion of this court has expressly held that the preponderance of evidence test applies to determination of coconspirator status in civil cases, although the *Trowery* court seems to have assumed so. 542 F.2d at 626. We are not persuaded that a different standard of proof for this preliminary question in civil cases should be adopted. The preponderance of evidence standard is commonly used for preliminary evidence questions in civil cases. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271, 273-74 (1975). While there may be merit in the position of those courts which have, in criminal cases, raised the threshold standard to substantial evidence, we see none in the position that for either civil or criminal cases the responsibility of the court in making the *Glasser* determination should be decreased.

---

31. *See, e.g.*, United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980) (substantial evidence test); United States v. James, 590 F.2d 575, 581 (5th Cir. 1979) (substantial evidence test); United States v. Dixon, 562 F.2d 1138, 1141 (9th Cir.) (prima facie evidence of coconspirator status), *cert. denied*, 435 U.S. 927 (1977). The First, Second, and Tenth Circuits apply the preponderance standard. *See* United States v. Peterson, 611 F.2d 1313, 1327 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); United States v. Stanchick, 550 F.2d 1294, 1297-99 (2d Cir. 1977); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977). The Fourth Circuit is apparently equivocal. *See* United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976).

NUE and Zenith urge that there is a valid distinction, for purposes of the coconspirator statement rule, between civil and criminal cases, because in the latter the jury must find guilt beyond a reasonable doubt and thus the court, finding the existence of an agreement by a preponderance of the evidence, is not usurping the function of the jury. In civil cases, on the other hand, if both the preliminary question and the ultimate question are to be decided by the preponderance of the evidence standard, the court may, to the disadvantage of the plaintiff, usurp the jury's function. One fallacy in that reasoning, however, is that the court's determination of the ultimate issue is not binding on the jury. Another fallacy is that the two questions are not the same. In order to admit the statement the court need only find that the speaker and the party against whom it is offered were engaged in a common undertaking for the advancement of which the statement was made. The jury, or court if the case is tried non-jury, must also find that the common undertaking was unlawful and can rely on the contents of the statement for that purpose.

We recognize that exclusion of statements by alleged coconspirators may have a severely damaging effect on a plaintiff's case in which concert of action is an essential element of the cause of action. Evidence rulings often have such an effect, however, and the admission against defendants, in proof of illegality, of statements of third parties without a proper foundation may be equally damaging. Thus we agree with the recent decision of the Court of Appeals for the Sixth Circuit rejecting the distinction between civil and criminal cases which NUE and Zenith urge. *James R. Snyder Co. v. Associated General Contractors*, 677 F.2d 1111, 1117 (6th Cir.), *cert. denied*, 103 S. Ct. 374 (1982).

Finally, NUE and Zenith contend that in deciding on the admissibility of coconspirator statements the

trial court erred in requiring a showing not only that there was a combination between the defendants, but also that the combination was unlawful. If the trial court had so ruled, that ruling would be error, for in order to admit coconspirator statements "it is necessary to show by independent evidence that there was a combination between them, . . . but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful." *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249 (1917); *see United States v. Trowery*, 542 F.2d at 626-27. Our examination of that portion of the trial court's opinion dealing with admissibility of coconspirator statements, however, convinces us that no such additional burden was imposed. The court said:

> [W]e simply make the factual finding that plaintiffs have not established by a preponderance of independent evidence that any of the defendants entered into an agreement . . . .

513 F. Supp. at 1298.

We conclude, therefore, that the trial court applied the correct rule: coconspirator statements can be admitted only if the court is convinced by a preponderance of evidence independent of the statements that there was a joint undertaking, that the statement was made to advance that undertaking, and that the party against which the statements are offered was a party to that undertaking. All of the independent record evidence must, of course, be considered.

The joint undertaking need not be identical to the conspiracy relied upon as a basis for liability. Rule 402 affords adequate protection against admission of statements in furtherance of joint undertakings that are remote and unrelated to the conspiracy relied upon as a basis for liability. It is well established, for example, that there need not be a conspiracy count in the

indictment before coconspirator statements may be admitted. 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(E)[01], at 801-166 (1981); *Kay v. United States*, 421 F.2d 1007, 1010 (9th Cir. 1970); *United States v. Cryan*, 490 F. Supp. 1234, 1240 (D.N.J.), *aff'd*, 636 F.2d 1211 (3d Cir. 1980). Moreover, coconspirator statements admissible on conspiracy counts may be considered on substantive counts as well. *United States v. Cahalane*, 560 F.2d 601, 605 n.4 (3d Cir.), *cert. denied*, 434 U.S. 1045 (1977). *See also*, *United States v. Mendozo*, 473 F.2d 692, 695 (5th Cir. 1972) (coconspirator exception applicable to criminal prosecutions and not limited to prosecutions for conspiracy); *United States v. Accardi*, 342 F.2d 697, 700 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965). The reasoning of these cases suggests that if, for example, a price fixing conspiracy in Japan were to be found by a preponderance of independent evidence, the statements of any of its members made in furtherance of it would, if relevant, be admissible against all members of it for all purposes.[32]

32. Chief Judge Seitz reluctantly joins the majority opinion with respect to what may be proved by the admission of coconspirator statements. In United States v. Trowery, 542 F.2d 623 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977), this court he[illegible] statements made in furtherance of an uncharged conspiracy may be admissible against coconspirators charged with other offenses. The logic of *Trowery* compels Chief Judge Seitz to accept the possibility that statements made in furtherance of a conspiracy to fix high prices in Japan may be used to establish the existence of a conspiracy to fix low prices in the United States, even though the conspiracy to fix low prices could not be established without the admission of coconspirator statements. Bound by precedent to reach this result, Chief Judge Seitz is troubled by a holding that seems to him to permit the bootstrap expansion of a conspiracy in circumvention of the *Glasser* independence requirement. *Cf.* Krulewitch v. United States, 336 U.S. 440, 443 (1948) (statements made in furtherance of an implicit conspiracy to conceal the conspiracy charged may not be used to prove the conspiracy charged); United States v. Cambindo Valencia, 609 F.2d 603, 635-36 n.25 (2d Cir. 1979) (court would limit coconspirator exception to statements made in furtherance of the conspiracy charged or proved, not other conspiracies "found to exist in the factual pattern of the case"), *cert. denied sub nom.* Prado v. United States, 446 U.S. 940 (1980); United States v. Layton, 549 F. Supp. 903, 916-17 (N.D. Cal. 1982) (coconspirator exception limited to statements made in furtherance of conspiracy charged or conspiracy underlying substantive charges).

The district court made a Rule 104(a) finding that NUE and Zenith had not established "by a preponderance of independent evidence that any of the defendants engaged in the 'unitary' conspiracy alleged by plaintiffs (or, for that matter, either the home market or export facets thereof)." 513 F. Supp. at 1299. We are unable to affirm the exclusion of coconspirator statements on the basis of this finding, however, because, as noted hereafter, much independent evidence bearing on the existence of joint undertakings by the defendants, particularly with respect to price fixing in Japan, was erroneously excluded. The admissibility of coconspirator statements must on remand be reconsidered by the trial court in light of all the independent evidence in the record.

C. *Rule 803(8)(C) Materials.*

Included in the FPS are a number of documents originating with public offices or agencies, which NUE and Zenith contend are properly admitted for the truth of the matter asserted therein as hearsay exceptions under Rule 803(8)(C). That rule admits "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8). Five categories of documents were tendered:

1. Six documents prepared in proceedings instituted by the United States Treasury Department under the 1921 Antidumping Act, 19 U.S.C. § 160 *et seq.* (repealed 1980);

2. Eighteen documents prepared in proceedings before the United States International Trade Commission under the Trade Expansion Act of 1962, 19 U.S.C. § 1801 *et seq.* and its successor statute, the Trade Act of 1974, 19 U.S.C. § 2101 *et seq.*;

3. Two documents prepared in proceedings before the Japanese Fair Trade Commission under the Japanese Anti-Monopoly Law;

4. Findings of fact made by Judge Higginbotham in the instant case in ruling on motions to dismiss for lack of personal jurisdiction, improper venue, and improper service of process; and

5. Two documents, one of which was prepared for the Statistical Office of the United Nations, and the other a report of the Organization for Economic Cooperation and Development.

See 505 F. Supp. at 1138-39. Of these twenty-nine documents the trial court ruled inadmissible all but the two documents in the fifth category, identified as DSS #46 and #47. Many of the excluded documents were also relied upon by plaintiffs' experts in reaching the opinions which they expressed, and thus received the court's attention a second time when it considered, pursuant to Rule 703, the admissibility of those opinions.[33]

---

33. *See* Part VI *infra*.

1. *The Court's General Approach to Rule 803(8)(C).*

Before ruling on specific public records and reports the trial court outlined a general approach toward the consideration of Rule 803(8)(C) materials. The court noted first that the rule permits only the admission of factual findings, including evaluative findings, but not legal conclusions, and not underlying exhibits and data.[34] Turning to the trustworthiness proviso in the rule, the court identified eleven factors which would be taken into consideration in determining trustworthiness, and hence admissibility. Four of these are the factors listed in the Notes of the Advisory Committee on Proposed Revisions to Rule 803(8)(C):

> Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation . . . ; (2) the special skill or experience of the official . . .; (3) whether a hearing was held and the level at which conducted . . .; (4) possible motivational problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

(citations omitted). The Advisory Committee's reference to the motivational problems suggested by *Palmer v. Hoffman* is to the bias which may arise when a report is compiled for the purpose not of finding the facts in a neutral manner, but in anticipation of litigation. To the four factors mentioned by the Advisory Committee, the trial court added seven more:

> (1) The finality of the agency findings, *i.e.*, the state of the proceedings at which the findings were made (whether they are subject to subsequent proceedings or *de novo* review), and the likelihood of modification or reversal of the findings.

---

34. 505 F. Supp. at 1144-46.

(2) The extent to which the agency findings are based upon or are the product of proceedings pervaded by receipt of substantial amounts of material which would not be admissible in evidence (*e.g.* hearsay, confidential communications, ex parte evidence), and the extent to which such material is supplied by persons with an interest in the outcome of the proceeding.

(3) If the findings are products of hearings, the extent to which appropriate safeguards were used (Administrative Procedure Act, Due Process), and the extent to which the investigation complied with all applicable agency regulations and procedures.

(4) The extent to which there is an ascertainable record on which the findings are based.

(5) The extent to which the findings are a function of an executive, administrative, or legislative policy judgment (as opposed to a factual adjudication) or represent an implementation of policy.

(6) The extent to which the findings are based upon findings of another investigative body or tribunal which is itself vulnerable as a result of trustworthiness evaluation.

(7) Where the public report purports to offer expert opinion, the extent to which the facts or data upon which the opinion is based are of a type reasonably relied upon by experts in the particular field.

505 F. Supp. at 1147. NUE and Zenith urge that by adding these seven factors in addition to those suggested by the Advisory Committee the court destroyed the utility of the public records and reports

hearsay exception. Without at this point endorsing the seven specific criteria, we reject the contention that in ruling on the admission of findings by public agencies a trial court is restricted to the four factors listed by the Advisory Committee. The Committee's note to Rule 803(8)(C) observes that "[o]thers no doubt could be added." It continues:

> The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception [803](6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present.

In considering whether an official report is sufficiently reliable to be admitted under Rule 803(8)(C), we start from the premise that such reports of investigations are presumed to be reliable. As this court has noted:

> Official reports are admitted as an exception to the hearsay rule because they are presumed to be generally reliable. . . . Before [untrustworthiness] objections may be recognized . . . the party challenging the validity of an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness.

Melville v. American Home Assurance Co., 584 F.2d 1306, 1316 (3d Cir. 1978). *Cf. Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467, 472-73 (3d Cir. 1950) (before the codification of the Federal Rules of Evidence, held that a trial court erred in rejecting a report of the Bureau of Mines which supported a plaintiff's contention that negligent design of a gas tank had caused a disaster).

The scope of our review of the trial court's trustworthiness determination depends on the basis for the ruling. When the trial court makes Rule 104(a) findings of historical fact about the manner in which a report containing findings was compiled we review by the clearly erroneous standard of Fed. R. Civ. P. 52. But a determination of untrustworthiness, if predicated on factors properly extraneous to such a determination, would be an error of law.[35] *See Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1183 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978). There is no discretion to rely on improper factors. Such an error of law might, of course, in a given instance be harmless within the meaning of Fed. R. Civ. P. 61. In weighing factors which we consider proper, the trial court exercises discretion and we review for abuse of discretion. Giving undue weight to trustworthiness factors of slight relevance while disregarding factors more significant, for example, might be an abuse of discretion. With that in mind, we turn to the task of reviewing the specific documents tendered as official reports.

2. Reports Prepared by the United States Treasury Department Under the 1921 Antidumping Act.

The Antidumping Act of 1921, 19 U.S.C. §§ 160-173 (1976), provided[36] for the imposition of dumping duties The legislation was aimed at sales of foreign

35. Chief Judge Seitz believes that considering extraneous factors when making a trustworthiness determination under Rule 803(8) would be an abuse of discretion rather than an error of law. In his view, the abuse of discretion standard includes improper application of the factors which show trustworthiness under Rule 803(8).

36. That Act has now been superseded by section 101 of the Trade Agreements Act of 1979, 19 U.S.C. §§ 1673-73i (1982).

merchandise at less than fair value which injured or prevented the establishment of an American industry by the importation of such merchandise into the United States. The statutory remedy was the imposition of a special dumping duty. 19 U.S.C. § 161 (1976). Before a special duty could be imposed, both aspects of the statute - - sales at less than fair value and injury to an actual or potential American industry -- were to be satisfied. Procedures for the establishment of both aspects were set forth in title 19 of the Code of Federal Regulations, which is included in the FPS. App., vol. II, at 4177-87. Suspected dumping could result in proceedings under the Act either because any district director of the Customs Service reported a suspicion of dumping to the Commissioner of Customs, *see* 19 C.F.R. § 53.25 (1969), or because a person outside the Customs Service communicated information about suspected dumping to the Commissioner. 19 C.F.R. § 53.26 (1969). A communication from a person outside the Customs Service had to include detailed information about the suspected merchandise, its source, the injured industry, and price information. 19 C.F.R. § 53.27 (1969). Upon receipt of such information, whether from within or outside the Customs Service, the Commissioner was to conduct a summary investigation. On the basis of that investigation the Commissioner could for specified reasons close the case. 19 C.F.R. § 53.29 (1969). If he did not do so, the Commission was to publish in the Federal Register an Antidumping Proceeding Notice, including a summary of the information received and an identification of its source. 19 C.F.R. § 53.30 (1969).

On June 10, 1968 the Commissioner of Customs, having received information from an antidumping source outside the Customs Service and having conducted a summary investigation, published in compliance with 19 C.F.R. § 53.30 (1969), an

antidumping proceeding notice, stating that "[t]he information received tends to indicate that the prices of the television sets for exportation to the United States are less than the prices for such or similar merchandise for home consumption in Japan." This notice is part of the FPS and identified as DSS #1. App., vol. II, at 4188. It was held to be admissible as a report of activities of the Customs Service, under Fed. R. Evid. 803(8)(A), or of activities observed pursuant to a duty imposed by law, under Fed. R. Evid. 803(8)(B). 505 F. Supp. at 1155. The trial court held, however, and we agree, that it is not a factual finding resulting from an investigation within the meaning of Rule 803(8)(C). The notice "finds" no more than reasonable cause to pursue a more thorough investigation.

Once the Antidumping Proceeding Notice was published, the Commissioner of Customs was required "by a full-scale investigation, or otherwise, to obtain such additional information, if any, as may be necessary to enable the [Treasury] Secretary to reach a [fair-value] determination as provided by § 53.32." 19 C.F.R. § 53.31(a) (1969). The Customs Service was to conduct the investigation through its own representatives, including Customs representatives in foreign countries. Id. On the basis of its report the Secretary of the Treasury was required to "proceed as promptly as possible to determine whether or not the merchandise in question is in fact being, or is likely to be, sold in the United States or elsewhere at less than its fair value." 19 C.F.R. § 53.32(a) (1969). Interested persons could make written submissions, which were to be given appropriate consideration, and the Secretary could invite any person to supply information orally. 19 C.F.R. § 53.32(b) (1969).

Upon concluding that there were reasonable grounds to believe or suspect that merchandise was being sold at less than fair value and that there was

evidence concerning actual or potential injury to an American industry, the Commissioner of Customs could publish in the Federal Register a Withholding of Appraisement Notice, setting forth the basis of his belief or suspicion. 19 C.F.R. § 53.34(a) (1969). The effect of this notice was to direct district directors of customs to withhold appraisements, and thus leave undetermined the liability for tariff duties of the importers of the goods in question. On August 28, 1970 the Commissioner of Customs published such a notice with respect to Japanese manufactured television sets. This notice is part of the FPS and denominated DSS #2. App., vol. II, at 4189. Like the June 10, 1968 notice, it was held to be admissible under Rule 803(8)(A) and (B), but not under Rule 803(8)(C). 505 F. Supp. at 1155. This notice, like that of June 10, 1968, did not make findings, but only set forth reasonable grounds for belief or suspicion. It served merely to preserve the status quo pending further proceedings. It also triggered an opportunity for interested parties to appear, through counsel or in person, to make known their point of view and supply further information. 19 C.F.R. § 53.37 (1969). Thus the trial court's ruling that the August 28, 1968 notice is not admissible to establish the fact of sales at less than fair value or of injury to an American industry was not erroneous.

If on the basis of information before it the Treasury Secretary decided that a determination of sales at less than fair value was required, he was required to publish a Federal Register Notice of the determination and advise the U.S. Tariff Commission. 19 C.F.R. §§ 53.36, 38 (1969). On December 4, 1970 an Assistant Secretary of the Treasury did so. That determination, DSS #3, provided in relevant part:

> I hereby determine that for the reasons stated below, television receiving sets, monochrome and

color, from Japan are being, or likely to be, sold at less than fair value within the meaning of section 201(a) of the Act.

Statement of reasons on which this determination is based. The information currently before the Bureau reveals that the appropriate basis of comparison is between purchase price or exporter's sales price and adjusted home market price.

Purchase price was calculated on the basis of f.o.b. or f.o.r. packed prices with deductions for freight, packing, and other charges applicable. The applicable Japanese commodity tax was added to this price.

Exporter's sales price was calculated by deducting from the resale prices of the related firms to distributors in the United States any applicable discounts to arrive at a net selling price. From the latter appropriate deductions were made for inland freight in Japan, ocean freight and insurance, U.S. duty, brokerage charges, U.S. freight, warranty costs, packing, and commissions and other selling expenses incurred in the United States. To this additions were made for any applicable Japanese commodity tax refunded [illegible] paid on exportation of the merchandise.

Home market price was based on the delivered price to distributors in the home market. Appropriate deductions were made for discounts and rebates, granted for cash, quantities, and certain sales promotions. From the net price adjustments were made for commissions, warranty and installation costs, inland freight, inland insurance, patent fees, bad debts, where applicable, and packing. Adjustments were also made for

differences in the merchandise, and for difference in advertising and credit costs.

Purchase prices or exporter's sales prices were lower than home market prices by amounts that were more than minimal in relation to the total volume of sales.

35 Fed. Reg. 18549 (1970). The trial court held this less-than-fair-value finding to be inadmissible because it was untrustworthy, Fed. R. Evid. 803(8)(C), irrelevant, Fed. R. Evid. 402, and unduly prejudicial, Fed. R. Evid. 403.

The court found that the investigation was timely, that the investigating officials were professionally responsible for making the investigation, and that there were no motivational problems. 505 F. Supp. at 1155. Moreover, the court found that the investigation was conducted in compliance with the applicable Treasury Department regulations. *Id.* at 1156. Nevertheless the finding was held to be untrustworthy for eight reasons: (1) there was no evidentiary hearing; (2) the Assistant Secretary did not attend the hearings which were held but instead relied of staff reports; (3) the investigation included hearsay, confidential communications, and *ex parte* evidence; (4) the procedures, while permitting submissions and the opportunity to present argument by counsel, did not provide for cross-examination; (5) there was no ascertainable record; (6) the finding was made at a nascent stage of the investigation; (7) the finding was subject to some form of judicial review; and (8) the finding contained no statement of reasons for allowances or disallowances of particular adjustments. *Id.* Neither singly nor collectively do these reasons overcome the presumption of reliability.

Requiring that the government report of an investigation be based on an evidentiary hearing providing an opportunity for cross-examination would

rob Rule 803(8)(C) of any practical utility. Most governmental investigations proceed without either evidentiary hearings or the opportunity for cross-examination. The indice of reliability for the governmental investigative report is the fact that it is prepared pursuant to a duty imposed by law. The law sets forth the standards for conducting the investigation and those standards were complied with. An important governmental decision -- whether to proceed with the costly and time-consuming procedure for determining the amount of dumping duties -- was predicated on the outcome. We note, moreover, without suggesting that Rule 803(8)(C) so requires, that during the investigation the parties were represented by counsel and had an opportunity to make written submission and oral arguments. *Id.* at 1151-52, 1155. *See* 19 C.F.R. §§ 53.32(b), 53.37 (1969). Under these circumstances reliability is highly likely. We reject as well the contention that the Assistant Secretary's absence from the hearings and his reliance on reports of others makes his findings unreliable in this instance. In the real world of governmental affairs, investigations into economic facts -- such as whether or not sales are being made at less than fair value -- will frequently require that the expert to whom the agency entrusts the task of making a finding rely on facts not directly observed by him. There is no suggestion in the record that the procedures specified in the Treasury Department's regulations for conducting a fair-market-value investigation are a professionally unreliable means for ascertainment of economic facts. The fact that the finding was made at a nascent stage of the proceedings is in our view of no significance in this instance. Under the statutory and regulatory scheme, the finding at that stage was a predicate for further proceedings leading to the determination of the amount

of dumping duties. As noted above, the findings were sufficiently reliable for the Treasury Department to go forward with that costly and time-consuming proceeding. Furthermore, there is no requirement in Rule 803(8)(C) that an investigative report contain a statement of reasons for each adjustment or allowance. Finally, the fact that under the statute some form of judicial review of the imposition of dumping duties was available at some point does not support an inference that the investigation was unreliable or the finding based upon it untrustworthy. In holding the finding in 39 Fed. Reg. 18549 (1970) to be untrustworthy, the trial court gave undue weight to considerations either legally irrelevant under Rule 803(8)(C) or of only slight relevance, and too little weight to the fact that the investigation was conducted by officials charged with a legal duty to conduct it, for an important governmental purpose, in full compliance with the governing law. This determination of untrustworthiness was, therefore, an abuse of discretion.

The trial court also held the less-than-fair-value finding to be irrelevant for two reasons: (1) the finding resulted from a comparison of prices constructed from a formula, not of actual transactional prices, 505 F. Supp. at 1158-59; (2) the finding indiscriminately applied to all sales of Japanese television receivers. *Id.* at 1159.

Rule 402 requires the exclusion of irrelevent evidence. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Judge Weinstein observes that "the test of relevancy is whether a reasonable man might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence." 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 401[07].

at 38 (1982). Our review of a Rule 402 relevancy ruling is plenary.[37] Especially in the context of review of a summary judgment or a directed verdict, we must determine to our own satisfaction whether the finding has any tendency to prove or disprove a consequential fact. A consequential fact in this action is the sale of television receivers by the defendants in the United States, in the time frame covered by the report, at prices lower than similar receivers were being sold in Japan.

The less-than-fair-value finding could be relied upon to establish that there were significant price differences in the two markets. While some of the Treasury Department's adjustments may have been arguable, that objection goes, at best, to weight, not admissibility. *See Elwood v. New York*, 450 F. Supp. 846, 874 (S.D.N.Y. 1978), *rev'd on other grounds sub nom. Badgley v. City of New York*, 606 F.2d 358 (2d Cir. 1979), *cert. denied*, 447 U.S. 906 (1980) (appraisal of diminished land values resulting from diversion of river headwaters relevant to issue of damages despite claim that they lacked detailed adjustments for time and location). The Treasury Department's finding can be contested at trial just as an expert's opinion can be contested. It is, however, plainly relevant on the issue of price disparities in the two markets. Nor are we persuaded that the lack of specificity with respect to the defendants renders the industry-wide finding

37. Chief Judge Seitz does not agree that our review of relevancy rulings is plenary. Rather, he would review for abuse of discretion, citing Hamling v. United States, 418 U.S. 87, 124-25 (1974); Gagliardi v. Flint, 564 F.2d 112, 116 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). In addition to this case law, Chief Judge Seitz relies on Rule 401, which defines relevancy in terms of evidence that has a "tendency" to make facts "more probable or less probable." Fed. R. Evid. 401. Chief Judge Seitz concludes that these terms admit of a latitude in the district court's relevancy determinations that is appropriately reviewed under the abuse of discretion standard.

irrelevant. The defendants are a part of the industry, and the affidavits on file indicate that at least some of the defendants participated in the Treasury Department investigation. The finding has some tendency to establish that Japanese manufacturers, including the defendants, maintained the price differentials complained of. No more is required for relevancy under Rule 401. Thus we hold that the trial court erred in its relevancy ruling.

Finally, the trial court held that even if the less-than-fair-value finding were trustworthy and relevant he would exclude it under Rule 403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. In contrast with the Rule 402 relevancy determination, we review this ruling by an abuse of discretion standard. *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 636 (3d Cir. 1977). The trial court found potential prejudice in the fact that the less-than-fair-value finding carrying the imprimatur of the Treasury Department might sway the jurors and dissuade them from making an independent appraisal of the record evidence. 505 F. Supp. at 1160-61. The court also ruled that admission of the finding would lead to confusion of the issues and misleading of the jury. *Id.* at 1161. Reliance on these factors was premature, however, since it had not yet been determined that the case would actually be tried to a jury. The court also concluded that admission of the finding would cause undue delay and needless presentation of cumulative evidence. *Id.* Because two of the factors relied upon were plainly premature, and thus

improper, we cannot affirm the court's exercise of discretion under Rule 403 on the basis of these factors, since we do not know precisely what weight was given to them. Moreover, we cannot disregard the fact that the court's Rule 403 ruling was colored by its erroneous rulings on trustworthiness and relevance. We do not hold that on remand a Rule 403 exclusion would necessarily be error. Rather, the trial court should reconsider that ruling in light of factors that are proper at the time of its ruling. We need not decide whether the less-than-fair-value finding is properly a part of the summary judgment record at this stage, because we conclude that it is not outcome determinative as to any defendant.

Following the determination that sales were being made at less than fair value the United States Tariff Commission, in accordance with 19 U.S.C. § 160(a) (1976), instituted an investigation to determine whether an industry in the United States was being injured by such sales. A notice of hearing was published in the Federal Register on December 10, 1970, 35 Fed. Reg. 18768 (1970). An evidentiary hearing was conducted before the Tariff Commission, and on March 4, 1971 it issued a Determination of Injury, which was published at 36 Fed. Reg. 4576 (1971) and which is included in the FPS as DSS #4. App., vol. II, at 4191-98. The Commission found that the United States industry for the production of television receivers was being injured. The Federal Trade Commission's report concluded:

> In the Commission's judgment, the imports of television receivers from Japan, sold at LTFV [less than fair value], have adversely affected the prices of comparable domestically produced receivers in the United States, and have caused substantial loss of sales by U.S. producers. Accordingly, we have unanimously determined that an industry in the United States is being injured by reason of such LTFV imports.

App., vol. II, at 4198. The trial court held that the Federal Trade Commission finding of injury was untrustworthy, and thus inadmissible under Rule 803(8)(C), solely because it was predicated upon the Treasury Department's less-than-fair-value finding. 505 F. Supp. at 1157. Since we have concluded that the court erred in holding the latter untrustworthy and irrelevant, the ruling on the Federal Trade Commission injury finding is tainted by that error.

The defendants object that the finding of injury was predicated in part on confidential submissions to the Federal Trade Commission, not disclosed to counsel for the importers. The trial court rejected that objection to admissibility, noting that "the consideration of confidential sources of evidence does not in and of itself render the Commission's findings inadmissible" 505 F. Supp. at 1157. We agree with that ruling, essentially for the reasons set forth above with respect to the admissibility, under Rule 803(8)(C), of the less-than-fair-value finding. If the government, in conducting investigations pursuant to authority granted by law, is authorized to rely and does rely on confidential submissions in making a finding, that fact does not so impugn the trustworthiness of the finding as to make it inadmissible. The indice of reliability remains the fact that it is prepared pursuant to a duty imposed by law. The injury finding qualifies for admission under Rule 803(8)(C).

The district court also excluded the finding of injury as irrelevant for two reasons. First, it held that the injury finding could be no more relevant than the less-than-fair-value determination on which it was based. 515 F. Supp. at 1160. Our rejection of the district court's analysis of the relevance of the less-

than-fair-value determination prevents us from affirming on that ground. Second, the district court held that because the injury finding was countrywide, it was not relevant to whether Zenith or NUE were injured. *Id.* Essentially for the reasons given in our discussion of the less-than-fair-value determination, we are convinced that the injury finding is plainly relevant on this issue. We therefore conclude that the district court erred in holding that the injury finding is irrelevant.

Finally, the district court excluded the injury finding under Rule 403. Our analysis of the admissibility of the less than fair value finding under this rule is equally applicable here. Since the Rule 403 ruling was colored by erroneous rulings on trustworthiness and relevance, and was premature, we cannot approve the trial court's exercise of discretion. The Rule 403 issue remains for reconsideration on remand. Since it is not outcome determinative as to any defendant, we need not decide whether the injury finding is properly part of the summary judgment record.

When the Treasury Secretary found sales at less than fair value and the Federal Trade Commission found injury to an American industry, 19 U.S.C. § 160(a) (1976) mandated a public notice of those determinations, referred to elsewhere in the statute as a finding of dumping. That notice was published at 36 Fed. Reg. 4597 (1971) on March 10, 1971, and is included in the FPS as DSS #5. App., vol. II, at 4200. The court concluded that it was a mere ministerial act, adding no weight to the underlying fair-value and injury findings. 505 F. Supp. at 1160. We agree. However, since we have concluded that those findings are admissible under Rule 803(8)(C) and relevant, the finding of dumping is admissible and relevant as well. Admissibility under Rule 403 must likewise be reconsidered in the trial court on remand. Since it is not outcome determinative as to

any defendant, we need not decide whether the finding of dumping is properly part of the summary judgment record.

3. Findings Under the Trade Expansion Act of 1962 and the Trade Act of 1974

The FPS includes a group of records and reports of proceedings under the Trade Expansion Act of 1962, Pub. L. No. 87-794, tit. I, 76 Stat. 872 (sections repealed 1975), and its successor statute, the Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1982). One group of proceedings sought relief on behalf of the domestic industry in the form of import quotas or increased duties. Another group involved trade and adjustment assistant proceedings. The trial court held these records and reports to be inadmissible under Rule 803(8)(C) as untrustworthy and under Rule 402 as irrelevant. 505 F. Supp. at 1168-71. They were also excluded under Rule 403. NUE and Zenith do not urge here that those documents should have been considered in ruling on the motion for summary judgment. Thus we do not consider whether they were properly excluded.

4. Records and Findings of the Japanese Fair Trade Commission

NUE and Zenith in the FPS tendered a group of documents originating with the Japanese Fair Trade Commission. One is a Recommendation Decision in a case brought against the Home Electric Appliance Market Stabilization Council, six of whose members[38] are defendants in our case, charging illegal price stabilization in Japan. App., vol. II, at 4685-4720. This case, commenced in 1957, involved an illegal agreement to stabilize the domestic market by establishing high

38. Sanyo, Toshiba, Hayakawa (now Sharp), Hitachi, Matsushita and Mitsubishi.

prices and to enforce this agreement among the parties. The other documents were developed in a case brought in 1967 against MEI charging it with illegal efforts to require that its Japanese wholesalers maintain high resale prices. App., vol. II, at 4541-4684.

Preliminarily to the consideration of admissibility of this group of documents, the trial court reviewed the affidavits of experts on Japanese law who described the Japanese Anti-Monopoly Act and the role of the Japanese Fair Trade Commission in its enforcement. 505 F. Supp. at 1173-76. The Commission is an independent government agency charged with the primary responsibility of enforcing the Anti-Monopoly Act. It is composed of a chairman and five members, and is supported by a staff organized into three divisions, including an investigation division. The staff includes hearing examiners. Proceedings commence with a preliminary investigation, during which, as described by the trial court,

> the staff can move from a highly unstructured initial screening process to a slightly less informal one by invoking certain legal processes to obtain information, including compulsory process, spot inspections, the interrogation of witnesses, the taking of statements, and the use of expert testimony.

505 F. Supp. at 1174. At the close of the investigation the staff prepares a report for the Commission setting forth the claimed violation, the investigative process, a synoposis of the facts, applicable legal provisions, and the opinion of the investigator. If the Commission deems a violation likely to have occurred it issues to the respondent a Recommendation, setting forth the facts and law taken from the staff report and proposed measures for eliminating the violation. The respondent may either accept or reject the Recommendation. If it is

accepted, the Commission issues a Recommendation Decision, without resorting to a hearing. *Id.* at 1175. The Recommendation Decision in the case against the Home Electric Appliance Market Stabilization Council was the result of the process described thus far: an investigation, a staff report to the Commission, and a Recommendation accepted by the respondents.

Should a respondent reject the Commission's Recommendation, the Commission serves a Complaint, making the same allegations as in its Recommendation. The Complaint may result in a hearing conducted before a hearing examiner. At any time before the Commission renders a final decision the respondent may agree to the entry of a Consent Decision in which it admits the findings of fact and application of law in the Complaint and submits a proposed plan containing concrete measures to be taken to eliminate the violation. If no Consent Decision is entered the hearing examiner, following a hearing, submits a report containing a proposed decision which, with the record, is forwarded to the Commission. The Commission reviews the report and the record, and issues its own decision. It may adopt the hearing examiner's report, remand for further proceedings, or initiate its own hearing. *Id.* at 1175-76. The documents in the MEI case include a Recommendation which was rejected by MEI, a Complaint which is identical to the Recommendation, a draft decision by a hearing examiner recommending a finding that MEI had violated the Anti-Monopoly Act, a Consent Decision admitting the allegations in the Complaint, a proposal for compliance, and a subsequent report on measures taken pursuant to the Consent Decision. The hearing examiner's draft report was made after lengthy hearings in which testimony was taken, statements were filed, and exhibits were introduced. *Id.* at 1177-78.

The trial court held that certain documents connected with the MEI case were not findings within the meaning of Rule 803(8)(C). 505 F. Supp. at 1179. Because certain of these documents were authored by Matsushita rather than by a "public office or agency," we agree with the trial court that those documents cannot qualify for admission under Rule 803(8)(C). The court held that the remainder of the documents were findings within the meaning of the rule. 505 F. Supp. at 1180. Since this ruling is not challenged on appeal, we will assume that it is correct for purposes of this appeal.

The trial court found that there was a timely investigation by a staff with the requisite skill and experience. Nevertheless the court held that none of the documents qualified for admission under Rule 803(8)(C), because all were untrustworthy. The investigation on which the Recommendation was based was deemed to be "simply too preliminary to be trustworthy within the meaning of 803(8)(C), and that the document relied upon as the distillation of the investigation, because it is accusatory in nature, cannot be deemed a trustworthy finding." 505 F. Supp. at 1180. The Complaint, in the court's view, added nothing to the Recommendation because it, too, was accusatory. Even the Consent Decision was deemed untrustworthy because it was based on the staff investigation, not on the facts developed in the hearing before a hearing examiner. *Id.* at 1181. The hearing examiner's draft decision in the MEI case was deemed unreliable because it was superseded by the Consent Decision. *Id.* The court reasoned that because the initial staff investigation did not require a hearing, the staff findings could be revised in later de novo proceedings, and because the report was accusatory, none of the documents could qualify as "factual findings resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8)(C).

Both the Home Electric Appliance Market Stabilization document and the MEI documents involve findings set forth after investigations made by the Japanese Fair Trade Commission staff pursuant to the provisions of the Anti-Monopoly Act. The court's reliance on the fact that they resulted from accusatory proceedings is misplaced, because Rule 803(8)(C) plainly includes findings in investigatory proceedings, accusatory or otherwise. There is nothing in the record casting any doubt upon the thoroughness of the investigation. Moreover, at least in this case, reliance on the preliminary nature of the investigation is misplaced. In the Home Electric Appliance Market Stabilization case the respondents' early acquiescence in the Recommendation is strong circumstantial evidence that the investigation was in fact thorough and its finding trustworthy. This acquiescence is clearly sufficient to dispel any doubts which might otherwise exist about trustworthiness based on factors such as the motivation of the investigators, on which the trial court relied. The trustworthiness determination was, therefore, an abuse of discretion.[39]

In the MEI case the respondent went through a hearing to the stage of a draft recommended decision and at that point agreed to a Consent Decree in the form of the original recommendation. The draft decision was the product of a formal hearing at which the respondent was afforded the right to be represented by counsel, to cross-examine witnesses, and to present a defense. That

39. Chief Judge Seitz agrees with the district court's alternative holding that the Recommendation Decision is inadmissible under Rule 408. The only document that plaintiffs offer from the Home Electric Appliance Market Stabilization case is the Recommendation Decision in which the Home Electric Appliance Market Council acquiesced.

Rule 408 excludes evidence of the compromise of a claim if that evidence is offered "to prove liability for or invalidity of the claim or

the recommended decision was superseded by the Consent Decree is irrelevant, since the Consent Decree in no sense rejects the findings in the recommended decision. The recommended decision unquestionably is sufficiently trustworthy for admission under Rule 803(8)(C). The congruence between the Recommendation, the draft recommended decision, and the Consent Decree are strong circumstantial evidence that the staff investigation was thorough.[40] There is no contrary evidence. As we noted in Part C. 1 above, there is a presumption that reports of governmental agency investigations are reliable. There is insufficient evidence in this record to overcome that presumption. Thus we conclude that the trial court abused its

its amount." Fed. R. Evid. 408. On the basis of expert testimony, the district court found that in a proceeding before the Japanese Fair Trade Commission, the purpose of permitting the accused to acquiesce in a Recommendation Decision "is to obtain early settlement of disputes." 505 F. Supp. at 1175. Chief Judge Seitz believes that it is the purpose of Rule 408 to encourage settlements by shielding the parties to a settlement from liability based on the fact of settlement or on statements made in settlement negotiations. *See* Notes of Advisory Committee on Proposed Rules: Notes of Committee on the Judiciary, Senate Report, *reprinted in Federal Rules* 206 (West 1982) (Note to Rule 408). Because the Recommendation Decision in the Home Electric Appliance Market Stabilization case is evidence of the settlement of a claim against the members of the Home Electric Appliance Council, it may not be admitted to prove that the defendant Council members were liable for the acts that the Recommendation Decision describes. *See* 23 C. Wright & K. Graham, Federal Practice and Procedure § 5308, at 240-45 (1980).

40. Chief Judge Seitz would hold that the Recommendation, the Complaint, and the Draft of Decision from the MEI case are sufficiently trustworthy as the products of a governmental investigation to warrant their admission under Rule 803(8)(C) without considering the content of the Consent Decision. Because the Consent Decree is evidence of the settlement claim, Chief Judge Seitz would hold the Consent Decree inadmissible under Rule 408. *See supra* note 39.

discretion in holding that the Recommendation, the Complaint, and the Draft of Decision from the MEI case failed to qualify for admission under Rule 803(8)(C).

The Recommendation Decision from the Home Electric Appliance Market Stabilization case contains this finding:

> Under the direct influence of the above mentioned discount sales in Nagoya and Tokyo the manufacturers involved who were affiliated with the Radio Industries Association or with the Electrical Manufacturers' Association prepared the "Nine Points of Implementation" as per Attachment One about early July of the same year for the purpose of promoting maintenance of the so-called list price and of rectifying various conditions which were responsible for the so-called underselling.

App., vol. II, at 4696-97. The trial court excluded the attachment for lack of authentication.[41] 513 F. Supp. 1224. The court also held it to be irrelevant to this case because it did not refer to export matters. *Id.* at 1225. Authenticity is in our view established by the quoted finding which is itself admissible. *See* Part V E 1 *infra*. The attachment is not offered for the truth of the matters asserted therein, but for the fact that, as the report of the investigation found, it was prepared by the manufacturers for the purpose of price maintenance. As such it is a part of the finding and admissible under Rule 803(8)(C). Its relevancy depends on its tendency to support the NUE-Zenith conspiracy theory.

The trial court considered as alternative grounds

41. Because Chief Judge Seitz relies on Rule 408 to exclude the Recommendation Decision from the Home Electric Appliance Market Stabilization case, he would also exclude the attachment to the Recommendation Decision.

for excluding the Japanese Fair Trade Commission documents in evidence Fed. R. Evid. 408, prohibiting the use of offers in compromise to prove liability, Fed. R. Evid. 410(2), prohibiting use of nolo contendere pleas to prove liability, and the proviso to section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1982), excluding consent judgments from the collateral estoppel effect of final judgments in federal government civil or criminal antitrust cases. 505 F. Supp. at 1181-84.

The trial court rejected the contention that section 5(a) of the Clayton Act applied. 505 F. Supp. at 1183 n.67. We agree. Section 5(a) makes final judgments in favor of the United States under the antitrust laws of the United States prima facie evidence against the defendant in subsequent actions. The proviso to the section excludes consent decrees entered into before any testimony has been taken. Neither the section nor its proviso has any application to reports of an investigation made pursuant to the laws of Japan.

The trial court did rely on Rule 410, which provides that plea offers are not, "in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions." Fed. R. Evid. 410; *see* 505 F. Supp. at 1181-84. By its terms Rule 410 deals only with pleas and plea negotiations in criminal cases. There is nothing in the Advisory Committee Note or the Congressional Reports on the Evidence Rules indicating that Rule 410 was intented to apply to civil consent decrees. Thus the trial court erred in relying on that rule to exclude the findings in the recommended decision.

The trial court also appears to have relied on Rule 408 which provides that compromises or offers of compromise are "not admissible to prove liability for or invalidity of the claim or its amount." Fed. R. Evid. 408; *see* 505 F. Supp. at 1181-83. What is offered, however, is not the compromise with the Japanese Fair Trade

Commission, but the findings in its investigation. It would be entirely proper, if the case is tried to a jury, to exclude from its attention or consideration the facts of entry into the Consent Decree and of acquiescence in the Recommended Decision. Thus the ultimate fact finder can consider the findings resulting from an investigation without making use of the Consent Decree to prove liability.

A more difficult question is presented, however, by our observations, *supra*, with respect to trustworthiness. We noted there that the fact of consent or acquiescence supports the inference that the investigation was thorough and its findings trustworthy. In making the trustworthiness determination the trial court is not limited to admissible evidence.[42] Fed. R. Evid. 104(a). Thus the fact that consent or acquiescence is inadmissible because of Rule 408 is not dispositive. Moreover Rule 408 is not a privilege, for by its terms it "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." As the Notes of the Advisory Committee explain:

> The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the

42. Because he finds the documents in question sufficiently trustworthy as the result of a governmental investigation, *see supra* n.41, Chief Judge Seitz would not reach the question of whether a court may rely on a consent decree in making a determination of trustworthiness. Because the parties have not raised the issue, he would also refrain from deciding whether Rule 408 creates a privilege that falls within the exception to Rule 104(a).

validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule.

Entirely apart from Rule 104(a), therefore, consideration of the fact of compromise or acquiescence not as an admission of liability, but only for the purpose of determining the trustworthiness of findings made in an investigation conducted pursuant to authority granted pursuant to law, does not fall within Rule 408. The trial court erred, therefore, in relying on that rule to exclude the findings of the Japanese Fair Trade Commission.

The court reserved ruling on relevancy of the Japanese Fair Trade Commission documents until his discussion of the summary judgment motion. We do likewise. But for purposes of that motion we deem those documents admissible under Rule 803(8)(C) to the extent that they contain the reports of investigations conducted pursuant to law.

5. Judge Higginbotham's Findings of Fact

NUE and Zenith contended in the trial court that the findings of fact made by Judge Higginbotham in ruling on the defendant's motions to dismiss for lack of personal jurisdiction, improper venue, and insufficient service of process were admissible under Rule 803(8)(C). The court rejected that contention. 505 F. Supp. at 1184-86. It is not renewed in this court. We will not consider those findings in determining whether summary judgment was proper.

D. *Rule 702 Expert Opinion Evidence*

A substantial part of the NUE-Zenith case set out in the FPS consisted of an offer of proof as to the testimony to be given by expert witnesses. These offers were made in the form of five expert reports: (1) Economic Study of the Japanese Television Industry, by Dr. Horace J. DePodwin and others of Horace J. DePodwin Associates,

Inc., an economic consulting firm (the DePodwin report, App., vol. 5, at 1583); (2) The Pervasive Use of Collusive and Company Group *(Keiretsu)* Activities in Achieving the Rapid Increase in Japanese Exports of Television Receivers to the United States, by Professor Kozo Yamamura, Chairman, Japan Studies Program and Professor of Economics and East Asian Studies at the University of Washington (the Yamamura Report, App., vol. 7, at 2661); (3) Economic Analysis of Evidence Relating to Japanese Electronic Products Antitrust Litigation, by Stanley Nehmer of Economic Consulting Services, Inc. (the Nehmer Report, App., vol. 6, at 2239); (4) The Impact of Japanese Financial and Employment Practices on Japanese Production, Marketing and Price Behavior, by Professor Gary R. Saxonhouse, Professor of Economics, University of Michigan (the Saxonhouse Report, App., vol. 7, at 2887); and (5) Vertical Restraints by Japanese Television Manufacturers: Anticompetitive Effects, by Professor John Owen Haley, Associate Professor of Law, University of Washington (the Haley Report, App., vol. 7, at 2921). In its ruling on the admissibility of opinions contained in these reports or of live testimony expressing the opinions contained therein, the trial court focused upon two separate issues: first, whether the opinions complied with the reasonable reliance requirement of Rule 703; and, second, whether they complied with the specialized knowledge and helpfulness requirements of Rule 702.

First, the trial court noted that under Rule 703 the facts or data on which an expert bases an opinion need not be admissible "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Fed. R. Evid. 703. The court held that it must make a factual determination under Rule 104(a) as to whether experts in the field rely on the type of data relied upon. Such a determination must be made when there is a factual dispute over such

reliance. The court held, however, that in making this determination "[w]e do not consider the affidavits submitted by plaintiffs' experts to the effect that the material upon which they relied in forming their opinions is of a type generally relied upon by experts in their respective fields as in any way determinative of the issue." 505 F. Supp. at 1325-26. The proper inquiry is not what the court deems reliable, but what experts in the relevant discipline deem it to be. *See, e.g., Wilder Enterprises v. Allied Artists Pictures*, 637 F.2d 1135, 1143-44 (4th Cir. 1980); *Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980); *United States v. Genser*, 582 F.2d 292, 298 (3d Cir. 1978), *cert. denied*, 444 U.S. 928 (1979). There are in the record unequivocal and uncontradicted affidavits from each of the experts that the data they relied on in forming their opinions were of a type reasonably relied upon by experts in their respective fields. Thus the court's ruling was that these affidavits, the only record evidence bearing on the reliance issue, would be disregarded. Instead the court developed its own set of standards for determining reasonable reliance, including:

> 1. The extent to which the opinion is pervaded or dominated by reliance on materials judicially determined to be inadmissible, on grounds of either relevance or trustworthiness;
>
> 2. The extent to which the opinion is dominated or pervaded by reliance upon other untrustworthy materials;
>
> 3. The extent to which the expert's assumptions have been shown to be unsupported, speculative, or demonstrably incorrect;
>
> 4. The extent to which the materials on which the expert relied are within his immediate sphere of expertise, are of a kind customarily relied upon by experts in his field in forming opinions or inferences on that subject, and are not used only for litigation purposes;
>
> 5. The extent to which the expert acknowledges the questionable reliability of the underlying information, thus indicating that he has taken that factor into consideration in forming his opinion;
>
> 6. The extent to which reliance on certain materials, even if otherwise reasonable, may be unreasonable in the peculiar circumstances of the case.

505 F. Supp. at 1330 (footnote omitted).

In substituting its own opinion as to what constitutes reasonable reliance for that of the experts in the relevant fields the trial court misinterpreted Rule 703. The court's approach involved fundamental legal error because, as a matter of law, the district court must make a factual inquiry and finding as to what data experts in the field find reliable. There is no discretion to forbear from making this inquiry and finding. Insofar as the district court substituted its own views of reasonable reliance for those of the experts, therefore, we review for legal error.[43]

---

43. Chief Judge Seitz agrees with the result reached by the majority, but he believes that our review of the reasonable reliance determination under Rule 703 is for abuse of discretion rather than for error of law. In his view, improper application of the law is embraced within the abuse of discretion standard. *See* Barris v. Bob's Drag Chutes & Safety Equip., Inc., 685 F.2d 94, 101 n.10 (3d Cir. 1982); Seese v. Volkswagenwerk A.G., 648 F.2d 833, 844-45 (3d Cir.), *cert. denied*, 454 U.S. 867 (1981); United States v. Genser, 582 F.2d 292, 298 (3d Cir. 1978), *cert. denied*, 444 U.S. 928 (1979). Chief Judge Seitz incorporates this footnote by reference to each of the majority's uses of the legal error standard when reviewing the district court's exclusion of the DePodwin, Yamamura, Nehmer, Saxonhouse, and Haley reports under Rule 703.

The indice of reliability under Rule 703 is the fact that experts in the field in question rely on the type of data in forming their opinions. As Professor McCormick observed years ago:

> It is reasonable to assume that an expert in a science is competent to judge the reliability of statements made to him by other investigators or technicians. He is just as competent indeed to do this as a judge and jury are to pass upon the credibility of an ordinary witness on the stand. If the statements, then, are attested by the expert as the basis for a judgment upon which he would act in the practice of his profession, it seems that they should ordinarily be a sufficient basis even standing alone for his direct expression of professional opinion on the stand . . . .

C. McCormick, Evidence § 15, at 35-36 (2d ed. 1972) (footnote omitted). It was this view which the drafters incorporated in Rule 703. They did so over significant opposition.[44] What the trial court did in effect was to reject the decision of the Judicial Conference, the Supreme Court, and Congress and adhere to an unusually restrictive view as to the basis on which an expert's opinion may be laid. This court has recognized that the rule "broadens and liberalizes the basis for expert opinions" by focusing on what experts in the field deem reliable. *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 844 (3d Cir.), *cert. denied*, 454 U.S. 867 (1981). The trial court's interpretation of the rule has in this respect been criticized by the leading commentator on the federal evidence rules. J. Weinstein & M. Berger, 3 Weinstein's Evidence ¶ 703[03], at 703-17-22 (1982).

We do not disagree with the trial court's observation that "the assumptions which form the basis for the

44. *See, e.g.*, Committee on the Federal Courts of the New York County Lawyers Assoc. Report (April 1970).

expert's opinion, as well as the conclusions drawn therefrom, are subject to rigorous examination." 505 F. Supp. at 1328. But once the court finds that the data relied on is such as experts in the field reasonably rely upon, the rigorous examination should be conducted in the cross-examination for which Rule 705 makes explicit provision.[45] In that setting the fact-finder can be expected to determine the appropriate weight to be given to the testimony.[46] We hold, therefore, that on this record the trial court erred in excluding expert opinion evidence on the ground that it was based on materials not reasonably relied upon. Thus we will disregard such

45. Rule 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

46. Most of the cases relied upon by the trial court in developing its restrictive approach to admissibility under Rule 703 involved weight, not admissibility. *See* Punnett v. Carter, 621 F.2d 578, 583-86 (3d Cir. 1980) (trial court properly denied preliminary injunction despite expert's opinion); Drayton v. Jiffee Chemical Corp., 591 F.2d 352, 362-64 (6th Cir. 1978) (trial court did not err in admitting economist's testimony, but gave it undue weight); Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 672-73 (D.C. Cir. 1977) (trial court did not err in giving expert's opinion little weight); Scheel v. Conboy, 551 F.2d 41, 43-44 (4th Cir. 1977) (trial court did not err in giving no weight to economist's testimony on future economic loss). Of the cases relied upon only Berguido v. Eastern Airlines, Inc., 317 F.2d 628 (3d Cir.), *cert. denied*, 375 U.S. 628 (1963), addresses admissibility rather than weight. *Berguido* did embrace a restrictive approach to admissibility of expert opinion based on anything but personal observation or trial testimony. *Id.* at 632. It has in that respect been overruled by the codification of a different approach in Rule 703. Pittsburgh Press Club v. United States, 579 F.2d 751 (3d Cir. 1978), on which the court also relied, is not apposite. It involved an expression of opinion based on a survey offered in evidence, and thus was not an interpretation of the second sentence of Rule 703. *Id.* at 760.

rulings in determining what evidence to consider for purposes of summary judgment. The defendants urge that expert opinion testimony cannot be considered for that purpose, but the law in this circuit is clearly otherwise. *Paton v. LaPrade*, 524 F.2d 862, 871 (3d Cir. 1975).

The second issue on which the trial court focused in considering the admissibility of the tendered expert opinion evidence was the interrelationship between Rules 702 and 704. 505 F. Supp. at 1330. The former provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702. The latter provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Fed. R. Evid. 704. Rule 704 settles, for the federal courts, the old dispute over whether expressions of expert opinion on the ultimate facts in issue somehow invade the province of the jury. They do not. Such expressions, if they will assist the trier of fact, are admissible. The court's role is to make the determination whether the proffered testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Undoubtedly the court is clothed by Rule 702 with some degree of discretion in determining whether the opinion will be helpful, and we normally review only for abuse of that discretion. *Knight v. Otis Elevator Co.*, 596 F.2d 84, 87 (3d Cir. 1979). But

that review must be more discriminating if we believe that the court's exercise of discretion proceeded under a misapprehension as to the meaning of the governing rules. The courts misinterpretation of the reasonable reliance requirement of Rule 703 is in this respect significant.

After reviewing the caselaw, much of it antedating the Federal Rules of Evidence, the trial court interpreted Rule 702 as embodying several basic principles governing the issue of assistance. First, "expert opinion must be approached on an expert by expert, or even opinion-by-opinion, basis." Second, "the court may -- indeed must -- carefully scrutinize the underlying assumptions, inferences drawn, and conclusions reached by the experts before reaching a decision on admissibility . . . ." Third, "opinions do not assist the jury when they are cumulative of evidence already before the jury, or when the expert has sifted through that evidence reaching a conclusion which in essence attempts to tell the jury how it should decide the case." Finally, "the expert must utilize specialized knowledge, not ordinarily possessed by the layman, to reach an opinion which truly aids the jury . . . ." 505 F. Supp. at 1333-34.

There are several serious problems with the trial court's formulation of standards for determining admissibility under Rule 702. First, the requirement for admissibility that expert testimony be "beyond the jury's sphere of knowledge" adopts a formulation which was rejected by the drafters of Rule 702. While that formulation applied prior to the adoption of evidence rules, it no longer applies.

> Such a test is incompatible with the standard of helpfulness expressed in Rule 702. First, it assumes wrongly that there is a bright line separating issues within the comprehension of jurors from those that

> are not. Secondly, even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful.

3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[02], at 702-9-10 (1982) (footnotes omitted). Moreover the suggestion that the court must, in deciding on admissibility, carefully scrutinize the underlying assumptions, the inferences drawn, and the conclusions reached, if followed rigorously, would result in the trial court, as distinguished from the fact-finder, deciding the weight to be given to the testimony:

> [D]oubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions. The jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberations.

Id. ¶ 702[03], at 702-14-15 (footnotes omitted). The objection that an expert should not be permitted to sift through the evidence in reaching a conclusion is inconsistent with the language of Rule 703 permitting expert testimony based on "facts or data . . . made known to him at . . . the hearing," language which codifies the longstanding practice of the courts. Whether the experts used specialized knowledge in reaching their opinions presents a question of fact, which we review by the clearly erroneous standard. The question whether such an opinion will be helpful to the jury involves discretion, but that discretion must be exercised consistent with the presumption that expert testimony will be helpful. Finally, to the extent that the trial court's discussion suggests that expressions of opinion on the ultimate fact in issue somehow

impermissibly invade the province of the jury, 505 F. Supp. at 1334, it is inconsistent with the clear mandate of Rule 704.

The trial court's general approach to admissibility of expert opinion evidence seems inconsistent with the case law in this circuit favoring admissibility under Rule 702. *See, e.g., United States v. Hill*, 655 F.2d 512, 514-16 (3d Cir. 1981) (when entrapment is an issue psychiatrist can express opinion on susceptibility to persuasion); *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 844-45 (3d Cir.), *cert. denied*, 454 U.S. 867 (1981) (engineer can testify that had window retaining system been installed in van plaintiffs would not have been injured); *Knight v. Otis Elevator Co.*, 596 F.2d 84, 86-88 (3d Cir. 1979) (factfinder, not trial court, determines credibility of expert's opinion on design defect). We turn, therefore, to the proffered expert opinions.

1. *The DePodwin Report*

The three volume DePodwin Report is described by the trial court as "by far the most careful, scholarly, and disinterested of the reports submitted by the plaintiffs' expert witnesses." 505 F. Supp. at 1334 (footnote omitted). The critical materials are in Volume I, consisting of eleven parts and a conclusion.[47] Part I is an outline of the economic analysis. Part II contains background on television manufacturing in the United States and Japan. Part III describes the Japanese television industry, with statistical information on concentration, construction and export data, production capacity, investment, and facilities expansion for the industry as a whole and for individual defendants. With one limited exception the court assumed that these parts were admissible under Rule

47. Volume II is a statistical appendix and Volume III is a compilation of damage calculations for NUE.

702. 505 F. Supp. at 1336-37. The court also assumed admissibility of Part VII describing the nature of the market for television receivers in Japan as conducive to cartel arrangements. *Id.* at 1363. It did not address Parts VIII through XI dealing with issues of damage and injury. Part IV, in which the experts opine that there was a Japanese television industry cartel, and Part V, in which they describe the operation of that cartel, were entirely excluded. Part VI, a comparison of prices of Japanese television receivers in the United States and in Japan, was also excluded.

a. Parts IV & V

Exclusion of Parts IV and V was predicated on two grounds: that the expert relied on materials which did not satisfy the reliability requirement of Rule 703; and that the expert's conclusions as to the existence of a conspiracy are impermissible expert testimony under Rule 702 because they would not be helpful to the factfinder. The first ground need not long detain us. In this Part V-D we have already held that the trial judge misapplied Rule 703 in concluding that he, not the experts in the field, was the source of information about reasonable reliance. Thus we examine Parts IV and V of the DePodwin report only to determine whether testimony such as is there proposed displayed specialized knowledge, or would be helpful to the trier of fact.

The trial court found that DePodwin did not use economic expertise in reaching the opinion that the defendants participated in a Japanese television cartel. 505 F. Supp. at 1342-46. We have examined the excluded portions of Parts IV and V in light of the admitted portions, and we conclude that this finding is clearly erroneous. As a result, the court also held the opinions to be unhelpful to the factfinder. What the court in effect did was to eliminate all parts of the report in which the

expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs' conspiracy theory. Considering the complexity of the economic issues involved, it simply cannot be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue. Characterizing the expert as an "oath-help[er]," or a "conspiracy-ologist," *see, e.g.*, 505 F. Supp. at 1343, 1352, 1367, 1369, is no substitute for recognition of the rule of law embodied in Rule 702. Exclusion under that rule of an opinion clearly based on expert judgment as unhelpful to the factfinder was an abuse of discretion.

b. Part VI

The court also excluded Part VI of the DePodwin report, entitled "Japanese Television Prices in Japan and the United States." 505 F. Supp. at 1352-59. This part of the report purports to compare defendants' prices in the Japanese domestic market with their prices in the United States market. In deciding the motion for summary judgment, however, the court noted:

> We ruled most of these [price comparison] materials inadmissible in our Expert Testimony Opinion. However, because of their pivotal role in plaintiffs' case, we shall assume arguendo their admissibility and thereupon consider them.

513 F. Supp. at 1235-36 (footnote omitted). Because of our disposition of the case we cannot assume admissibility arguendo, but must address defendants' objections to admissibility.

The report makes three comparative analyses of the

prices charged by defendants in domestic sales in Japan and in export sales. The first sets forth a comparison of average domestic sales and export sales by screen size categories for each defendant. The calculations of average prices are made in a report by the accounting firm of Morris R. Cohen & Co., which is in evidence without objection. This report calculated average prices from list prices furnished by the defendants in answers to interrogatories. The second price analysis compares prices of domestic models and export models found by Zenith's engineers to be technically comparable. List prices for such models were derived from the Cohen report, but the DePodwin organization also used wholesale prices which the Japanese defendants had submitted to the Japanese Ministry of Finance when they filed commodities tax returns. The third analysis used figures for average prices by screen size developed in the Morris R. Cohen & Co. report, but adjusted those prices by the adjustments to prices which are specified in the Antidumping Act of 1916. From the three methodologies DePodwin drew the same general conclusion: that "these companies engaged in pervasive and systematic price discrimination over many years." App., vol. 5, at 1861. "Moreover," DePodwin concluded, "the magnitude of the differences in Japanese domestic and export prices was very often so substantial as to indicate that a serious distortion in the relationship between supply and demand in the United States market must necessarily have resulted from this discriminatory policy of the Japanese television cartel." *Id.* at 1865.

The trial court ruled that the first and third analyses, both of which used average screen size prices developed by Morris R. Cohen & Co., which were already in evidence, were inadmissible because these average price calculations were not the type of comparison on which an economist would reasonably rely. The

analyses did not, for example, separately calculate average prices of monochrome and color receivers. 505 F. Supp. at 1353-54. The second analysis, using sets found by Zenith's engineers to be comparable, was held to be inadmissible under the reasonable reliance requirement of Rule 703 because the economist relied on list prices furnished by the defendants in answers to interrogatories, without taking into account defendants' rebate structures. *Id.* at 1355.

In making these exclusionary rulings the trial judge made the same fundamental legal error which we noted earlier: he assumed that the determining factor under Rule 703 was his view of what data experts in a field ought to rely upon rather than making a factual inquiry and a finding as to what data experts, in this case economists, deem reliable. Moreover in the report, which is, after all, an offer of proof, Dr. DePodwin explains:

> The differences in average domestic and export prices for each manufacturer . . . may to some extent reflect differences in the mix of models within each screen size category sold domestically and exported. The fundamental differences in price for comparable models sold in Japan and exported to the United States are so large and consistent that any effect of differences in the mix of models cannot be significant.

App., vol. 5, at 1818. There is no record evidence suggesting that economists would not, given the range of differences observed, rely on average prices rather than actual model-by-model price comparisons. Thus the ruling excluding Part VI of the DePodwin report on the authority of Rule 703 also was error.

The trial court also excluded the first and third sets of comparisons under Rule 702. The court found that price comparisons calculated in such gross terms

"[take] no account of highly significant variations among models" and thus held that these comparisons cannot "be helpful to the trier of fact." 505 F. Supp. at 1354. However, the court's finding that the "highly significant variations" impugn the probative value of the price comparisons is contradicted by the record. DePodwin explained that "[t]he fundamental differences in price for comparable models sold in Japan and exported to the United States are so large and consistent that any effect of differences in the mix of models cannot be significant." App., vol. 5, at 1818. In light of this expert evidence, we hold that the trial court's helpfulness determination is not consistent with the sound exercise of its discretion.

The trial court also excluded Appendix B to Part VI. Appendix B is a mathematical cost construction offered to show that four defendants -- MEI, MELCO, Hitachi, and Sanyo -- sold television receivers in the United States at prices below cost while earning substantial profits in Japan. The trial court held that Appendix B was inadmissible under Rule 703 because it is "pervaded by reliance on untrustworthy sources of information: false or unsupported assumptions, and average prices calculated in gross terms." 505 F. Supp. at 1363. In so ruling, the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely. Instead, the court substituted its own opinion of what constitutes reasonable reliance. As we have held above, exclusion of expert evidence on the basis of this misinterpretation of Rule 703 is error.

c. Part VII

Although the trial court admitted most of Part VII of the DePodwin Report, it excluded several pages that are based solely on what it assumed to be a scholarly Japanese language article. 505 F. Supp. at 1364. The

court held that because the opinions contained in these pages are based on material that has not been shown to be independently admissible under Fed. R. Evid. 803(18),[48] they may not qualify as expert opinions under Rule 702. The court assumed that the article relied on was the type of data on which experts in the field reasonably rely. Thus, the article itself need not be admissible in order for the opinions that DePodwin draws from it to qualify as admissible expert opinions. To the extent that the trial court ruled otherwise, it erred.

We will, therefore, in deciding whether summary judgment was proper, consider Parts I through VII of the DePodwin Report.

2. *The Yamamura Report*

The Yamamura Report is by an economist specializing in the Japanese economy. The trial court ruled that the first seventy-three pages detailing background information on the relationship between Japanese industry and government were admissible under Rule 702. 505 F. Supp. at 1366. The balance of the report was excluded essentially for the same reasons that most of the DePodwin Report was excluded. For the reasons set forth in our discussion of that report, exclusion on such grounds was improper.

---

48. Rule 803(18) provides:

Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice [are not excluded by the hearsay rule]. If admitted, the statements may be read into evidence but may not be received as exhibits.

In addition the court took exception to the fact that the report quotes from a Japanese language journal, which the court assumed to be a scholarly article by a group of economists. The court held that this quoted material must be excluded because its admissibility was not independently established under Rule 803(18). 505 F. Supp. 1368. The court apparently assumed that Yamamura could reasonably rely on the quoted material as a basis for his own opinions, but found that he did more than rely on the quoted material: he adopted the opinions expressed therein as his own. This, the court held, was impermissible.

To the extent that Yamamura used his expertise to evaluate and credit the opinions contained in the quoted material, the court, for purposes of summary judgment, should have considered the credited materials as reflecting Yamamura's own expert opinion. Nothing in Rule 803(18) suggests otherwise. We note that for purposes of summary judgment, only the content of Yamamura's opinion and not its form is relevant. How the article is to be handled in the event that Dr. Yamamura testifies is a matter we need not now decide. But certainly the reference in his report to what he apparently viewed as a learned treatise is no reason for ruling that he cannot express an opinion consistent with it.

We will, therefore, consider the Yamamura Report in deciding whether summary judgment should have been granted.

3. *The Nehmer Report*

The Nehmer Report, relying on materials from published sources and on materials obtained during discovery, makes an economic analysis which suggests that in the Japanese market there were barriers to entry by American firms, collusive efforts to stabilize domestic prices, concert of action with respect to sales at low

prices in the United States, and additions to capacity far in excess of the needs of the Japanese domestic market. The most significant parts of the Nehmer Report were ruled inadmissible essentially for the same reason that most of the DePodwin report was excluded.[49] 505 F. Supp. at 1369-76. The ruling suffers from the same defects.

We will, therefore, consider the entire Nehmer Report in deciding whether summary judgment should have been granted.

4. *The Saxonhouse Report*

The Saxonhouse Report, relying on economic information which was not seriously challenged as unreliable, posits that Japanese firms in general and Japanese electrical equipment manufacturers in particular have higher fixed costs than do similar American firms. These higher fixed costs are the result of differences in the labor market and differences in financing practices. These higher fixed costs, the report concludes, create a climate in which vigorous price competition is unlikely and collusion to avoid it is desirable. The Report also concludes that it creates a climate in which dumping abroad is necessary in order to absorb excess capacity. Finally, the Saxonhouse Report finds that collusive price stabilization in the home market enables Japanese firms to support sustained sales at low prices in the export market.

The trial court noted relevancy objections, 505 F. Supp. at 1377, but postponed ruling on them. Instead it ruled, without extended discussion, that the opinions expressed in the Saxonhouse Report were inadmissible, because "[n]either Rule 703, which excludes opinions based upon unreliable assumptions, nor Rule 702,

---

49. As with the DePodwin Report the trial court did not rule on admissibility of the sections of the Nehmer Report dealing with injury and damage issues. 505 F. Supp. at 1376.

which excludes opinion testimony not helpful to the trier of fact, condones the admission of such circular expert testimony." 505 F. Supp. at 1378. Even on the doubtful assumption that this conclusory statement qualifies as a finding that Dr. Saxonhouse relied, in forming his opinion as to the likelihood of collusion, on materials on which economists do not rely, it would be based on the erroneous interpretation of Rule 703 noted earlier. Thus as a Rule 703 ruling it is improper.

The trial court also excluded the Saxonhouse Report as not helpful under Rule 702 because it explicitly assumed a collusive decision by the defendants. 505 F. Supp. at 1378. The Report does assume that "a calculated collusive decision has been made by Japanese radio and television manufacturers to take a continually increasing share of the American market for their products . . . ." App., vol. 7, at 2893-94. The Report does not appear to rely on this assumption to reach its conclusion that conditions in the Japanese home market make collusion highly likely. Rather it relies upon the presence in that market of high fixed costs, high debt-equity ratios, and a social environment of low labor turnover, *id.* at 2889-90, all of which suggest a desire and motivation to collude in the manner alleged by NUE and Zenith. Insofar as the Saxonhouse Report assumes collusion, it does so to demonstrate that the assumed collusion would lead to price differentials between the American and Japanese markets. There is record evidence of such differentials. Saxonhouse's opinion would unquestionably be helpful to the trier of fact in understanding the reason for those differentials. Exclusion under Rule 702 was inconsistent with the sound exercise of discretion. Neither Rule 703 nor Rule 702 justifies exclusion.

Because the trial court did not make a Rule 403 determination and the defendants have not urged exclusion under Rule 403 before this court, we have no

occasion to consider whether exclusion of the Saxonhouse Report under that rule would be an abuse of discretion. We will therefore consider it as part of the summary judgment record.

5. *The Haley Report*

The Haley Report opines that in the relevant time period the defendants had the capacity effectively to police a price-fixing agreement related to sales of television receivers in Japan as a result of governmentally imposed barriers to entry by foreign manufacturers, the practice of major Japanese manufacturers marketing through manufacturer-controlled wholesale and retail outlets which thus could be supervised, and the use of the actual control over distribution to fix and maintain retail prices. The report is by a law professor specializing in Japanese antitrust law. The court held that Professor Haley's descriptions of Japanese barriers to entry and of the distribution arrangements of major manufacturers were admissible. His opinion that there was horizontal concert of action in price fixing in Japan was excluded on two grounds. First the court held that because the opinion was based in part on the Japanese Fair Trade Commission documents, which the trial court had excluded, it did not meet the reasonable reliance requirement of Rule 703. 505 F. Supp. at 1379. We have held above that the court misinterpreted Rule 703 by substituting its own view for that of experts in the field. Second, the court held that Haley's conclusion that there was horizontal concert of action among defendants in pricing practices in Japan did not follow from the materials on which he relied. *Id.* We do not believe, however, that the court's disagreement with the expert's opinion is a proper ground for excluding evidence. In any event we have reviewed the Haley Report and conclude that the opinion that there was horizontal concert of action is

logically related to the materials on which he relies, some of which we have held to be independently admissible. Thus the trial court's rulings excluding the report were improper.

Because the trial court did not make a Rule 403 determination and defendants have not urged exclusion under Rule 403 before this court we have no occasion to consider whether exclusion under Rule 403 would be an abuse of discretion. The Haley Report will, therefore, be considered as part of the summary judgment record.

E. *Rule 803(6) Materials*

NUE and Zenith included in the FPS a number of documents seized by the Japanese Fair Trade Commission from the offices of the defendants in the course of its market stabilization investigation, additional materials produced in discovery from the defendants' files, relating to activities of the defendants in Japan, and materials obtained in discovery from defendants and American purchasers respecting certain import transactions. NUE and Zenith contend that all of these documents are admissible under Rule 803(6) as records of regularly conducted business activity. They also contend that many of them are admissible under the residual hearsay exception in Rule 803(24) or, in instances where the witnesses are unavailable, under Rules 804(3) and (5). The defendants objected to almost all of these documents on grounds of authenticity, and because they did not qualify as records of regularly conducted business activity.

1. *Authentication*

Rule 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in

question is what its proponent claims." Fed. R. Evid. 901(a). This standard is the same as that for the admission of conditionally relevant evidence under Rule 104(b). It differs from the general standard for admissibility expressed in Rule 104(a) which requires that the court make findings on preliminary questions. All that is required is a foundation from which the fact-finder could legitimately infer that the evidence is what its proponent claims it to be. I believe that under Rule 901(a) this prima facie standard for authentication is a legal one, as to which our review is plenary. Chief Judge Seitz and Judge Meskill believe that we review Rule 901 determinations by the abuse of discretion standard. *See United States v. Clifford*, 704 F.2d 86, 91 (3d Cir. 1983). On the record presented here any difference in scope of review is not dispositive.

The trial court held, and we agree, that the evidence required to establish a prima facie case that the evidence is what the proponent claims it to be must itself be admissible. This contrasts with Rule 104(a) rulings, which may be based on inadmissible evidence. The difference lies in the fact that if authenticity is disputed the dispute must be resolved by the jury or other fact-finder. 5 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 901(a)[01], at 901-16 (1983). We note that the court, citing *United States v. Goichman*, 547 F.2d 778, 784 (3d Cir. 1976), referred to the necessity for "substantial" admissible evidence. 505 F. Supp. at 1219-20. The reference to "substantial" evidence in *Goichman*, however, as the context discloses, was not intended to require anything more than a prima facie showing that the evidence is what its proponent claims it to be. We do not understand the trial court to have imposed any stricter standard.

In one respect, however, we disapprove of the trial court's approach to authentication. The court observed:

> As a corollary to this holding [that admissible evidence is required], we acknowledge that some

> documents may be authenticated only as against certain parties, since the authenticating evidence for those documents may be admissible only against certain parties.

505 F. Supp. at 1220 n.19. This ruling confuses questions of authenticity – that the evidence is what its proponent claims it to be -- with questions of admissibility. The rules governing admissibility are aimed at preventing use against a party of materials that are as to it untrustworthy. Thus as to each party evidence must have some independent basis of admissibility. Less is required in establishing that evidence is what its proponent claims it to be. For example, if one party in an answer to interrogatories states that a given document is a record kept in the course of its regularly conducted business activity, that answer suffices to authenticate it, even though for other purposes the answers to interrogatories of one party may not be admissible against another. The evidence which suffices to establish authenticity should be evidence that is relevant on the limited question of genuineness: that is, evidence admissible against the party having such a relationship to the proffered materials that it is likely to know the facts as to genuineness. Once a prima facie case of genuineness against that party is established, the court should regard the materials as sufficiently authenticated against all parties, subject, of course, to the right of any party to offer evidence to the ultimate factfinder disputing authenticity. The other parties are adequately protected, with respect to trustworthiness, by the requirement that the court must still rule on admissibility.

The trial court ruled that six sets of materials proffered under Rule 803(6) were authenticated as to all defendants: the Yajima Diaries, DSS 48-50, 505 F. Supp. at 1267-70; the Yamada Diary, DSS 51, 505 F. Supp. at 1277-79; the Yamamoto Diaries, DSS 52-54,

505 F. Supp. at 1280-82; the Shimizu Memorandum, DSS 95, 505 F. Supp. at 1297-98; the Toshiba Memoranda, DSS 96-98 505 F. Supp. at 1299-1300; and the TV Export Council Meetings documents, DSS 1030-1034, 505 F. Supp. at 1310-12. The trial court also held to be prima facie authentic against all defendants two sets of materials offered as prior testimony under Rule 804(b)(1): testimony of seventeen witnesses before hearing examiners of the Japanese Fair Trade Commission in the market stabilization case, DSS 58-74, 505 F. Supp. at 1286-88; and protocols, or records of statements given to the same commission by officers of several defendants, DDS 75-92, 505 F. Supp. at 1294-96. These findings are not challenged on appeal.

One exhibit, the Okuma Diary, DSS 55, was held to be authenticated only against MELCO. 505 F. Supp. 1283-84. The diary was identified in MELCO's supplemental answers to interrogatories as that of its assistant to the manager of the Consumer Products Sales Department. It is mentioned by Okura in his protocol to the Japanese Fair Trade Commission as having been written in relevant part at a meeting of the Tenth Day Group. Okura also testified in the Commission proceedings that he attended the meeting. The diary was lawfully seized by the Commission at MELCO's premises. The protocol was admitted against MELCO, 505 F. Supp. 1294-97, and the relevant testimony was admitted against all six defendants in the market stabilization case. 505 F. Supp. at 1293. The court ruled similarly with respect to the Tokizane Diary, DSS 56-57, holding that it was authenticated only against MEI. *Id.* at 1285-86. Mr. Tokizane was director of MEI's television division. The diary was an exhibit in the market stabilization case and is referred to in MEI's answers to interrogatories. Because there was sufficient evidence admissible against MELCO and MEI, respectively, to authenticate the two diaries, we hold

that the evidence referred to suffices to support a finding, against all defendants, that the Okura and Tokizane diaries are authentic.

Two sets of Rule 803(6) materials were held to be unauthenticated. The first set is offered as minutes of the meetings of officers of the Electronic Industries Association of Japan. DSS 1027 refers to a meeting of February 16, 1963. DSS 1028 refers to a January 18, 1964 meeting. Both are typewritten but unsigned. The documents were obtained during the course of this litigation from the Association at its office in Japan. Various defendants in answers to interrogatories refer to the meetings of the officers taking place on these dates. The documents were produced in compliance with a direction by Judge Higginbotham that the defendants, who are directors of the Association, make a good faith effort to have the Association's records made available to NUE and Zenith. Counsel for MELCO was present when such production took place. The two exhibits were removed from a stack of similar minutes of meetings held monthly. We hold that from the totality of these circumstances a finding could be made that exhibits DSS 1027 and 1028 are what NUE and Zenith claim them to be: namely, minutes of the monthly meetings of the Electronic Industries Association of Japan. They have the appearance, content and substance typical of minutes. Fed. R. Evid. 901(b)(4). They were produced by the defendants pursuant to a discovery order in this proceeding. Fed. R. Evid. 901(b)(10). They come from a source where such minutes were likely to be kept, and the Association was a body which was likely to prepare such minutes. No more evidence was needed to establish a prima facie case of authenticity than the record contains.

The second Rule 803(6) document rejected as unauthenticated, 505 F. Supp. at 1303-08, is DSS 1029, an internal memorandum from the files of Japan Victor

Company, not a party to this litigation, but a member of the Statistical Committee of the Electronic Industries Association of Japan. Although separately operated, Japan Victor is fifty-one percent owned by MEI. The memorandum refers to a December 26, 1966 meeting of the Statistics Committee of the Electronic Industries Association of Japan, and suggests that at that meeting the members of the committee agreed to modify their accounting practices so as to conceal from government agencies the extent of the disparity between export and domestic prices. The document, dated January 6, 1966, was produced from the files of Japan Victor Company pursuant to a subpoena accepted by MEI's counsel on behalf of Japan Victor, at Japan Victor's office in Tokyo. MEI's counsel was present when it was produced. According to the translation, which is not disputed, it is addressed to the Chief, Plant Accountants' Section, and is from Sales Promotion. Two "chops" or signatures appear on it: those of Mr. Shiokawa and Mr. Oguri. The defendants admit that both are employed by Japan Victor. Answers to interrogatories by several defendants establish that Japan Victor is a member of the Statistics Committee, that a meeting of that committee took place on December 26, 1966, that Mr. Oguri was Japan Victor's representative at meetings of the Statistics Committee, and that there had been a discussion at that meeting of the general subject matter set forth in the memorandum. App., vol. 4, at 1438. The handwritten memorandum is on stationery bearing a Japan Victor Company Ltd. legend and is dated eleven days after the meeting it purports to describe. The trial court held that this document was not authenticated because "[w]e have no notion of who wrote the document, or where, or on what basis." 505 F. Supp. at 1306. The court noted that "while the plaintiffs might have taken the deposition of someone from Japan Victor when their counsel was in Tokyo to receive production of the

document and thus shed some light on its origin and its genuineness, they elected not to do so." *Id.* The evidence, however, indicates that there was a meeting of the Statistical Committee on December 26, 1966, that Japan Victor was a member of that committee, that Mr. Oguri represented Japan Victor in meetings of that committee, that the general subject matter described in the memorandum was discussed at the meeting, that the document on its face is addressed from Sales Promotion to Accounting and discusses matters on which action by the accounting section would be expected, that its date is in close proximity to the date of the committee meeting, and that it was preserved in the files of Japan Victor. We conclude that a fact-finder could reasonably infer that the document is what NUE and Zenith claim it to be: Mr. Oguri's instruction to the accounting section to implement an agreement reached on December 26, 1966 at the committee meeting. Its admissibility must be separately considered, but prima facie it is authentic.

We have dealt thus far with all of the authenticity rulings made following the *in limine* hearing on admissibility. In addition the trial court made some evidentiary rulings on materials proffered under Rule 803(6) in its opinion granting summary judgment. 513 F. Supp. at 1211 n.157, 1228, 1229, 1223-25. The documents in question include the MD group documents, DSS 101, 102, 103 and 104, and the Nine Essential Points of Implementation document which was an exhibit to the Recommended Decision in the market stabilization case before the Japanese Fair Trade Commission. The court excluded all of them, but it is not clear with respect to any of them that the ruling was based on lack of authenticity as well as inadmissibility under Rules 802, 803 and 804. In Part V E 2, *infra*, we hold that exhibits DSS 101, 103 and 104 do not qualify for admission as business records; in Part V

H, *infra*, we conclude that no other hearsay exception supports their admission. Thus we need not examine the record for prima facie evidence of their authenticity. The finding in the recommended decision of the Fair Trade Commission is evidence from which a factfinder could conclude that the Nine Essential Points document is what NUE and Zenith claim it to be. The trial court's ruling on DSS 102, testimony of Mr. Saeki of MEI before the Japan Fair Trade Commission, is unclear. 513 F. Supp. at 1229. The testimony was sufficiently authenticated.

2. *Admissibility*

Since, except for DSS 101, 103 and 104, all of the documentary evidence which NUE and Zenith tender as admissible under Rule 803(6) has been sufficiently authenticated in compliance with Rule 901, we turn to admissibility. The trial court held that the question whether a document qualifies as a record of regularly conducted activity for purposes of Rule 803(6) must be answered by the court under Rule 104(a), not by the ultimate fact finder. It held, as well, that in answering that question the court is not bound by the Rules of Evidence. Finally, the court held that it must be satisfied by a preponderance of the evidence that the preconditions for admission are satisifed. 505 F. Supp. at 1230. At least insofar as the rulings on preliminary questions involve factual issues, each of these rulings is correct. Moreover, our review of these factual determination is by the clearly erroneous standard of Rule 52. To some extent, however, preliminary rulings about admission under Rule 803(6) involve the application to those facts of defined legal standards, and as to such applications our review is plenary.[50]

---

50. Chief Judge Seitz agrees that our review of the district court's preliminary determinations under Rule 803(6) is by the

Business records are admissible under Rule 803(6) "if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6). Despite the reference in the Rule to a qualified witness, the trial court held "that the testimony of the custodian or other qualified witness is not a sine qua non of admissibility in the occasional case where the requirements for qualification as a business record can be met by documentary evidence, affidavits, or admissions of the parties, *i.e.*, by circumstantial evidence, or by a combination of direct and circumstantial evidence." 505 F. Supp. at 1236. This interpretation of Rule 803(6) is not challenged here by the defendants. It seems, in any event, consistent with the spirit of the Rules. The ruling on admissibility is to be made by the court under Rule 104(a), and the court is not even confined, in making it, to admissible evidence. It would make little sense to require live witness testimony every time a business record is offered when, from the other materials open for the court's consideration, it can make the required finding to its own satisfaction. The

clearly erroneous standard. However, he believes that where the facts are not in dispute, our review in general is for abuse of discretion. E.C. Ernst, Inc. v. Koppers Co., 626 F.2d 324, 331 (3d Cir. 1980); United States v. Bailey, 581 F.2d 341, 346 (3d Cir. 1978); *see also* United States v. Flom, 558 F.2d 1179, 1182-83 (5th Cir. 1977). While he reaches the same conclusions on admissibility as business records as the majority, he would review the district court's rulings on the business record status of the documents discussed in section V E by an abuse of discretion standard wherever the majority uses a legal error or plenary standard.

court held that in the absence of live witness testimony as to regularity of the activity and its recordation, the proponent "must show regularity of practice in some precise and explicit manner, either by external evidence or from the documents themselves plus surrounding circumstances." *Id.* Placing the burden of establishing regularity of practice on the proponent was also proper. Addressing the Rule 803(6) requirement that the record be made "by, or from information transmitted by, a person with knowledge," the court held that the proponent must show "either (1) that the author of the document had personal knowledge of the matters reported, or (2) that the information he reported was transmitted by another person who had personal knowledge, acting in the course of a regularly conducted activity, or (3) that it was the author's regular practice to record information transmitted by persons who had personal knowledge." 505 F. Supp. at 1237. Both the allocation of this burden and the methods by which it may be satisfied were correctly stated by the court. Finally, turning to the Rule 803(6) proviso excluding business records when "the source of information or the method or circumstances of preparation indicate lack of trustworthiness," the court held that the burden of showing such untrustworthiness was on the party opposing admission. *Id.* Placing this burden on the party opposing admission was correct.

The trial court held, however, that Rule 803(6) requires that the proponent of business records show that they were "created by routine practices where careful checking and habits of precision and regularity assure their accuracy." *E.g.*, 505 F. Supp. at 1271. In adopting this stringent standard the trial court looked to caselaw antedating the Evidence Rules. Even the pre-rules caselaw does not uniformly support so stringent a standard. *Compare Standard Oil Company*

of California v. Moore, 251 F.2d 188, 215 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958) (requiring an established procedure "for the systematic or routine and timely making and preserving of company records") *with United States v. Hyde*, 448 F.2d 815, 846 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972) (informal, regularly kept notes admissible). We do not believe that Rule 803(6) as drafted requires that the court independently analyze the procedures used by a business or its employees in making regularly kept records of regularly conducted business activity. The principal indice of reliability is that reliance on routine record keeping is essential to ongoing business activity. Deficiencies in the manner in which specific records are kept may be called to the court's attention in carrying the burden of showing that the "method or circumstances of preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6). Given the separate treatment in Rule 803(6) of untrustworthiness, we think the regular practice requirement should be generously construed to favor admission. Thus, for example, it may well be that a record of a single meeting satisfied the regular practice requirement if the business in question routinely records other important meetings. Thus we agree with NUE and Zenith that the trial court generally imposed too stringent a burden of showing regularity of practice.

Our review of the trial court's factual conclusions as to business records under Rule 104(a) is by the clearly erroneous standard. Where the facts are not in dispute, whether a given document is a business record is a legal question. If the court has misconstrued the requirements of Rule 803(6), its conclusion that a given record is not a business record may be legal error.

With these general observations in mind, we turn to the specifics.

a. The Diaries

(1) The Yajima Diaries

Exhibits DSS 48, 49 and 50 are three notebooks which the Japanese Fair Trade Commission seized from Toshiba Corporation in the course of its investigation in the Market Stabilization case. App., vol. 12, at 5087-5266. As noted above, the diaries were held to be authentic: that is, genuine diaries of Mr. Seiechi Yajima, who during the period covered by them, 1965 and 1966, was employed by Toshiba. During that period, Yajima attended, on Toshiba's behalf, meetings of the Tenth Day and TS groups, at which meetings, according to NUE and Zenith, the Japanese defendants engaged in price fixing. The diaries are offered as evidence of what transpired at those meetings. The court held that diaries did not qualify for admission under Rule 803(6). 505 F. Supp. at 1270-73.

The court found that Mr. Yajima was a high management official with responsibility for production and sales planning whose attendance at the Tenth Day Group meetings was within the scope of the authority with which he had been entrusted by Toshiba, and that he reported to his superiors about what transpired at those meetings. 505 F. Supp. at 1270 n.100. The diaries are referred to in the protocols (deposition testimony) in evidence, furnished by Mr. Yajima in the Japanese Fair Trade Commission case. The protocols establish that in 1966 Mr. Yajima attended meetings of the Tenth Day Group regularly (App., vol. 12, at 4925), that tentative decisions on price were arrived at (App., vol. 12, at 4916-17), but that although in attendance he had to consult with his superior in Toshiba before settling specific problems (App., vol. 12, at 4918). As translated, the diaries appear to be notes rather than complete transcripts of the meetings. The entries suggest the repetitive nature of Mr. Yajima's note taking. Moreover

the contents of the notations are entiely consistent with notations of proposed business activity which would be needed by someone without final decisional responsibility in order to inform his superiors and obtain such authority.

The trial court held that NUE and Zenith failed to establish regular practice. "In contrast to notions of regularity," the judge observed, "the diaries are erratic." 505 F. Supp. at 1271. The court's observations about their style are, for purposes of the Rule 803(6) regular practice requirement, simply irrelevant. The court observed that Yajima's notations "are, like most notes that one keeps for oneself, written in an irregular and shorthand manner which Yajima himself doubtless understood, but which no one else can. One cannot tell with any certainty where accounts begin and end. The diaries are laden with all kinds of arrows and symbols and code-like notations and references which are unintelligible." *Id.* Rule 803(6) focuses on the regularity of the record keeping process, not on its form. Business records unintelligible to the uninitiate because of the code in which they have been kept may nonetheless qualify under Rule 803(6), subject, of course, to a conditional relevancy determination under Rule 104(b). In the light of other evidence, business records which might otherwise be irrelevant because of unintelligibility may become clearly relevant because in whole or in part their meaning becomes intelligible. The court also observed that "we do not know when and where he got the information, including figures, which he recorded or when he recorded the entries." *Id.* This observation, too, is irrelevant to the regular practice requirement.

As to the personal knowledge requirement, the court observed, "Yajima's diaries contain double and triple hearsay, and because of the manner in which the entries were kept, it is impossible to sort out what is

based upon Yajima's personal knowledge and what is based upon hearsay." 505 F. Supp. at 1273. The diaries are offered as business records reflecting what went on at the Tenth Day Group meetings. Undoubtedly what was said by others in attendance was hearsay as to the truth of what they said about events elsewhere. But the significance of the diaries is as a record of what transpired at the meeting. The record evidence is that Yajima regularly attended. Thus he had personal knowledge of what was discussed, and it was this he recorded so as to be able to inform his superiors.

There is no question that Yajima had personal knowledge of what transpired in the meeting described in DSS 48, since he testified before the Japan Fair Trade Commission that he attended it. App., vol. 12, at 4928. DSS 50 describes meetings of the Tenth Day Group. Yajima testified that he attended the same meetings and if he did not attend, Mr. Kamakura, the Manager of the TV Sales Department, attended. App., vol. 12, at 4925. The entries in DSS 48 and DSS 50 suggest a regular practice of recording what went on at the meetings. Yajima testified that he made regular reports to his superiors of the meetings he attended. App., vol. 12, at 4918, 4926. From these circumstances the only reasonable inference which may be drawn is that the diary entries were made on the basis of Yajima's personal knowledge or from information transmitted by Kamakura. Thus the trial court's finding of lack of knowledge with respect to DSS 48 and 50 is clearly erroneous.

There is no evidence that Yajima attended the meetings described in DSS 49. With respect to the Palace Group meeting to which it refers, Yajima got his information from his immediate superior, Kono, who was director of the TV Business Department. App., vol. 12, at 4933. Kono's superior was Senior Manager Narita.

who was a member of the Police Group. App., vol. 12, at 4918. While a permissible inference would be that Yajima's information came from Narita, who may have had personal knowledge, we cannot say that the trial court's finding of absence of personal knowledge is in this instance clearly erroneous. Thus we agree that DSS 49 is not admissible under Rule 803(6). We consider its admissibility under Rules 804(b)(3) and 804(b)(5) in Parts V F and H *infra*.

As to trustworthiness, the court observed that "we do not believe that [the] diaries possess the circumstantial guarantees of trustworthiness that the hearsay rules implicitly and 803(6) explicitly require." 505 F. Supp. at 1273. The circumstantial guaranty of trustworthiness for Rule 803(6) is regular recording of regular business activity. The trustworthiness proviso assumes that this guaranty is satisfied, and places on the opponent the burden of overcoming that badge of reliability by showing other reasons for untrustworthiness. The court reasoned that the diaries were untrustworthy because they were unintelligible, and thus might permit the jury to speculate as to their meaning. We believe that unintelligibility is a factor extraneous to the trustworthiness inquiry. Ambiguities in a business record, as with any evidence, may be argued to the jury. Exclusion of business records on the ground that their meaning might be arguable was an abuse of discretion.

We hold that Mr. Yajima's diaries, DSS 48 and 50, deal with meetings which were regularly conducted business activity, that these notebooks were kept as a regular practice, recording what transpired during that activity, that he had the requisite knowledge of what was recorded, and that no showing has been made that either the source of his information or the method or circumstances of the notebooks' preparation were

untrustworthy They are admissible under Rule 803(6).[51]

The Yajima diaries, DSS 48 and 50 will, therefore, be considered in considering the propriety of summary judgment.

(2) *The Yamada, Tokizane and Kozukue Diaries*

DSS 51 is a notebook kept by Noboro Yamada, Department Manager of the Electric Appliance Department, Consumer Products Division of Hitachi Limited, from August to November 1965. App., vol. 13, at 5281-5303. The notebook, like Mr. Yajima's, was seized by the Japanese Fair Trade Commission. Hitachi produced it in discovery in response to a Fed. R. Civ. P. 34 request. The trial court held that it was not admissible as a business record, both because there was no evidence of regular practice and because it is unintelligible. While we disagree with the court on the relevancy of its unintelligibility, we agree that no showing of regular business practice has been made. 505 F. Supp. at 1279. In contrast with the Yajima notebooks there is no independent evidence that Yamada regularly attended the Tenth Day Group meetings, or that he reported about those meetings to his superiors. There is no evidence about the circumstances of recordation. NUE and Zenith point to the similarity of the entries in Yamada's notebook with those in DSS 48, 49, and 50. That is not enough.

DSS 56 and 57 consist of two pages of the notebook made by Hayata Tokizane, who when the entries were made was Director of the Television Division of MEI. App., vol. 13, at 5425-27. The offer is made to establish that two of the defendants conspired to fix prices, and

51. Since they are admissible under Rule 803(6) we need not decide whether DSS 48 and 50 qualify under Rule 801(d)(2) or Rule 804.

the contents are suggestive in this respect. However, there is no evidence that Mr. Tokizane attended the meetings, no evidence about the source of his information, and no evidence about Mr. Tokizane's purpose in making the entries. We agree with the trial court that DSS 56 and 57 were not qualified as business records under Rule 803(6). 505 F. Supp. at 1286.

DSS 104 is a page from the diary of Mr. Kozukue of Sanyo, referring to a meeting of the 20th Day Group on May 20, 1965. The court excluded it. 513 F. Supp. at 1229. There is no evidence that Mr. Kozukue was a member of the 20th Day Group, or of the source of his information. We agree that it was not qualified as a business record under Rule 803(6).

Because we hold that the Yamada, Tokizane and Kozukue diaries were not qualified as business records, we must consider the other grounds on which they were offered. We consider DSS 51, 56 and 57 in Parts V F, G, and H *infra*, and DSS 104 in Parts V G and H *infra*.

(3) The Yamamoto Diary

DSS 52-54 consist of pages from the diary kept by Mamoru Yamamoto of Hitachi, Ltd. App., vol. 13, at 5305-5419. The diary was seized from the Yamamoto desk by the Japanese Fair Trade Commission in the course of its investigation. Returned to Hitachi, it was identified in Hitachi's answers to interrogatories. The diaries are offered to establish what transpired at Tenth Day and TS Group meetings. In his protocol to the Japanese Fair Trade Commission Yamamoto stated that he went to some Tenth Day Group meetings, that when he did not attend Mr. Adachi, another Hitachi employee, attended and within a week communicated back to him what transpired, and that Mr. Yamamoto would promptly record in his diary information relevant to his business responsibilities. App., Vol. 12, at 4995-96. DSS 52-54 were excluded for lack of showing

of personal knowledge and regular practice, and as untrustworthy. 505 F. Supp. at 1282-83.

In contrast with the Yamada and Tokizane diaries, there are protocols and testimony showing that employees from Hitachi regularly attended the Tenth Day and TS Group meetings, and that Yamamoto recorded what transpired, insofar as was relevant to his responsibilities, either from personal knowledge or from what Mr. Adachi reported. Thus the entires were "by, or from information transmitted by, a person with knowledge." The trial court's contrary finding is clearly erroneous.

The trial court's regular-practice ruling with respect to the Yamamoto diary suffers from the same reliance on factors extraneous to Rule 803(6) which we noted earlier. There is evidence of regularity in entries and of reliance on the diary by Mr. Yamamoto in carrying out his duties at Hitachi. Exclusion for absence of regular practice was improper.

The trial court also excluded the diary as untrustworthy because it was unintelligible and ambiguous. As in the case of the Yajima diaries this ruling was an abuse of discretion.

The Yamamoto diary qualifies as a business record under Rule 803(6) and, to the extent that what transpired at the Tenth Day and TS Group meetings is material, will be considered in deciding whether summary judgment was proper.

(4) The Okuma Diary

DSS 55 is a notebook in which Ushizo Okuma, formerly assistant manager of the radio and television section and later director of the sales department of MELCO, made entries. App., vol. 13, at 5421-23. The notebook was seized by the Japanese Fair Trade Commission, but later returned to MELCO which produced it in discovery. Both the notebook and Mr.

Okuma are identified in MELCO's answers to interrogatories. In his protocol to the Japanese Fair Trade Commission Mr. Okuma stated that he attended meetings of the Tenth Day Group, and that the entry for February 16, to which the NUE and Zenith offer of proof refers, was made at that meeting. App., vol. 12, at 5017. The trial court excluded the diary because of "lack of evidence of systematic checking or of a regular continuous habit on Okuma's part in making entries in his notebooks relating to group meetings." 505 F. Supp. at 1284. The court also noted that the entries with respect to what transpired at the Group meeting did not explain who the speaker was, and that the entries were "cryptic" and "chart-like." *Id.* The cryptic style of entries in business records is irrelevant to the issue of regularity of the entries. The fact that the speakers are not identified is also irrelevant for that purpose, since for purposes of the business in question that information will often be known. At best the absence of identification of the speakers goes to evidentiary weight. There is ample evidence that the Tenth Day Group meetings were regularly conducted business activities attended by representatives of the defendants, that Okuma attended the meeting in question in the course of his business responsibilities for MELCO, that the notebook was kept by him for business purposes, and that for the entries in question he had personal knowledge. The defendants rely on a nine page gap between the two entries relied upon to establish untrustworthiness. They make no showing, however, that the untranslated contents of the pages between the first and second entries would, if translated, reflect on the trustworthiness of the entries offered by NUE and Zenith.

Although DSS 55 is based on personal knowledge, relates to regularly conducted business activity, and has not been shown to be otherwise untrustworthy, we are

not aware of any additional evidence significantly probative of regular practice in making the entries.

Chief Judge Seitz and Judge Meskill conclude that NUE and Zenith have not adequately demonstrated a regular practice, but agree that because the trial court's standard for regular practice is too rigid a remand for reconsideration of admissibility of DSS 55 under Rule 803(6) is appropriate. I would hold that the factors referred to above suffice.

Because a majority of this court concludes that DSS 55 cannot be held to be admissible under Rule 803(6) we consider its admissibility under other Evidence Rules in Parts V F & H, *infra*.

b. *Internal Memoranda*

NUE and Zenith offered five internal memoranda, DSS 95, obtained from Hitachi, DSS 96, 97 and 98, obtained from Toshiba, and DSS 1029 obtained from Japan Victor Company. They also offered DSS 101, a MEI memorandum.

DSS 95 is a handwritten document on Hitachi stationery dated December 29, 1965, captioned "The Second Meeting of Color TV Committee," of the Okura Group and stamped by Mr. Shimizu, a Hitachi employee. App., vol. 12, at 5055-62. It was seized from Hitachi by the Japanese Fair Trade Commission a year after its date. It is written on stationery bearing a Hitachi business logo. The memo identifies Mr. Shimizu as a participant in the meeting and shows that it was routed to Satoshi Ueno of Hitachi, in whose custody it was when seized. The court excluded it for several reasons.

The court observed that "[w]e do not know who wrote it" and "[t]here is no showing of who received the document or that it was relied upon. Neither do we know anything of the sources of information of the writer of the memo." 505 F. Supp. at 1298-99. These findings are

clearly erroneous. Mr. Shimizu's signature on the document and the fact that he attended the meeting establish both authorship and personal knowledge. Receipt and reliance are shown, for on its face it shows a routing to Mr. Satoshi Ueno of Hitachi, in whose custody it was seized a year after it was written.

The trial court also noted that "the memorandum is laden with internal hearsay . . . ." 505 F. Supp. at 1299. The memorandum is offered, however, not for the truth of what was said at that meeting to which it refers, but as evidence of what transpired at the meeting, which is the only significance the exhibit has for summary judgment purposes. The fact that a business record memorializes hearsay statements is not a relevant consideration under Rule 803(6) and does not justify exclusion.

The trial court also observed, "nor do we know anything of the method of its preparation, whether it was created by a process involving habits of precision or regularity and systematic checking, or otherwise." 505 F. Supp. at 1298-99. The depositions of Hitachi employees Adachi, App., vol. 12, at 4982-90, and Yamamoto, App., vol. 12, at 4992-98, while not referring to the memorandum, suggest that it was Hitachi's practice to have employees who attended group meetings report to other company officials what transpired. The parties to this appeal have not, however, referred us to any evidence of Mr. Shimizu's practice.

Considering the testimony of Adachi and Yamamoto, the contents, routing, letterhead, and retention by Hitachi of the exhibit, and taking into account that the trial court's standard for establishing regular practice misconstrues Rule 803(6), I would hold that the court should have admitted exhibit DSS 95, and that it should be considered part of the summary judgment record. Chief Judge Seitz and Judge Meskill,

recognizing that a substantial question exists as to whether the record establishes regular practice, prefer to have that question reconsidered by the trial court.

As with the other documents which we have not held admissible under Rule 803(6), we will consider other bases for admission of DSS 95 in Parts V F & H, *infra*.

DSS 96, 97 and 98 are internal Toshiba memoranda which were seized by the Japanese Fair Trade Commission and furnished by Toshiba in discovery. App., vol. 12, at 5063-86.

DSS 96 is a memo, dated April 11, 1966, from Mr. Kamuro to Mr. Narita of Toshiba. The trial court found with respect to it: "We are in the dark as to the method of preparation of the memo[ ]. We do not know if [its] preparation was attended by regularity or systematic checking. We know nothing of the writer's source of information." 505 F. Supp. at 1300.

The memo is identified in Kamuro's protocol as written by him on the basis of information received from Narita about an April 8, 1966 Palace Group meeting. App., vol. 12, at 4974-76. Narita in his protocol identified it as a Toshiba internal memorandum about the April 8, 1966 Palace Group meeting. App., vol. 12, at 4948. The protocol discloses that "[a]s to the Palace Group, in the case of Tokyo Shibaura Electric Co., Ltd [Toshiba], Vice-President Hiraga and me, or sometimes Director Sato, attend it. General issues of all electrical appliance matters are discussed at these meetings of Senior Managing Directors and Managing Directors of each company which are also members of the Okura Group." App., vol. 12, at 4947. It also discloses that "[a]t the meeting of the Palace Group on April 8th, somebody from Matsushita Electric Industrial Co., Ltd. proposed to increase the profit margin for color TV from 18% to 20% and everyone in attendance agreed that this practice should take effect as of September 21st." App.,

vol. 12, at 4948-49. As to the manner of preparation of the memorandum, Mr. Kamuro, who was employed in the TV Business Department of Toshiba when he prepared it, testified:

> I wrote the manuscript from what I heard from the Managing Director at that time, Mr. Narita, after the meeting of the Palace Group was over, and a girl clerk transcribed it. Mr. Narita came to my desk and told me more than what was written in this document, so, I took notes right there and wrote only the essential points in the manuscript.

App., vol. 12, at 4974-75. He also testified that "our company was the secretary of the Tenth-Day Group." *Id.* at 4974. Thus the Kamuro protocol discloses precisely how and why DSS 96 was prepared.

There is in the record somewhat ambiguous testimony about Mr. Narita's attendance at the specific April 8, 1966 meeting. Narita testified:

> I don't think I attended on April 8th because there was an All-Japan Business Conference held from the 7th to 9th and I gave a congratulatory address at the rally of the All-Japan Wholesalers' Union on April 8th. However, if there were 3 attendants on this day, I would have attended.

App., vol. 12, at 4948. Tadashi Kamakura of Toshiba testified that he, Mr. Kawara of Toshiba, and Mr. Narita of Toshiba attended the April 8, 1966 meeting. App., vol. 12, at 4971. This testimony establishes that there were three attendants on that day and that Narita was one of them. Thus while Mr. Narita's memory is unclear his testimony is consistent with that of Mr. Kamakura, and consistent with that of Mr. Kamuro. There is no other record evidence bearing on DSS 96. Like the Yajima, Yamamoto and Okura diaries, DSS 96 is a record of a regularly conducted business meeting, prepared to

preserve the "essential points" of the meeting. It was prepared from information transmitted by a person with knowledge. Its preservation by Toshiba and Toshiba's role as Secretary of the Tenth Day Group verified the regularity of maintaining such a record. Thus the trial court's findings, quoted above, are clearly erroneous. The court also objected that it contains internal hearsay, 505 F. Supp. at 1300, but business records often do, and this one is being offered only to establish what transpired at the meeting. DSS 96 qualifies as a business record under Rule 803(6). Thus DSS 96 will be considered in deciding whether summary judgment was proper.

DSS 97 is a Toshiba memorandum from Mr. Kamakura, Director of the TV Business Division, to Mr. Iwata, Senior Managing Director, and Mr. Narita. Dated May 4, 1966, it refers to what transpired at Tenth Day Group meetings on April 4 and April 28 of that year. The trial court excluded it for the same reasons it excluded DSS 96. 505 F. Supp. at 1300.

The subject matter of DSS 97 is such as would necessarily fall under the responsibility of Iwata and Narita. Mr. Kamakura's protocols establish that beginning in January of 1966 he attended the Tenth Day Group meetings, which were held monthly. App., vol. 12, at 4960-61. DSS 97 discusses, among other things, the retail price maintenance of color TV sets. Mr. Kamakura's protocol also states that "[t]he time when the target price for table model color TVs was decided as 180,000 yen was shortly after I came to Tokyo, probably either at the March or April Tenth-Day Group meeting." App., vol. 12, at 4962. There is also Mr. Kamura's testimony that Toshiba served as Secretary of the Tenth Day Group. Thus although Mr. Kamakura did not specifically identify DSS 97 to the Japanese Fair Trade Commission there is evidence, and none to the contrary, that he attended the meeting in question and

prepared the memorandum from personal knowledge for use of others in Toshiba who would be interested in what transpired. The very nature of the detailed subject matter of DSS 97 discloses that others in the business would have to rely on it in order to implement the specific steps said to have been agreed upon. Its preservation by Toshiba confirms as much. Thus the trial court's findings about DSS 97 are clearly erroneous. Its exclusion was error. It is a business record and will be considered in deciding whether summary judgment was proper.

DSS 98 is a Toshiba memorandum, dated October 26, 1966, written by Mr. Yajima, and forwarded to Mr. Narita by Mr. Kamakura. Mr. Yajima's protocol identifies DSS 98 as his report of a Tenth Day Group meeting on October 25. App., vol. 12, at 4933. The protocol explains the business purpose of this and similar reports:

> I have been reporting to my superior on what has been discussed at the meetings of the Tenth-Day Group. In the case I attend alone, I report to the Sales Department Manager, Kamakura. With regard to important matters, I believe I have been reporting to the Senior Managing Director, Siego Narita, who is director in charge.
>
> The matters referred here as important are the matters which affect our company's merchandise and sales planning and information pertaining to prices, etc.
>
> Information pertaining to prices about which we discuss are the current prices and future prices including the actual selling prices and I report on them.
>
> Though what I spoke at the Tenth-Day Group meeting was my view at that time, the view could

> ultimately become the company's, since I have been reporting to my superiors upon my return to the company. The same is true when Kamakura, Department Manager, attended and spoke at the Tenth-Day Group meeting.

App., vol. 12, at 4926. The trial court excluded DSS 98 for the same reasons it excluded DSS 96 and 97. 505 F. Supp. at 1300. However, the admissibility of DSS 98 as a business record under Rule 803(6) is, if anything, clearer. Indeed Yajima's protocol affords additional evidence that DSS 96 and DSS 97 were routine reports of regular business activity, contemporaneously made and regularly recorded for business purposes. The document is neither opaque nor suffused with internal hearsay. The trial court's findings about DSS 98 are clearly erroneous. DSS 98 will be considered in deciding whether summary judgment was proper.

DSS 1029 is the Japan Victor document which we have already discussed in Part V E 1 above dealing with authenticity. App., vol. 4, at 1479-80. It is an internal memorandum from persons in sales promotion to the Chief, Plant Accountants' Section, about what transpired at a meeting of the Statistics Committee of the Electronics Industry Association of Japan. The trial court held that it was inadmissible, noting:

> "[n]ot only do we know nothing of its author, but we know nothing of the circumstances of its preparation, of its source or origin or when it was prepared. Thus, we do not know if there was any habit of regularity or precision or systematic checking attendant to its preparation, or whether it was maintained in the ordinary course of business, nor do we know whether the author had first hand knowledge or received information from someone with such and with a duty to report.

505 F. Supp. at 1307 (footnote omitted).

As noted in our discussion of authenticity, however, we know that Japan Victor was a member of the Statistics Committee, that Mr. Oguri represented it at Statistics Committee Meetings, that there was a meeting of the Statistics Committee on December 26, 1966, and that the Statistics Committee was a regular business activity. We know from the face of the document that it was prepared either by Mr. Oguri or by Mr. Shiokawa, and it is readily inferable that if the latter prepared it Mr. Oguri, who attended the meeting, furnished the information. We know from the subject matter -- prices reported to the government agencies -- that the addressee, the Chief of the Plant Accountants' Section, would have to take action to implement the decisions on which it reports. We know from the face of the document that it was prepared shortly after the meeting. Finally we know it was preserved in Japan Victor's business files. Thus it is a report of what went on at a business meeting, by someone who attended on behalf of his employer, to a fellow employee who would logically have to take action as a result of what went on, and who preserved the memorandum in the company files. The trial court is clearly erroneous about lack of identification of the author or circumstances of identification.

We have noted that the trial court's approach to the regular practice requirement is inconsistent with Rule 803(6). Considering the subject matter, routing, and retention of DSS 1029, I would hold that it is a business record and should be considered as part of the summary judgment record. Chief Judge Seitz and Judge Meskill, recognizing that a substantial question exists as to whether the record establishes regular practice, prefer to have that question reconsidered by the trial court.

As with the other documents which we have not

held admissible under Rule 803(6) we will consider other bases for admission of DSS 1029 in Parts V F & H, *infra*.

c. *Minutes of Trade Group Meetings*

NUE and Zenith proffered DSS 1027 and 1028, minutes of the officers meetings of the Electronic Industries Association of Japan, App., vol. 13, at 5605-08, and DSS 1030-34, minutes of the TV Export Council Meetings, App. vol. 14, at 6241-56. In Part V E 1 above we held that DSS 1027 and 1028 were sufficiently authenticated; the trial court assumed authentication as to 1030-34. 505 F. Supp. at 1312. Both sets of minutes were excluded by the trial court. 505 F. Supp. 1303, 1312.

As we noted in discussing authenticity, the Officers' Meeting Minutes were produced during discovery at the office of the Association from a stack of typewritten minutes of monthly meetings, and have the appearance, contents, and substance typical of minutes. The Association obviously engages in regular business activities through its officers. Of all the records likely to be kept by an industry association, minutes of its meetings are the most likely. It is true that these are unsigned. However, they were deemed by the Association to be sufficiently probative as to be retained in its files. Regular practice is established by the fact that the two minutes which are offered were kept in a stack of minutes recording monthly meetings. It is inconceivable that these would have been retained unless the recorder had been present or at least had obtained the information recorded from someone who was present and transmitted the information while acting in the regular course of business. A deposition of the unknown scrivener would have gilded the lily, but such gilding is not required for admissibility. Moreover, when an organization like the Electronic Industries

Association of Japan keeps minutes of its own meetings it is acting in the course of a regularly conducted business activity. Nor are we impressed by the court's observation that "[t]here is no record of who said what to whom, nor do we know whether what is written is what someone said, or what the writer (or someone informing his judgment) thought." 505 F. Supp. at 1303. Minutes of meetings which do no more than record topics discussed by item and record votes are nevertheless business records of what they in fact record. There is no requirement in Rule 803(6) that the minutes of a business meeting, intended to preserve a record of what is needed for business purposes, be the equivalent of a stenographic transcription. The badge of authenticity is the regular recordation of so much that transpired as is needed for purposes of the business in question. The court's reasons for rejecting Exhibits DSS 1027 and 1028 as business records are legally insufficient. Since only one of the exhibits, DSS 1027, is reproduced in the appendix, it, but not DSS 1028, will be considered in deciding whether summary judgment was proper.

DSS 1030-34, App., vol. 14, at 6243, 6246, 6253, present a different problem. Like DSS 95, 96-98 and 1029, these are internal memoranda, in this instance of MEI, although at least one is entitled "Minutes of T.V. Export Council Meeting of November 17, 1969." They were produced in response to document requests and referred to in interrogatory answers. Unlike the other internal memoranda referred to, however, they are not referred to in protocols or in answers to interrogatories. The trial court ruled that the personal knowledge requirement had not been satisfied and "that neither the structure of the documents nor their sheer number nor their retention in MEI's files satisfies the 'regular practice' requirement as we have explicated it, *supra*." 505 F. Supp. at 1312. Since we believe the court's

approach to admissibility under Rule 803(6) was generally too strict, we have independently examined the record.

NUE and Zenith complained in the trial court that the documents were produced only after discovery was closed, and thus they were prejudiced in their ability to produce foundation evidence. The trial court held that "[i]nsofar as plaintiffs argue that because of late production they were unable to lay foundation by taking depositions . . . plaintiffs failed to avail themselves of that provision of P.T.O. 154 which permitted reopening of discovery for good cause shown." 505 F. Supp. at 1312. This ruling was not, in the circumstances, an abuse of discretion. Thus we must find support for admission in the record as it stands.

As to personal knowledge, we note that Interrogatory #19 asked: "With respect to each meeting of the T.V. Export Council: (a) State whether any . . . notes, minutes, [or] memoranda . . . were prepared which refer or relate to such meeting . . . ." App., vol. 32, at 14855. Matsushita replied that no such documents were prepared, except that "from time to time, its attendants prepared notes or 'minutes' of TV Export Council Meetings. . . . To the extent such notes and 'minutes' were made . . . they have been produced to plaintiffs." App., vol. 32, at 14856. Portions of one of the documents, DSS 1032, were redacted by Matsushita pursuant to a claim of attorney-client privilege. Thus the documents were unquestionably authored by employees of Matsushita. The interrogatory answer states that attendants at the meeting prepared notes or minutes. The internal contents of the exhibits indicate that the author was in attendance. Thus the trial court's finding of lack of personal knowledge is clearly erroneous.

As to regular practice, there is no question but that attendance at the Television Export Council meetings

was a regularly conducted business activity of Matsushita. The documents were prepared by Matsushita employees in the course of that business activity, and were retained in Matsushita's files. The contents suggest subject matter on which a business corporation would for some period need ongoing information, and thus suggest reliance. Indeed the answer states that "[p]rior to 1971, these notes, or 'minutes' were routinely disposed of shortly after the meetings to which they related due to their short-lived usefulness," *id.*, which suggests that those retained and furnished were relied on for business purposes. We have already noted that the district court's approach to the regular practice requirement was unduly severe. Moreover it seems likely that the court's ruling with respect to regular practice was the result of disregarding the rdcord evidence to which we have referred. We conclude that the evidence referred to establishes regular practice. Thus DSS 1030-34 will be considered part of the summary judgment record.

Another group of minutes, those of the MD Group, were excluded by the trial court in its summary judgment opinion. 513 F. Supp. at 1211 n.157. Similarly the court excluded DSS 101, a memorandum from the files of MEI dated December 11, 1955, entitled "itemized minutes of the October 10 [1965] meeting of the presidents of sales companies from all over Japan." 513 F. Supp. at 1228. Finally DSS 103, a notice of meeting of the Market Stabilization Council on September 1, 1966 was excluded. 513 F. Supp. at 1229. We have been unable to find in the record evidence which would qualify these documents under Rule 803(6), and we know of no other basis for their admission. NUE and Zenith also note the exclusion of DSS 1173, but we have been unable to locate that document in the appendix and do not consider it. Thus we will not consider any of them in determining whether summary judgment was proper.

NUE and Zenith challenge the exclusion of DSS 1035. App., vol. 14, at 6255. That document, obtained in discovery from MELCO, is a memorandum from the Deputy to the Manager, Merchandise Export Department, to the Manager of that Department, routed via two other employees in that Department. It reports on attending the TV Council meeting of January 22, 1973. MELCO's answers to interrogatories state that "[t]his council was created pursuant to MITI's direction in order to implement the foreign trade policies established by the Japanese Government. . . . The general purpose of this Council was to prepare proposals regarding MITI-mandated minimum prices below which television receivers could not be sold in the Japanese domestic market for export to the United States." App., vol. 30, at 13526. The answer also states that MELCO had a representative who attended meetings from time to time. *Id.* at 13527. DSS 1035 is dated the same date as the meeting it describes and MELCO's answer to the interrogatory establishes that the Council was still functioning on that date. It is not disputed that while it operated the TV Council regularly conducted business activity. What is missing, however, in the record, to the extent we have been able to master it, is anything suggesting the regularity of MELCO's practices with regard to recording what transpired at the meetings of the Council. Thus we cannot hold that DSS 1035 should, as a busiess record, be considered part of the summary judgment record. As with other documents not found to be admissible under Rule 803(6), we will consider other bases for admission, infra.

Finally, NUE and Zenith urge that the trial court erroneously excluded DSS 1164, which appears to be a series of Sharp Corporation documents. We have been unable to find any place in the trial court's opinions where this exhibit was excluded. Since it does not

appear material to summary judgment we have not examined it in detail.

F. *Rule 804(b) Materials*

NUE and Zenith offered, under Rule 804(b)(1), the testimony of seventeen witnesses, employees of the Japanese manufacturer defendants, who testified before the Japanese Fair Trade Commission in the Market Stabilization case. DSS 58-74, App., vol. 13 at 5429-5574. That rule permits admission of such prior testimony if the witness is unavailable and "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). Unavailability includes the proponent's inability to procure the witnesses' attendance by process or other reasonable means. Fed. R. Evid. 804(a)(5). The trial court held, and we agree, that the witnesses in question, including one deceased and the others resident in Japan, are unavailable. 505 F. Supp. at 1249-51, 1288. The court also held that against Sanyo, Toshiba, Sharp, Hitachi, Matsushita and MELCO, who defended the Market Stabilization case jointly, there was an opportunity and similar motive to develop the testimony, and thus that it was admissible in support of the NUE-Zenith claim that there was concert of action to maintain high prices in Japan. 505 F. Supp. at 1291. The court also held that the testimony was admissible against all defendants to authenticate, under Rule 901, the diaries, referred to above. These rulings are not challenged by the defendants.

In addition, the trial court held the employees' testimony inadmissible under Rule 804(b)(1) against any parties except the six defendants to the JFTC proceedings. 505 F. Supp. at 1292. The NUE and Zenith briefs do not specifically address that holding, and therefore the court does not review it. The admissibility of the testimony against other defendants under other evidentiary rules is considered elsewhere in this opinion.

The trial court also held that all references in DSS 58-74 to export matters would be excluded, because there was no allegation in the Market Stabilization case of an export conspiracy, and thus no motivation to develop testimony on that subject. *Id.* at 1291-92. The majority declines to review this holding, again because the NUE and Zenith briefs do not specifically address it.

I would hold that the limitation with respect to export matters was an error of law. The badge of trustworthiness for former testimony admissible under Rule 804(b)(1) is the fact that in the former proceeding the present opponent had an adequate motive for testing it on cross-examination. What was principally relevant in the Market Stabilization proceeding was the fact that officials met together for the purpose of acting in concert. There was a strong motive to develop the facts about what occurred at those meetings and to negate the suggestion that any steps were taken as a result of the meeting. The testimony is offered for the truth of matters asserted by the witnesses with personal knowledge.[52] If it happens that the witnesses' assertions are relevant to issues in this case which are broader than those in the Market Stabilization case, the testimony is nevertheless admissible on those issues. The test is not identity of issues between the two

---

52. In considering the former testimony for purposes of summary judgment we will, of course, take into account only so much as satisfies Rule 805, which provides:

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rule.

Fed. R. Evid. 805.

proceedings, but rather the relevancy of the testimony to the disposition of the first proceeding, and thus the opportunity and motive of the opponent to develop it. Once the latter is established, the testimony is admissible against the party to the first proceeding for all purposes.

NUE and Zenith also contend that DSS 58-74, as well as other evidence considered by the district court, is fully admissible against all defendants under Fed. R. Evid. 804(b)(3) as statements by the witnesses against pecuniary, proprietary, or criminal law interest. NUE and Zenith urge that "[a]ll of plaintiffs' evidence is . . . admissible under . . . [Rule] 804(b)(3)." Appellant's Brief p. 124. The trial court found that "plaintiffs have made no showing from which we could infer that any of the declarants were conscious that the statements were against their personal interests; and because the testimony is generally consistent with the defense offered in the Six-Company [Market Stabilization] Case[,] [this testimony] is not even against the employers' interests." 505 F. Supp. at 1293. These findings are not clearly erroneous, and they preclude admission of the testimony against the remaining defendants under Rule 804(b)(3). Similarly, the district court was not clearly erroneous in excluding DSS 49, 51, 55-57, and 95 on the grounds that plaintiffs had failed to show a belief by the declarants that the diaries and other writings were against the declarants' interests.[53]

53. Chief Judge Seitz would apply the abuse of discretion standard in reviewing the district court's decision to exclude the testimony under Rule 804(b)(3).

Chief Judge Seitz also observes that the district court's exclusion of this evidence under Rule 804(b)(3) was premised on its earlier holding that the rule requires a showing of the declarants' "*subjective* understanding of the danger to his interests." 505 F. Supp. at 1259-60 (emphasis in original). The court therefore rejected plaintiffs' argument that there is an objective or "reasonable person" test for assessing the declarants' beliefs. Chief Judge Seitz emphasizes that this court is not ruling on the validity of the district court's analysis, because the evidence offered by the plaintiffs would be inadmissible under either construction. The district court noted the extreme improbability of the declarants' prosecution for violations of Japanese antitrust laws based on statements contained within the diaries, and appellants do not challenge that finding on appeal. It would not be clearly erroneous to conclude that a "reasonable man" would not fear for his interests in such circumstances.

For similar reasons we will consider DSS 102, App., vol. 12, at 4909-12, an excerpt of the testimony of Mr. Saeki of MEI in the Japanese Fair Trade Commission Resale Price Maintenance case, to be admissible only against MEI.

G. *Rule 801(d)(2) Materials*

NUE and Zenith offer, against all defendants, DSS 75-92, the protocols given by employees of the defendants in the Market Stabilization case. App., vol. 12, at 4915-5050. These protocols are statements given to investigators of the Japanese Fair Trade Commission. The trial court admitted all except DSS 90 as admissions of a party opponent because, under Rule 801(d)(2)(C) & (D), each is "a statement by a person authorized by him to make a statement concerning the subject, or . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship . . . ." Fed. R. Evid. 801(d)(2)(C), (D); *see* 505 F. Supp. at 1297. Those rulings are not challenged on appeal. However, DSS 90 was excluded because when the statement was made the declarant, Mr. Maekawa, was no longer employed by the defendant Sharp Corporation. 505 F. Supp. at 1296-97. We agree that NUE and Zenith have made an insufficient showing of authority in the case of DSS 90 for its admission under

Rule 801(d)(2)(C) or (D). With that exception these documents will be considered as admissions by a party-opponent in deciding whether summary judgment was proper.

NUE and Zenith contend that a number of documents should have been admitted under Rule 801(d)(2)(A) or (B) as statements of a party or statements as to which a party has manifested adoption or belief in its truth. Appellants' Brief at 131. They point out that many of the documents in question were furnished by the defendants in answers to interrogatories pursuant to Fed. R. Civ. P. 33(c). That rule provides:

> Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

The defendants do not contend that answers to interrogatories would be inadmissible under Rule 801(d)(2)(A) or (B). *See Mangual v. Prudential Lines, Inc.*, 53 F.R.D. 301, 302 (E.D. Pa. 1971). They urge, however, that mere cross-reference does not amount to

an adoption. The trial court noted the problem, and held that a Rule 33(c) submission is not an adoption unless so expressed. 505 F. Supp. at 1244-45.

Rule 33(c) does not permit an answering party to list documents and thereby avoid answering an interrogatory. "The responding party . . . has a 'duty to specify, by category and location' the records from which he knows the answers to the interrogatories can be found." 4A J. Moore, J. Lucas & D. Epstein, Moore's Federal Practice ¶ 33.25[5.5], at 33-149-50 (2d ed. 1983) (footnote omitted). The rule does not contemplate that the response be so couched as to avoid its obvious intent that a cross-reference to documents vouches that the response is contained in the documents. If the responding party does not know the answer to the interrogatory and cannot find the information, then he must so state explicitly under oath. In the absence of such an explicit statement the interrogating party is entitled to assume that a cross-reference to documents adopts the contents of the documents as answers to the interrogatory, and the answering party is estopped from claiming otherwise.

We have examined the Rule 33(c) references in the defendants' answers to interrogatories, and find that they do not contain statements under oath that the answering party does not know or cannot find the information. Thus they have adopted the referenced documents as answers, and the documents are properly admissible under Rule 801(d)(2)(B).

While noting the problem, the trial court did not rule explicitly on admissibility under Rule 801(d)(2)(B) by virtue of a Rule 33(c) reference. Because the parties have not in the briefs before us focused on specific documents, not otherwise admissible, which might qualify for admission under Rule 801(d)(2)(B), and those documents are not outcome determinative for summary judgment purposes, we conclude that admissibility

under that rule should be considered by the trial court on remand.

The Yamada, Tokizane and Kozukue diaries were also offered under Rule 801(d)(2) as admissions by representatives of their respective employers. *See* 505 F. Supp. at 1279, 1285-87; 513 F. Supp. at 1229. Subject to our observations about the interrelationship between Rule 33(C) and Rule 801(d)(2)(B), we hold that the trial court did not err in finding that the diaries were not statements of a party.

H. *Rules 803(24), 804(b)(5) and 803(l)*

We have found no basis for admission against some or all defendants of DSS 49, 51, 55, 56-57, 58-74, 90, 95, 101-04, 1029, and 1035 in the rules considered thus far. Thus we must consider their admissibility under the residual exceptions in Rule 803(24) and Rule 804(b)(5), admitting statements not specifically covered by other rules "if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

The trial court held that NUE and Zenith failed to establish the second requirement of the rules, that the documents were more probative on the point for which they were offered than other evidence which the proponent could procure through reasonable efforts. The court correctly placed this burden on the proponents. *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978). We review the trial court's factual determinations by the clearly erroneous standard. *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 964 (3d Cir. 1981).

We note, moreover, that those exceptions are intended to have a narrow focus. *United States v. Bailey*, 581 F.2d 341, 346 (3d Cir. 1978). We have carefully examined the record and conclude that the trial court did not err in holding that NUE and Zenith failed to meet the burden imposed by the residual exceptions rules.[54]

This court is not able, however, to affirm the exclusion of the JFTC Testimony, DSS 58-74, and the protocol of Mr. Maekawa, DSS 90, under the residual exceptions. In deciding to exclude these documents, the district court apparently applied what it labeled the "Near Miss" theory. Because we reject that theory, we must remand for further consideration of their admissibility under the appropriate legal standard to meet the burden imposed by the residual exceptions rules with regard to DSS 49, 51, 55, 56-57, 95, 101-04, 1029, and 1035.

The Near Miss theory, according to the district court, states that a piece of hearsay evidence may only be offered under the exception that most nearly describes it. If it is excluded under that exception, it may not be offered under the residual exceptions. The district court endorsed this theory "in principle" but noted that many of the hearsay exceptions are so amorphous that strict adherence to the Near Miss theory would virtually eliminate the residual exceptions. The court therefore decided to apply the theory in cases where consideration of the evidence clearly seemed appropriate under a

54. The district court emphasized that the availability of depositions is an important factor in determining whether the proffered hearsay is the most probative evidence on point. 505 F. Supp. at 1264-65. We do not understand the court to have imposed a requirement that depositions must be taken in all cases before hearsay can be considered under the residual exceptions. Clearly other factors are relevant, including the staleness of the deponent's memory and the cost of taking the deposition.

discrete and well-defined exception such as former testimony. Rule 804(b)(1). Otherwise the district court would ignore the theory.

The district court did not directly refer to the Near Miss theory in excluding the JFTC Testimony. The inference that the theory supports the exclusion, however, is not a difficult one.

The most obvious flaw in the theory is the one noted by the district court. We consider this flaw fatal. The residual exceptions cannot be explained by a theory that makes sense for only a few of the twenty-seven other exceptions. The fact that many documents may be considered under Rule 803(24) or Rule 804(b)(5) despite having failed the requirements of one of the other exceptions clearly suggests that the residual exceptions are not dependent on the other exceptions for their meaning.

This points to a more general difficulty with the Near Miss theory, namely that it conflicts with the general function of Rules 803(24) and 804(b)(5). Plainly stated, the theory puts the federal evidence rules back into the straightjacket from which the residual exceptions were intended to free them. *Cf.* J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(24)[01] (1981).

Finally, the theory appears to derive no support from the cases. The district court cites no authority for its position, and in fact the cases support rejection of the theory. *See, e.g., United States v. Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979); *Pittsburgh Press Club v. United States*, 579 F.2d 751, 757-58 (3d Cir. 1978).

For these reasons, we reject the Near Miss theory. The appropriate limitations on the residual exceptions should be found in the rules themselves and in their legislative history. Without doubt the exceptions were not intended to have broad application. This does not warrant, however, the creation of some new theory of

limitation that seems more to complicate matters than to resolve them.

NUE and Zenith offered various documents under Fed. R. Evid. 803(1), "Present Sense Impressions." The district court refused to admit any of the documents under that hearsay exception. This court has admitted some of the documents, DSS 52-54 and 1027, under different exceptions. It is necessary, however, to consider the admissibility of the other documents. There can be no doubt that DSS 51 (the Yamada Diary) is inadmissible under Rule 803(1). As noted elsewhere in this opinion, there is no evidence that the author of that diary actually attended the relevant meetings. The admissibility of the remaining two documents, DSS 55 (the Okuma Diary) and DSS 1029 (the Japan Victor memorandum), is a closer question. There is evidence that both documents were created during or shortly after the relevant meetings. There is, however, no corroboration of the declarations contained within the documents. The exception for present sense impressions is founded on the notion that contemporaneity of observation and impression provide some guarantee against misrepresentation and defective memory. Apparently because this guarantee is not considered totally reliable, however, the rule is generally understood to require that, in addition to contemporaneity, there be some corroborating testimony. *See Houston Oxygen Co. v. Texas*, 139 Tex. 1, 5-7, 161 S.W.2d 474, 476-77 (1942); *cf.* J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(1)[01] (1981). In the present circumstances, there is reason to be skeptical of the documents, and we therefore refuse to admit them solely on the basis of contemporaneity.

Thus DSS 49, 51, 55, 56-57, 90, 95, 101, 103-104, 1029, and 1035 will not be considered part of the summary judgment record. DSS 58-74 and 102 will be

considered against only those defendants as previously discussed.

I. *Other Contentions*

NUE and Zenith urge that the court erred in excluding certain evidence proffered under Rule 803(5) as recorded recollections. Assuming, arguendo, that the recorded recollection rule applies in contexts other than witness testimony, NUE and Zenith have referred to no evidence that any witness "has insufficient recollection to enable him to testify fully and accurately . . . ." Fed. R. Evid. 803(5). In a related contention NUE and Zenith urge that the court erred in requiring testimony establishing a declarant's lack of memory for purposes of Rule 804(a)(3). However, the district court found no other evidence that established lack of memory, and we are aware of none.

J. *Other Evidence*

We have discussed all of the court's contested evidentiary rulings. Other evidence was deemed to be admissible without objection, except for relevancy, and will be considered insofar as relevant in our ruling on summary judgment.

VI. Liability Issues

We have in Part V above established the record that we must review. It includes the materials in the FPS that we hold were erroneously excluded, as well as materials that the trial court agreed should be taken into account. We must now consider separately for each claimed basis of liability and as to each moving defendant whether on every necessary element of their prima facie case there is any evidence from which a reasonable inference could be drawn in favor of NUE and Zenith. As noted in Part IV above, we do not approach that task with any

assumption about burden of production or of persuasion. Rather we assume that the evidentiary materials in question are before the fact-finder and determine whether or not the inferences necessary to support the NUE and Zenith claims are as a matter of law logically permissible.

A. *The Conspiracy*

I. *The Legal Standards for Sufficiency of Evidence of Conspiracy.*

Cases in which, as under section 1 of the Sherman Act and section 73 of the Wilson Tariff Act, liability depends upon the existence of a conspiracy usually will require determining the permissible limits of inferences which may be drawn from circumstantial evidence. That is so because it rarely happens that conspirators in an illegal enterprise will provide direct evidence of agreement. Because the concert of action which violates the antitrust laws will so rarely be the subject of direct evidence, the Supreme Court has permitted broad latitude with respect to what inferences are permissible from the totality of the circumstances. *E.g.*, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 223-28 (1939). There are, however, limits beyond which reasonable inference-drawing degenerates into groundless speculation, limits having due process aspects.[55] Those limits are defined in each case by the laws of logic, which inform the court whether there is a reasonable probability that the asserted conclusion follows from the proven facts. It is not surprising therefore that the courts have had frequent occasion to address the minimum quantum of circumstantial

55. A judgment supported by no evidence on an essential element violates due process. *See, e.g.*, Vachon v. New Hampshire, 414 U.S. 478 (1974) (per curiam); Thompson v. Louisville, 362 U.S. 199 (1960).

evidence sufficient to support an inference of conspiracy.

This court has in a series of cases dealt with the problem of discerning those limits. The context in which that problem has been most frequently presented is in cases in which the court has been asked to draw an inference of concert of action from the circumstantial evidence of conscious parallel conduct by the defendants. Certainly such circumstantial evidence has some tendency to make the existence of concert of action more probable than it would be without such evidence. Fed. R. Evid. 401. That standard of admissibility, however, is not determinative of the question whether such evidence, standing alone, can as a matter of due process be relied upon to support such an inference. While conscious parallel conduct has some tendency suggestive of concert of action, the tendency is so slight that we have held that circumstance, standing alone, to be legally insufficient. *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 890-91 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981) (parallel refusals to lend); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 207-09 (3d Cir. 1980) (parallel refusals to deal); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (parallel lease terms); *Venzie Corp. v. United States Mineral Prod. Co., Inc.*, 521 F.2d 1309, 1314 (3d Cir. 1975) (parallel refusals to deal); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 202-07 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962) (parallel terms of sale). These cases are merely illustrations of the more general proposition that there are legal limitations upon the inferences which may be drawn from circumstantial evidence, which must be determined in light of the ultimate fact in issue and the totality of relevant circumstantial evidence having any tendency to make the existence of that fact more probable.

When there is direct evidence of concert of action -- a written agreement, or a memorandum of what transpired at a meeting, for example -- the legal problem facing a court is different. Then it is not faced with the limitations of the inference-drawing process, for such direct evidence "tends to show the existence of a fact in question [concert of action], without the intervention of the proof of any other fact . . . ." Black's Law Dictionary 414 (5th ed. 1979). Rather, the court must simply determine whether, if the fact-finder were to credit the direct evidence of the fact in issue, the existence of that fact would have the legal significance urged by the proponent of the credited evidence. Would direct evidence of a horizontal agreement to fix resale prices in Japan, for example, have any legal significance in this action? Unlike most of the cases referred to in the preceding paragraph, this case presents a record in which there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred. Thus none of those conscious parallelism cases can be dispositive on the propriety of summary judgment in this case. They deal not with the substantive question of what is a violation of section 1 of the Sherman Act, but with the adjective question of how such a violation may be proved circumstantially. Here, direct evidence and circumstantial evidence may validly be considered to cumulate and reinforce with respect to the ultimate facts in issue. For example direct evidence of some kinds of concert of action like price fixing in Japan may be circumstantial evidence of a broader conspiracy. A piece of circumstantial evidence like conscious parallel conduct, marginally relevant, but standing alone legally insufficient to support an inference of those ultimate facts, may nevertheless be taken into account along

with such direct evidence, and such other circumstantial evidence, as the record contains.

This process of examining all of the admissible evidence, direct and circumstantial, in order to determine what legitimate inferences could be drawn as to the ultimate facts in issue is what the Supreme Court had in mind when in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962), it warned against fragmentizing or compartmentalizing the evidence in an antitrust conspiracy case. *See American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1253 (3d Cir. 1975) With that admonition in mind we turn to the conspiracy alleged by NUE and Zenith.

2. *The NUE-Zenith Theory of the Case*

As noted in Part I, *supra*, NUE and Zenith charge that the defendants conspired to fix and maintain artificially high prices for their products sold in Japan, while maintaining artificially low prices for those products in the United States, to the injury of American television manufacturers.

In ruling on the summary judgment motions the trial court assumed, correctly, that there is evidence in the record from which a fact-finder could conclude that the defendant Japanese manufacturers sold comparable television sets in the United States at prices significantly below the prices charged in the Japanese home market. Such a differential, even if regarded as consciously parallel business behavior, obviously would not establish a violation of section 1 of the Sherman Act or of the Wilson Tariff Act. NUE and Zenith therefore also charge that the Japanese manufacturers, who in the aggregate had manufacturing capacity in excess of what could be absorbed by the Japanese home market at a desirable price, entered into an agreement or understanding to stabilize prices in that market. While

such an agreement or understanding was unlawful under Japanese law, standing alone it would normally be beyond the reach of American law. NUE and Zenith contend, however, that its necessary effect was to make it possible for the conspirators to sell at prices in the American market below the prices at which they could successfully compete.

The defendants urge that even if there was such a home market horizontal price-fixing agreement it would not be a violation of American law so long as their behavior in the American market was behavior in the American market was non-conspiratorial and pro-competitive. NUE and Zenith do not agree that a price-fixing conspiracy in Japan, having the effect of permitting each of its members to cut prices in the American market, is beyond the reach of American antitrust law. That question is not free from doubt. *See, e.g., Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 608-15 (9th Cir. 1976). NUE and Zenith urge, however, that the question is not presented here, because they also charge that the defendants entered into certain agreements respecting the export of consumer electronic products. One feature of these alleged agreements was that each manufacturer would confine itself to sales to five companies in the United States. Other features were secret rebates and sales at prices that produced losses. The effect of those agreements, they urge, was to reduce, if not eliminate, competition among the Japanese manufacturers in the American market, and permit the full effect of the support derived from home market price stabilization to be concentrated upon competition with American manufacturers.

A horizontal allocation of customers in the American market would, of course, be a violation of section 1 of the Sherman Act. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). It would not

ordinarily be one for which primary line competitors like NUE and Zenith could seek recovery under section 4 of the Clayton Act, however, since it would leave them free to compete for all customers, and tend to insulate them from competition. Thus it would not injure their business or property. When coupled with a home market price stabilization conspiracy in Japan, however, the effect on them would be different. Price stabilization in Japan coupled with customer allocation in the United States would tend to permit separate Japanese manufacturers to concentrate their predatory tactics on separate selected American mass merchandisers, insulated from price competition at home and from Japanese competition here. The full brunt of the support derived from home market price stabilization could thus be concentrated against the American manufacturers competing for sales to the retailers in question. We hold that if the evidence would permit a finding that there was a conspiracy having these features, it would support the conclusion that there were Sherman Act and Wilson Tariff Act violations for which NUE and Zenith may recover under section 4 of the Clayton Act.

In so holding we reject the contention, advanced principally by MELCO, that the NUE and Zenith complaints do not charge conduct which as a matter of customary international law is within the jurisdictional reach of American antitrust law. We have in this court adopted the test, first articulated in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-45 (2d Cir. 1945), that the Sherman Act reaches conduct abroad which is intended to and does have an impact on United States commerce. *See Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979). Even if we were to refine the *Mannington Mills* test so as to apply the Sherman Act only to conduct which has a *substantial* effect on United States commerce, the NUE

and Zenith allegations would amply satisfy such a test. They charge foreign conduct which in conjunction with American conduct impinged severely on primary-line competition in consumer electronic products in the American market.[56]

3. *Evidence Supporting the NUE-Zenith Conspiracy Theory*

In Part V C, we reserved ruling on the relevancy of evidence we found otherwise admissible. To the extent that we refer to it hereafter, we hold that evidence to be relevant under Rule 402 and admissible under Rule 403.

a. *Evidence Relating to the Japanese Home Market*

It is undisputed that the Japanese television receiver manufacturing industry originated with the utilization by Japanese manufacturers of American technology, and that the encoding system adopted in Japan, that of the National Television Standards Committee, is compatible with that used in the United States. This encoding system differs from the Phase Alternating Line encoding system used in Germany, and the Sequential Color and Memory System used in France and the Soviet Union. 494 F. Supp. at 1204. There are technical differences, acknowledged in the opinion filed simultaneously herewith on the 1916 Antidumping Act claim. But, as that opinion makes clear, the similarities are more significant than the differences.

There is also evidence from which a fact-finder could conclude that although American technology in

56. In Part VI B, *infra*, we address the separate contention that the Act of State or Sovereign Compulsion Doctrine warrants summary judgment.

television receivers is substantially compatible with Japanese broadcast standards, there are governmentally imposed barriers to competition by American or other non-Japanese manufacturers in the Japanese home market. That evidence is contained in the Nehmer, DePodwin, Yamamura and Haley Reports, discussed in Part V C, *supra*. The barriers include high tariff rates, discriminatory ocean freight rates, the Japanese commodity tax, import deposits, limitations on foreign investment in Japan, safety and design standards involving cumbersome inspection and testing procedures, and Japanese government procurement practices. 513 F. Supp. at 1183-84. Besides these governmentally erected barriers to entry, there is evidence of structural barriers to entry arising from the traditional methods of organization of Japanese businesses in *keiretsu*, which effectively control channels of distribution. 513 F. Supp. at 1185. The evidence respecting entry barriers to manufacturers whose products are technically compatible with Japanese broadcast standards would support an inference that a home-market horizontal price-fixing agreement among the Japanese manufacturers was a technically feasible project, because the parties to such an agreement would be protected from price competition from non-parties.

There is also evidence from which a fact-finder could conclude that Japanese manufacturers of consumer electronic products had relatively higher fixed costs than did their American counterparts, resulting from Japanese employment practices, and from Japanese financing practices. Japanese manufacturers are expected to maintain the permanence and stability of their workforce. They also customarily have higher debt-equity ratios, and thus greater fixed obligations. Saxonhouse Report, App., vol. 7, at 2891-92. A fact-finder could reasonably infer that

higher fixed costs provide a strong incentive to utilize manufacturing capacity at the highest possible rate.

The evidence also would permit a finding that the manufacturer defendants, individually and in the aggregate, created plant capacity which exceeded what could reasonably be absorbed by the Japanese home market for consumer electronic products at a desirable price. DePodwin Report, App., vol. 5, Part III. A fact-finder could reasonably infer, from the existence of such excess capacity, that those manufacturers had strong incentives to dispose of the products of this excess capacity in a market outside Japan. Since, however, unlimited price competition in all markets in an industry characterized by excess capacity would be likely to produce losses, a reasonable inference could be drawn that if it were feasible to avoid price competition in one such market, efforts might be made to do so. Because the Japanese home market may be sheltered from outside competition by the entry barriers referred to above, it would not be unreasonable to believe that such collusion was possible.[57]

The evidence also would permit a finding that the Japanese consumer electronic industry was in the years in issue characterized by concentration in a small number of dominant manufacturers, and that those manufacturers belonged to industry trade associations which met at regular intervals and exchanged

57. Chief Judge Seitz believes that appellants' evidence would support an inference that appellees had a motive to fix prices in Japan because of market conditions and high fixed costs. This inference, combined with the other evidence discussed in the court's opinion, is sufficient to reverse the grant of summary judgment. In his opinion, it is unnecessary to consider whether appellants' evidence supports an inference that exports were necessary to maintain this price-fixing conspiracy, or an inference that price-cutting in the United States was required in order "to absorb excess capacity."

information about plant capacity, inventories and pricing. These included the Electronic Industries Association of Japan, the TV Export Council, the Market Stabilization Council, and others. Evidence of concentration among a small number of manufacturers, and of their common membership in industry trade associations which met regularly and exchanged information, would support the inference that there were opportunities for concert of action with respect to home market price stabilization. Such concert of action would make possible export sales at prices sufficiently low to absorb excess capacity.

To the foregoing can be added the evidence in Part VI of the DePodwin Report tending to show that fairly consistently each defendant sold comparable models in the Japanese market at prices higher than they were being sold in the United States. That parallel conduct over a long time permits an inference that each manufacturer was confident that it would be able to support low price sales in the export market by higher price sales at home.

The evidence relating to the Japanese home market to which we have referred thus far, while having some tendency to make the existence of a conspiracy to stabilize home market prices more probable than if there were no such evidence, is probably not, standing alone, sufficient to support a conspiracy finding. What it suggests is a set of economic circumstances providing a strong incentive for horizontal price stabilization, the feasibility of such a program, an opportunity to meet for the purpose of agreeing on it, and pricing activity in the export market consistent with the existence of such an agreement. Were this the only evidence, we would probably agree that a finding of conspiracy would be impermissibly speculative.

Besides the foregoing circumstantial evidence, however, we have considerable direct evidence that

there was agreed-upon price stabilization in Japan. That evidence includes the findings of the Japanese Fair Trade Commission which in Part V C 4 above we have held to be admissible for the truth of the matters reported upon. The report in the Market Stabilization case finds that the six respondents in that case agreed to stabilize the domestic market by establishing high prices and enforcing that agreement among the parties. The report in the 1967 MEI case finds that MEI took steps to require that its Japanese wholesalers maintain high resale prices. Moreover the evidence of what transpired at certain meetings, which in Part V E we have held to be admissible, tends to show that the participation of the defendants in various trade groups led to agreements on price stabilization. There is, moreover, direct evidence of the exchange of production and inventory statistics which would be necessary for the functioning of a horizontal price stabilization agreement.

The trial court rejected the significance of such of the Japanese price-fixing evidence as was deemed admissible on the theory that it would at best reflect a policy of increasing the margins of wholesalers and retailers. 513 F. Supp. at 1208, 1214. Entirely apart from the fact that exchanges of inventory and production data suggest far more than this, what the court has done is to select one of several permissible inferences to the exclusion of other equally permissible inferences. The obvious first step in a home market price stabilization scheme would be retail and wholesale price stabilization, but a fact-finder could reasonably conclude that no manufacturer would be likely to participate in such a scheme except for the long-range purpose of protecting its own profit margins. Moreover horizontal resale price maintenance agreements may have redounded to the benefit of the Japanese manufacturers by permitting them to ensure quality

and warranty control, to maintain brand image and consumer confidence, and to protect their credit with sales companies. App., vol. 11, at 4622. *See* L. Sullivan, Handbook of Antitrust Law §§ 134-35, at 380-87 (1977).

Liaison counsel for the defendants candidly conceded at oral argument that there was a two year period between 1964 and 1966 during which some discussions about bottom prices in Japan took place among some of the defendant companies. Transcript of argument, Oct. 22, 1982, at 71. The defendants contend, however, that evidence relevant to this period is legally insufficient to prevent the entry of summary judgment because it does not show that the conspiracy to stabilize prices in Japan began earlier or continued later. *Id.* We conclude, however, that the direct evidence of horizontal price-fixing in the periods referred to in the Japanese Fair Trade Commission proceedings, when coupled with the circumstantial evidence to which we have referred, would permit an inference that the conspiracy operated over a longer period. Particularly significant are the circumstances that the trade groups on which the Japanese Fair Trade Commission focused its attention operated over a much longer period, and that, as suggested in the price comparisons which in Part V D 1 we held to be admissible, the higher Japanese home market prices continued over many years. There is direct evidence of a horizontal price-fixing conspiracy in the home market at some points in time, and circumstantial evidence that neither the economic conditions providing an incentive for horizontal price-fixing in the home market, nor the industry circumstances providing opportunity for and feasibility of such a program, nor the price differentials between the home market and the American market, changed. That circumstantial evidence includes exchange of production and inventory statistics, which would facilitate the implementation of a horizontal price

stabilization agreement. *See* DePodwin Report, App., vol. 5, at 1616-17, 1673. While a fact-finder might well conclude that horizontal price-fixing in Japan began in 1964 and ended in 1966, a different conclusion is on this record a permissible one.

We hold, therefore, that on this record a fact-finder could reasonably infer the existence, among some Japanese manufacturers, of an agreement to stabilize prices in the Japanese home market, thereby deriving profits which would support sales at low prices in the United States. The direct and circumstantial evidence of a price stabilization conspiracy in the home market is reinforced by the conclusions of several of the NUE-Zenith economist experts, who, after studying the industry, opine that there was a price-fixing cartel in operation. *See* Nehmer Report; DePodwin Report.

Sony filed the affidavit of Mr. Akio Morita, its president, denying that Sony ever engaged in any price-fixing agreements in Japan. App., vol. 3, at 932. Sony was not a respondent in any Japanese Fair Trade Commission proceedings, and there is little direct evidence that it participated in specific meetings at which price-fixing in Japan was discussed.

Some of the circumstantial evidence respecting the Japanese market is, however, relevant to Sony. Like the six other manufacturing defendants, it could be found to have had higher fixed costs, and to have been protected from competition with American firms in Japan by entry barriers. Moreover there is direct evidence that Sony was a member of some trade groups which could be found to have engaged in price-fixing and was regularly represented at the meetings of those groups. Yajima Diary, App., vol. 12, at 5171-72, 5226. There is direct evidence that Sony was a member of the Japan Machinery Exporters' Association which enforced the five-company rule. Sony's retail prices in the American market were among the highest in the

industry, but it could be found that there were significant price differentials between the American and Japanese markets. Although the evidence linking Sony to a home market price-fixing conspiracy is not strong, we conclude that there is sufficient independent evidence from which a fact-finder could find that it was a member of such a conspiracy.

That conclusion, however, is not applicable to all the defendants. There is no direct evidence that Sears Roebuck & Co. or Motorola, Inc. participated in any meetings at which price-fixing in Japan was discussed. The circumstantial evidence about economic conditions in Japan has no probative value against Sears or Motorola. In Part V B above, we hold that before coconspirator statements may be admitted against an alleged member there must be independently admissible evidence of its membership. We have carefully examined the record, and conclude that there is no independently admissible evidence connecting Sears Roebuck & Co. or Motorola, Inc. with any agreement respecting price stabilization in Japan. NUE and Zenith contend that because these defendants became participants in the export aspects of an overall conspiracy having both home market and export aspects, the home market evidence should be admitted against them under Rule 801(d)(2)(E). We address that contention hereafter.

b. *Evidence Relating to Exports to the United States*

We have already noted the Japanese manufacturers' high fixed costs, higher debt-equity ratios (Saxonhouse Report, App., vol. 7, at 2887), and more stable workforce. A factfinder could reasonably infer that these conditions created an incentive to find a market for excess capacity. We have also noted that Japanese and American television standards are compatible. Thus, among the developed countries likely to be a market for

excess capacity of the Japanese manufacturers, the United States was the market with the greatest potential. This evidence would permit a factfinder to infer that the Japanese manufacturers had a strong incentive to find a market for excess capacity in the United States. Moreover, when considered in light of the evidence respecting price stabilization in the home market, it would permit a factfinder to infer a motive to sell at prices low enough to eliminate competition in the United States market by American firms.[58] The trial court reasoned that "[n]o defendant, or any other businessman for that matter, would have any motivation for entering a conspiracy to sell at low prices." 513 F. Supp. at 1238. On this record a fact-finder could find such a motive. Moreover a fact-finder could find, from the evidence od price stabilization in Japan, that the Japanese manufacturers, if they acted in concert, had the ability to carry out a predatory export raid on the American market sustained by home market profits. There is record evidence that the Japanese Ministry of International Trade and Industry (MITI) plays an important role in the supervision of Japanese firms engaging in exports. The purpose of that supervision is to discourage the sale of Japanese products in other countries at prices which might result in charges of dumping; charges which might encourage the erection in those countries of trade barriers against Japanese products. With the apparent encouragement of MITI, the seven principal Japanese manufacturers of television receivers between 1963 and 1973 became signatories of formal written agreements which established minimum prices for television receivers sold

58. As noted earlier at footnote 57, Chief Judge Seitz believes it is unnecessary to consider whether appellants' evidence supports an inference that exports of "excess capacity" were necessary to maintain appellees' price fixing conspiracy in Japan.

for export to the United States. Similar agreements were made with respect to radio receivers and tape equipment. At the same time the seven manufacturers were members of the Japan Machinery Exporters' Association, an export trade association which required all its members to register the names of all customers who purchased television receivers for the United States market, and which, after 1967, limited the number of customers so registered to five. While the minimum price agreements appear to have been encouraged, if not mandated, by MITI, a fact-finder could conclude that the five-company rule was the result of non-governmental action.

Putting aside for the moment the role of the Japanese government, an agreement fixing minimum prices for the American market would ordinarily be a per se violation of section 1 of the Sherman Act. Thus the United States might sue to enjoin enforcement of such an agreement, or a purchaser might seek damages under section 4 of the Clayton Act. Since, however, the effect of a horizontal agreement among manufacturers to set minimum prices would in isolation protect non-party competitors like NUE and Zenith from competition, they could not, absent other circumstances, bring a section 4 suit, because they could not show the requisite injury to their business or property. *E.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969); *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 254-55 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). Likewise, a horizontal agreement to allocate customers in the American market would ordinarily be a per se violation of section 1. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 606-12 (1972). But again, such an agreement would not, absent other circumstances, produce an injury to the business or property of a non-party competitor.

There is record evidence, however, of other circumstances suggesting that NUE and Zenith may have been injured in their business or property from the existence of what they refer to as an export cartel. First, there is evidence from which a fact-finder might conclude that the minimum prices agreed upon were in fact dumping prices. That evidence includes the finding made in investigations under the Antidumping Act of 1921 (Part V C 2) and several expert opinions (Part V D). The collusive establishment of dumping prices could support an inference of collective predatory intention to harm American competitors. Next, there is substantial evidence that with the exception of Sony, the defendant manufacturers and their subsidiaries engaged in various schemes to rebate part of the sales price to a number of mass marketing retail customers in the United States. The evidence would permit a finding that efforts were made to conceal this activity both from MITI and from the United States Customs Service, and a finding that at least some of the manufacturers knew that others were engaged in rebating but did not report it to either government. There is expert opinion evidence that export sales generally were at prices which produced losses, often as high as twenty-five percent on sales. Long-term sales below cost are circumstantial evidence from which one can draw an inference of intentional predatory pricing. Finally, there is evidence that the five-company rule operated at a time when a fact-finder might conclude that there was a horizontal price-fixing agreement in Japan. Thus a fact-finder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market.

The trial court questioned the probative value of the five-customer rule as illusory because a defendant could avoid its impact by creating a wholly-owned American sales subsidiary, and because agreements limiting customers normally tend to keep prices high. 513 F. Supp. at 1190. Neither reason is sufficient to exclude as a matter of law the inference that the five customer rule was intended to prevent competition among the Japanese manufacturers in the American market so that all could concentrate their competition on American firms.

We hold that a finding of a conspiracy to sell at artificially high prices in Japan while at the same time selling at artificially low prices in the United States would support liability to NUE and Zenith under section 4 of the Clayton Act, assuming they could show that they were in fact damaged. The defendants do not on this appeal contend that the FPS is deficient with respect to plaintiffs' proof of damage.

As with the evidence relating to the Japanese home market, however, we must separately consider what independent evidence connects each defendant to a conspiracy having export aspects.

(1) *Motorola, Inc.*

While Motorola, Inc. was an American competitor it was, if anything, a victim of the alleged conspiracy. In 1974 it sold its Consumer Products Division to the Matsushita interests. That transaction has no tendency to prove that Motorola joined in a conspiracy or even knew of its existence. Other evidence relied on by NUE and Zenith to connect Motorola to the conspiracy is evidence that in 1968 and 1969 it purchased from Sharp fourteen-inch color television receivers for resale. In the course of those transactions it became aware that six Japanese manufacturers were acting in concert, under

the auspices of MITI, to establish minimum prices for that model. Motorola, a fact-finder could conclude, agreed with Sharp, Toshiba and Aiko that it would pay the MITI minimum price but would receive secret rebates.

This is, perhaps, circumstantial evidence having some tendency to connect Motorola to the alleged conspiracy. We hold it to be legally insufficient, however, because there is no evidence that Motorola had any knowledge of Japanese home market price stabilization, or of the five-company rule, or any knowledge that the suppliers with which it dealt were acting in concert with respect to evasion of the minimum prices agreed upon with MITI. *Cf. Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 (1968). At best the rebating evidence admissible against Motorola would support an inference that it conspired separately with several Japanese suppliers to conceal dumping.

NUE and Zenith also rely on the fact that in 1973 Motorola entered into an agreement with Awai Co., Ltd., a Japanese company controlled by Sony, to market Motorola's Quasar console color television in Japan, and that it aborted that agreement when it sold its Consumer Products Division to Matsushita. The abandonment of Motorola's effort to penetrate the Japanese home market is said to have advanced the purposes of the overall conspiracy by helping to insulate the conspirators from home market price competition. Granting that a fact-finder could legitimately so conclude, that fact does not support an inference that Motorola was a conspirator. Obviously it was subject to the entry barriers in the Japanese home market to which we have referred in Part VI A 3 a above, and was in the American market a target of the alleged conspiracy. Its decision to bail out by selling to Matsushita does not support an inference that it became a conspirator. *See*

generally Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1072-73 (3d Cir. 1978).

We conclude, therefore, that there is no independent evidence connecting Motorola to either the home market side or the export side of the alleged conspiracy.

(2) *Sears Roebuck & Co.*

Sears Roebuck & Co. was an owner of twenty-five percent of Warwick Electronics, Inc., a manufacturer of television receivers for private label retail customers. It was also, in the years in question, one of the largest retailers of consumer electronic products in the American market. In 1976 Warwick, a failing enterprise, was acquired by a Sanyo Electric subsidiary in which Sears retained a twenty-five percent interest. As in the case of Motorola's sale of its Consumer Products Division to Matsushita, the Warwick-Sanyo transaction has no tendency to prove that Sears joined in a conspiracy or ever knew of its existence. There is evidence from which it could be found that Sears negotiated prices from Sanyo and Toshiba substantially lower than the minimum prices fixed in the MITI-sponsored minimum price agreement, and took steps, over a long period, to conceal these dumping prices from the Japanese government and the United States Customs Service. While that activity, if it occurred, may have been illegal, it was clearly consistent with Sears' economic interest as a retailer. There is no evidence that Sears was aware of retail price stabilization in Japan, or of the five-company rule, or that the suppliers with which it dealt were acting in concert with respect to the evasion of the minimum prices agreed upon with MITI.

It is true that Sears had an investment in Warwick Electronics, Inc. and thus that the solicitation of

dumping prices from Japanese suppliers may be considered to have been inconsistent with its own economic interest as an investor. Uncontradicted record evidence establishes, however, that Sears' interest in Warwick was primarily as a supplier for its retail business, and that it attempted to keep Warwick alive for that purpose during a great part of the alleged conspiracy. When Warwick could not be kept alive Sears acted consistently with its economic interests by retaining an interest in the firm which purchased Warwick's television receiver business. Granting that Sears' solicitation of dumping prices may have been to some extent inconsistent with its economic interest as an investor in Warwick, that circumstance is so slightly probative of a motive to join a conspiracy as, on this record, to be valueless.

There is no evidence that Sears was aware of the five-customer rule. Zenith contends that Sears' refraining from selling television sets in the Japanese home market tended to insulate the defendants from price competition there. There is no evidence that Sears was aware of price stabilization efforts in Japan. There is uncontradicted evidence that Sears' consumer electronic products were not designed for operation in Japan.

We conclude, therefore, that there is no independent evidence connecting Sears to either the home market side or the export side of the alleged conspiracy.

3) *Sony Corporation*

As noted in Part VI A 3 a above, there is some independent evidence linking Sony Corporation with a Japanese market price stabilization conspiracy. It had the same incentive to utilize excess capacity as did the other Japanese manufacturers. Sony was a party to the MITI-sponsored minimum export price agreements. It

was also a member of the Japan Machinery Exporters' Association, and could on that basis be found to be a party to the five-company rule. Sony contends that both the minimum export price agreements and the five-company rule were largely irrelevant to it, becaure unlike other manufacturers its sole export customer in the United States was its wholly-owned marketing subsidiary, Sony Corporation of America (Sonam). The record evidence establishes that Sony's efforts in the American market were concentrated at the upper range of television receiver prices. Moreover, there is no record evidence contradicting the affidavit of Mr. Akio Morita, Sony's Chief Executive Officer, to the effect that neither Sony nor Sonam ever gave any customer hidden discounts or rebates; that Sony was unaware of rebating practices by other manufacturers; that neither ever made sales to private label or original equipment manufacturer customers; that Sony never sold at dumping prices; and that Sony's American sales, representing forty-three percent of its total sales, were consistently profitable.

There is evidence of significant price differentials between Sony's home market and American market pricing. Although Sony sold to only one American distributor, its subsidiary Sonam, a fact-finder could conclude that it insulated other members of the conspiracy from direct competition by adhering to the five-company rule, and was in turn insulated from competition by them in that price segment of the market toward which its efforts were directed. Moreover a fact-finder could conclude that it was able to sell in the American market at prices significantly lower than its home market prices because it was protected from price competition in its price segment of the home market.

However, so far as the record disclosed, Sony never competed directly with NUE or Zenith because these plaintiffs concentrated their efforts at the lower end of

the price scale for consumer electronic products, while Sony concentrated on high quality, high price products. If Sony was found to be part of an overall conspiracy it could be held liable for injury to NUE's and Zenith's business or property caused by the conspiracy, even though its own sales did not directly cause that injury. There is no requirement that a section 4 plaintiff show a separate causal relationship between its injury and the separate actions of each member of a conspiracy.

Admitting that the question is close, Chief Judge Seitz and Judge Meskill believe that the complete lack of evidence that Sony competed with NUE or Zenith establishes that it had no motive to join in the export side of the unitary conspiracy which is the theory of the plaintiffs' case. Absent some evidence suggesting such a motive, the remaining evidence is entirely too speculative to support a prima facie case against Sony. Thus the summary judgment in Sony's favor on the conspiracy charges will be affirmed.

I agree that there must be some evidence linking Sony to the American side of the conspiracy, but conclude that the evidence referred to, while admittedly not substantial, suffices to satisfy the standards for summary judgment.

(4) *MELCO, Mitsubishi Corporation and Mitsubishi International Corporation*

MELCO is primarily a manufacturer of heavy electrical equipment, automotive electrical equipment, elevators, radar, computers, and aerospace equipment. Consumer electrical products exported for sale in the United States represent a tiny proportion of its total sales. Moreover, from 1965 to 1973 MELCO's share of the American market for Japanese-manufactured television receivers never exceeded 3.53 percent of monochrome and 5.52 percent of color receivers. During that same period its total sales of televisions for

the American market never achieved as much as one percent of that market. Considering its tiny market share, its continued participation in this protracted proceeding must be disproportionately burdensome. But while that factor may make us sympathetic to MELCO's plight it does not relieve us of the burden of examining the record evidence in the light most favorable to NUE and Zenith in order to determine if MELCO was entitled to summary judgment.

MELCO was a respondent in the Market Stabilization case. A MELCO representative, Mr. Okuma, attended meetings of the Tenth Day Group. See DSS 89. Mr. Okuma gave a protocol in the Market Stabilization case. Id. There is in these documents, direct evidence of MELCO's participation in the price stabilization conspiracy in Japan. MELCO is a party to the MITI-sponsored minimum export price agreement. It is also a member of the Japan Machinery Exporters' Association. Thus it is a party to the five company agreement.

MELCO urges that it cannot have been a part of any export conspiracy because from April 1970 to October 1974 it sold its consumer electronics products to Mitsubishi Shoji Kaisha (MSK), an independent Japanese trading company, or its American subsidiary, Mitsubishi International Corporation (MIC). After October 1974 MELCO sold its consumer electronic products in Japan to its own wholly-owned subsidiary, Melco Sales, Inc., which imported them to the United States for resale. MELCO contends that it cannot be held responsible for any activities of the Mitsubishi trading company, or even of its own wholly-owned subisidiary. There is evidence of rebating to five customers for MELCO products.

The trial court did not grant summary judgment in MELCO's favor on the theory that it had successfully isolated itself from any predatory pricing of its products

which may have occurred in the American market. Rather it elected "not to reach the question of the agency of MSI, the question whether there is a genuine issue of material fact as to Melco's involvement in the rebate scheme, or the question of the Melco-MC/MIC relationship and the 'Mitsubishi Group,' since at all events these issues of fact cannot be material." 513 F. Supp. at 1281. Under our analysis of the evidentiary issues and the evidence supporting the NUE-Zenith conspiracy theory, we think such issues of fact are material. If there is an agency relationship between MELCO and the sales organizations which marketed its products in the United States, the fact-finder could infer that actions taken by those organizations consistent with the objects of the conspiracy were done in furtherance of it. Thus we have examined the record to determine whether genuine fact issues exist as to the relationship between those organizations and MELCO. We conclude that summary judgment in favor either of MELCO or of Mitsubishi Corporation and Mitsubishi International Corporation is not possible. A fact-finder could reasonably conclude that MELCO was a part of the overall conspiracy and that the sales organizations knowingly joined MELCO in furthering its ends. *A fortiori* that is the case with respect to its subsidiary, Melco Sales, Inc.

(5) *The Remaining Defendants*

There is independent evidence tending to connect each of the remaining defendants to both sides of the alleged conspiracy.

4. *Proof of Injury Arising From Violation of the Antitrust Laws*

Defendants claim that any damage which may have been sustained by NUE and Zenith could not have been

caused by the conspiracy alleged. Their argument is that the minimumprices set in the MITI-sponsored manufacturers' export agreements would tend to insulate the plaintiffs from competition. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484-89 (1977); *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). Since, however, the MITI-sponsored agreements are relied on as evidence of a conspiracy to sell at predatory prices, we need not address this argument.

5. *The Defense of Sovereign Compulsion*

MELCO urges that all the Japanese manufacturer defendants are entitled to summary judgment because the activities of those defendants in Japan were undertaken at the direction of the Japanese Government, as an integral part of its trade policy toward the United States. MELCO's theory is that MITI mandated agreements fixing minimum export prices in order to accommodate United States concerns about dumping and to prevent the development of retaliatory trade barriers against Japanese products. We may assume, without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act. *See, e.g., International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). On this record, summary judgment on that ground is not possible for several reasons.

First, we note that NUE and Zenith rely on the minimum price agreements primarily as evidence of a low export price conspiracy. Moreover, it cannot be said with any degree of certainty that the minimum prices, claimed by the NUE and Zenith experts to be dumping

prices, were in fact determined by the Japanese Government. It is possible to conclude that the government merely provided an umbrella under which the defendants gained an exemption from Japanese antitrust law, and fixed their own export prices. Second, there is abundant evidence suggesting that many defendants departed from the agreed-upon minimums and took steps to conceal their departure from MITI. Thirdly, there is no record evidence suggesting that the five-company rule originated with the Japanese Government. Finally the evidence about price stabilization in the Japanese home market suggests unequivocally that this activity violated the laws of Japan.

Clearly, therefore, a summary judgment in defendants' favor on the defense of sovereign compulsion would be improper.

6. *The* Illinois Brick *Defense*

Certain defendants, relying on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), moved in the trial court for summary judgment against Zenith because Zenith sells all its consumer electronic products to wholesale distributors, all but four of which are independently owned, and not to retailers or consumers. Their theory was that if any injury occurred as a result of the alleged conspiracy, it was an injury to the business or property of the distributors, which could not be passed back to Zenith. According to the defendants, permitting Zenith to recover under section 4 of the Clayton Act would be inconsistent with the Supreme Court's rejection in *Illinois Brick* of the so-called pass-on defense. The trial court carefully analyzed the policies supporting the *Illinois Brick* interpretation of section 4, and held that none of them was implicated in this case. 494 F. Supp. at 1250-56. Because the parties have not briefed or argued the *Illinois Brick* defense on appeal as an

alternate ground for affirmance of the summary judgment, we do not address it.

7. *Conclusion as to the Conspiracy*

We conclude that there was sufficient evidence to raise a genuine issue of material fact as to participation in the conspiracy alleged by NUE and Zenith by all of the defendants except Sony Corporation, Motorola, Inc., and Sears Roebuck & Co. Such a conspiracy would violate section 1 of the Sherman Act and the Wilson Tariff Act, and would be a basis for liability to NUE and Zenith under section 4 of the Clayton Act. Thus the summary judgment in favor of defendants must, except to the extent indicated, be reversed.

B. *The Attempt to Monopolize*

In addition to their section 1 Sherman Act and Wilson Tariff Act claims, NUE and Zenith allege violations of section 2 of the Sherman Act. That section proscribes actual monopolization, attempts at monopolization, and combinations or conspiracies to monopolize. NUE and Zenith do not claim that any individual defendant achieved monopoly power or even a dangerous propensity to acquire such power in the manufacture or sale and distribution of consumer electronic products in the American market. Nor do they contend that individual defendants even attempted to achieve an individual monopoly in that market. Rather, their section 2 claim is predicated on *American Tobacco v. United States*, 328 U.S. 781, 809 (1946), which affirmed a criminal conviction under section 2 of several separate tobacco companies who conspired to acquire or maintain the power to exclude competition from a market in which collectively they had monopoly power, and who intended to exercise it. The trial court recognized that a combination or conspiracy to acquire shared monopoly power and to exercise it would be a

violation of section 2. 513 F. Supp. at 1319. NUE and Zenith relied upon the same evidence of conspiracy to support their section 2 charge as to support the section 1 charge. Since the trial court concluded that there was no evidence of conspiracy, the section 2 charge was also dismissed. 513 F. Supp. at 1321-23. *See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 118 (3d Cir. 1980). Because we conclude that except as to Motorola, Inc., Sears Roebuck & Co. and Sony Corporation, there is evidence of a conspiracy and of the defendants' participation in that conspiracy, we hold that there are on this conspiracy to monopolize claim, as well, disputed issues of material fact.

In the trial court, as a separate ground for summary judgment on the section 2 claim the defendants urged that even with their aggregate share of the American market for television receivers they lacked the monopoly power required by that section. Their aggregate share of that market gradually increased for monocrome receivers from 21.8 percent in 1969 to 49.2 percent in 1977, and for color receivers from 12.2 percent in 1969 to 44.2 percent in 1977. Market share figures for other consumer electronic products are in the record, but it is unclear how the market for each separate product other than television receivers should be defined. Conceding that the NUE-Zenith showing with respect to market share is not an overwhelming demonstration of the existence of monopoly power in the aggregate, we conclude that there are material fact issues both as to the definition of the relevant market for separate product lines and as to the aggregate percentage of such market which would represent monopoly power, in light of the overall picture of the industry.

We hold, therefore, that except for Sony Corporation, Motorola, Inc. and Sears Roebuck & Co., the summary judgment on the section 2 charge in favor of the defendants must be reversed.

C. *The Robinson-Patman Claims*

1. *Discrimination Between Japanese and American Customers*

NUE and Zenith both pleaded Robinson-Patman Act counts based on the fact that the defendants sold consumer electronic products in the Japanese home market at prices significantly higher than those charged for products of like grade and quality in the United States. As noted in Part II A above, Judge Higginbotham dismissed these counts for failure to state a claim upon which relief could be granted. 402 F. Supp. at 246-51. Section 2(a) applies "where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States. . . ." 15 U.S.C. § 13(a) (1982). NUE and Zenith urged that only one sale of a commodity need be for use, consumption, or resale within the United States. After carefully analyzing the less than pellucid statutory language, and the available statutory history of section 2(a) and its predecessors, the trial court concluded that both sales must be for use within the United States. *Id.* at 248.

Essentially for the reasons set forth in Judge Higginbotham's opinion, we agree that Count V of the NUE and Count IV of the Zenith complaints were properly dismissed for failure to state a claim on which relief may be granted.

2. *Discrimination Among American Customers*

Zenith has separately charged that Matsushita Electric Corporation of America, Matsushita Electronics Corporation, Mitsubishi International Corporation, Melco Sales, Inc., Toshiba America, Inc., Hitachi Sales Corporation of America, Sanyo Electric, Inc. and Sharp Electronics Corporation each violated

the Robinson-Patman Act by discriminating in price among American purchasers. Zenith contends, *see* 513 F. Supp. at 1323 nn.389-90, that the other manufacturers should be held to be vicariously liable for such violations because of their participation in a conspiracy. *See Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948); *Pinkerton v. United States*, 328 U.S. 640 (1946). The trial court granted summary judgment in defendants' favor because it found Zenith's Robinson-Patman claim to be "entirely dependent upon its allegation that the defendants engaged in a low-price export conspiracy . . . ." 513 F. Supp. at 1325. Since the court found no evidence of such a conspiracy it held that Zenith lacked standing under sections 4 and 16 of the Clayton Act to complain about the alleged price discriminations. 513 F. Supp. at 1325, 1328.

Because, except as to Sony Corporation, Sears-Roebuck & Co., and Motorola, Inc., the trial court's grant of summary judgment with respect to the alleged conspiracy was error, the reason relied upon for dismissing Zenith's separate Robinson-Patman Act claim is untenable. The court did not decide whether or not Zenith's FPS contains sufficient evidence from which a fact-finder could find the elements of a Robinson-Patman claim on behalf of a primary-line competitor. 513 F. Supp. at 1329. Since that issue has not been briefed here we conclude that we should not address it in the first instance. The summary judgment dismissing Zenith's Robinson-Patman claim is unsupportable for the reasons relied upon by the trial court. It should be vacated without prejudice to reconsideration of a summary judgment on other grounds. We note, however, that a primary line Robinson-Patman Act claim involves factually complex issues. *See generally O. Hommell Co. v. Ferro Corp.*, 659 F.2d 340 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

D. *Zenith's Clayton Act Section 7 Claim*

Zenith asserts that the acquisition by MEI in 1974 of Motorola's Consumer Products Division and its trademark "Quasar," and Sanyo's acquisition in 1976 of Warwick Electronics, Inc., violated section 7 of the Clayton Act. Other defendants are alleged to be vicariously liable for this section 7 violation. *See* 513 F. Supp. at 1329. That charge is independent of any conspiracy or intent, since section 7 prohibits acquisitions the effect of which may be substantially to lessen competition or create monopoly in any line of commerce in any section of the country. In this case neither the relevant product market (television receivers) nor the geographic market (the United States) is in dispute. The defendants against whom the section 7 charge is made dispute three issues. The first is whether the FPS contains evidence from which it could be found that the acquisitions had the requisite tendency to lessen competition or create a monopoly. *See United States v. General Dynamics Corp.*, 415 U.S. 486, 494-506 (1974); *United States v. Von's Grocery Co.*, 384 U.S. 270, 275-77 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 372 n.46 (1963); *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 331-32 (1962). The second is whether, in any event, the FPS establishes that Warwick was a failing enterprise and thus not a competitive force. *See United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555-56 (1971); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 136-39 (1969); *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291, 299-303 (1930). The third is whether, assuming a section 7 violation, it is one which would permit Zenith to obtain relief under section 4 or 16 of the Clayton Act.

The trial court did not resolve the first two issues. It held that as a matter of law NUE and Zenith lacked standing to obtain relief under those sections for any

section 7 violation which may have occurred, because aside from the conspiracy, which of course is the subject of the section 1 and 2 Sherman Act claims, they have shown no injury from those violations. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484-89 (1977); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1130-36 (1976).

In light of our holding that NUE and Zenith have adduced sufficient evidence to create a material issue concerning the alleged conspiracy, we must reverse the district court's dismissal of Zenith's section 7 claims as to all defendants except Sears, Motorola, and Sony. We express no opinion on the merits of defenses raised by defendants concerning whether the acquisitions in question had the requisite tendency to lessen competition or to create a monopoly, or whether the FPS establishes that Warwick was a failing enterprise. We also need not address the Clayton Act defenses raised in Motorola's separate brief.

E. *Clayton Act Injunctive Relief*

In addition to their prayer for damages under section 4 of the Clayton Act NUE and Zenith seek injunctive relief under section 16 of that Act for defendants' alleged violations of the various antitrust provisions enumerated in their complaints. In the trial court's only mention of plaintiffs' request for an injunction, it held that plaintiffs' claim was moot since the manufacturers' agreements and Japan Machinery Exporters' Association rules are no longer in effect.

On appeal, the plaintiffs contend that the court erred in its determination that the plaintiffs' voluntary cessation of the aforementioned agreements alone rendered plaintiffs' claim for injunctive relief moot. We agree. In *Phillips v. Pennsylvania Higher Education Assistance*, 657 F.2d 554 (3d Cir. 1981), we held that voluntary cessation of allegedly illegal conduct does not

by itself make a case moot. Instead, we said that a case becomes moot if (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will reoccur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *Id.* at 569. Because the trial court relied solely on an improper factor, to the exclusion of proper factors, we believe it abused its discretion in dismissing plaintiffs' claim for injunctive relief. Id. at 570 (standard of review of district court's grant or dismissal of claim for injunction is abuse of discretion). Therefore, we will vacate the court's dismissal of plaintiffs' claim for injunctive relief as to all defendants except Sears, Motorola, and Sony.

VII. Conclusion

The summary judgment in favor of Sony Corporation, Motorola, Inc., and Sears Roebuck & Co. on the NUE and Zenith claims under sections 1 and 2 of the Sherman Act, under the Wilson Tariff Act, and under section 7 of the Clayton Act will be affirmed. The summary judgment dismissing counts V of the NUE complaint and Count IV of the Zenith complaint will be affirmed. The summary judgment in favor of the remaining defendants on the section 1 and 2 Sherman Act claims, the Wilson Tariff Act claim, the section 7 Clayton Act claim, the Robinson-Patman Act claim addressed to discriminatory sales to American customers, and the claim for injunctive relief under section 16 of the Clayton Act will be reversed. The author of this opinion would also reverse the summary judgment in favor of Sony Corporation.

Costs will be taxed in favor of Sony Corporation, Motorola, Inc., and Sears Roebuck & Co. against NUE and Zenith, and in favor of NUE and Zenith against the remaining defendants. Each party is directed to furnish to the Clerk of this Court within ten (10) days of the entry

of judgment a brief written statement of its views as to allocation of costs among the parties. *See* Fed. R. App. P. 39(a).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

18 O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-[illegible]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2080, 81-2331/32/33

No. 80-2080

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D.C. MDL No. 189)

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC
CORPORATION,

Appellants

No. 81-2331

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D.C. MDL No. 189)

ZENITH RADIO CORPORATION,
Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D.C. Civ. No. 74-2451)

No. 81-2332

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D.C. MDL No. 189)

NATIONAL UNION ELECTRIC
CORPORATION,

Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D.C. Civ. No. 74-3247)

No. 81-2333

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D.C. MDL No. 189)

ZENITH RADIO CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D.C. Civ. No. 74-2451)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued: October 21 and 22, 1983
Before: SEITZ, *Chief Judge*, GIBBONS
and MESKILL*, *Circuit Judges*

(Opinion Filed: December 5, 1983)

EDWIN P. ROME, ESQ.
(Argued)
MORRIS L. WEISBERG, ESQ.
WILLIAM H. ROBERTS, ESQ.
ARNOLD I. KALMAN, ESQ.
KATHLEEN HERZOG LARKIN, ESQ.
NORMAN E. GREENSPAN, ESQ.
MARGARET B. DARDESS, ESQ.
BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103

Of Counsel:

PHILIP J. CURTIS, ESQ.
JOHN BORST, JR., ESQ.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Appellants,
Zenith Radio Corporation and
National Union Electric Corporation

*Hon. Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

ASA D. SOKOLOW, ESQ.
RENEE J. ROBERTS, ESQ.
BRIAN G. LUSTBADER, ESQ.
ROSENMAN COLIN FREUND LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

JOSHUA F. GREENBERG, ESQ.
RANDOLPH S. SHERMAN, ESQ.
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022

FRANKLIN POUL, ESQ.
WOLF, BLOCK, SCHORR & SOLIS-COHEN
Packard Building
Philadelphia, Pennsylvania 19102

Attorneys for Appellees,
Sony Corporation and Sony Corporation of America

LOUIS A. LEHR, JR., ESQ.
STANLEY M. LIPNICK, ESQ.
JOHN L. ROPIEQUET, ESQ.
CAROL R. KANTER, ESQ.
ARNSTEIN, GLUCK & LEHR
7500 Sears Tower
Chicago, Illinois 60606

HARRY SHORT, ESQ.
LIEBERT, SHORT, FITZPATRICK & LAVIN
Three Parkway, Suite 1900
17th & Benjamin Franklin Parkway
Philadelphia, Pennsylvania 19102

Of Counsel:

PHILIP M. KNOX, JR., ESQ.
CHARLES A. TAUSCHE, ESQ.
ANN M. COONS, ESQ.
Law Department

Sears, Roebuck and Co.
Sears Tower
Chicago, Illinois 60684

Attorneys for Appellee,
Sears, Roebuck and Co.

HENRY T. REATH, ESQ.
TERRY R. BRODERICK, ESQ.
DUANE, MORRIS & HECKSCHER
One Franklin Plaza
Philadelphia, Pennsylvania 19102

BAKER & McKENZIE
Suite 700, Prudential Plaza
Chicago, Illinois 60601

HOKEN S. SEKI, ESQ.
SEKI, JARVIS & LYNCH
Three First National Plaza
Suite 717
70 West Madison Street
Chicago, Illinois 60602

JOHN T. DOLAN, ESQ.
ARNOLD B. CALMANN, ESQ.
CRUMMY, DEL DEO, DOLAN & PURCELL
Gateway One
Newark, New Jersey 07102

Attorneys for Appellee,
Mitsubishi Electric Corporation

CHARLES F. SCHIRMEISTER, ESQ.
CHARLES Z. KRUEGER, ESQ.
REID & PRIEST
40 Wall Street
New York, New York 10005

THOMAS N. O'NEILL, JR., ESQ.
MONTGOMERY, McCRACKEN, WALKER & RHOADS
Three Parkway, 20th Floor

17th & Benjamin Franklin Parkway
Philadelphia, Pennsylvania 19102

Attorneys for Appellees,
Mitsubishi Corporation and
Mitsubishi International Corporation

DONALD ZOELLER, ESQ.
MUDGE ROSE GUTHRIE & ALEXANDER
20 Broad Street
New York, New York 10005

DRINKER BIDDLE & REATH
1100 Philadelphia National Bank
Building
Broad & Chestnut Streets
Philadelphia, Pennsylvania 1910[illegible]

Liaison Counsel for Appellees,
Attorneys for Toshiba Defendants

WHITMAN & RANSOM
522 Fifth Avenue
New York, New York 10036

HUNT KERR BLOOM HITCHNER O'BRIEN
& CONRAD
The Drexel Building, 14th Floor
15th & Walnut Streets
Philadelphia, Pennsylvania 19102

Attorneys for Sanyo Apppellees

THOMAS P. COFFEY, ESQ.
E. HOUSTAON HARSHA, ESQ.
KARL F. NYGREN, ESQ.
KIRKLAND & ELLIS
Standard Oil Building
200 East Randolph Drive
Chicago, Illinois 60601

OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Building
Philadelphia, Pennsylvania 19102

Attorneys for Motorola Appellee

PETER J. GARTLAND
PETER A. DANKIN
LANCE GOTTHOFFER
EDWARD H. MARTIN
WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022

DECHERT PRICE & RHOADS
3400 Centre Sq. West
1500 Market Street
Philadelphia, Pennsylvania 19102

Attorneys for the Sharp Appellees

MORGAN, LEWIS & BOCKIUS
2100 The Fidelity Building
123 South Broad Street
Philadelphia, Pennsylvania 19109

IRA M. MILLSTEIN, Esq.
A. PAUL VICTOR, ESQ.
JOEL B. HARRIS, ESQ.
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153

Attorneys for Matsushita Appellees

CARL W. SCHWARZ, ESQ.
(argued)
WILLIAM H. BARRETT, ESQ.
METZGER, SHADYAC & SCHWARZ

One Farragut Square South N.W.
Washington, D.C. 20006

Attorneys for Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha and Hitachi Sales Corp. of America

HUNT, KERR, BLOOM & HITCHNER
The Drexel Building, 14th Floor
15th and Walnut Streets
Philadelphia, Pennsylvania 19102

H. WILLIAM TANAKA, ESQ.
TANAKA, WALDERS & RITGER
1919 Pennsylvania Avenue, S.W.
Suite 303
Washington, D.C. 20006

Attorneys for Hitachi, Ltd., et al.

OPINION OF THE COURT

SEITZ, *Chief Judge*.

The procedural history of this complex antitrust litigation has been set forth in the immediately preceding opinion. As described in that opinion, plaintiffs are Zenith Electric Corporation [Zenith] and National Union Electric Corporation [NUE]. Defendants are various Japanese and American companies. This opinion addresses plaintiffs' claims under section 801 of the Revenue Act of 1916, commonly known as the Antidumping Act of 1916 [1916 Act], 15 U.S.C. § 72 (1976).

I.

Plaintiffs' complaints charge that from as early as 1960 to the filing of the complaints, defendants, individually and collectively, have engaged in illegal dumping by selling consumer electronics products [CEPs] in the United States at prices substantially lower

than in Japan. Dumping is "price discrimination between purchasers in different national markets." J. Viner, *Dumping: A Problem in International Trade* 4 (1923, reprinted in 1966). Analysis of plaintiffs' dumping claims in this case thus requires a price comparison between imported CEPs sold in the United States and CEPs sold in Japan.[1]

The 1916 Act makes it illegal to dump imported goods on the United States market with the purpose of destroying or injuring United States industry. The relevant text of the 1916 Act provides:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell, or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles . . . in the principal markets of the country of their production . . . : *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States . . . .

15 U.S.C. § 72 (1976)(emphasis in original).

Plaintiffs' dumping claims reach this court from two different stages in the extended litigation of this complex antitrust case. First, the district court granted partial summary judgment against plaintiffs and dismissed the majority of their individual and

1. Plaintiffs' dumping claims under the 1916 Act are to be distinguished from dumping proceedings under the so-called Antidumping Act of 1921 [1921 Act], 19 U.S.C. § 160 (1976), *repealed by* Trade Agreements Act of 1979, tit. I, § 106(a), 93 Stat. 144. The 1921 Act is administratively enforced and contains no provision for civil or criminal penalties or for treble damages. Unless otherwise noted, use in this opinion of the phrase "dumping claims" refers to claims under the 1916 Act.

conspiracy dumping claims. *Zenith Radio Corporation v. Matsushita Electric Industrial Company*, 494 F. Supp. 1190 (E.D. Pa. 1980). That ruling was based on the district court's determination that all of the television products that defendants imported or sold in the United States, and those non-television products imported or sold in the United States that operated without batteries or that received FM transmissions, were not comparable under the 1916 Act to similar products sold in Japan. Because there can be no liability under the 1916 Act absent a price differential between comparable products, the district court dismissed all of plaintiffs' dumping claims as to these products.

Finding that there was a "substantial ground for difference of opinion" over the interpretation of the Act's comparability requirement, the district court certified its partial summary judgment order for interlocutory review by this court under 28 U.S.C. § 1292(b) (1976). Plaintiffs filed a timely notice of appeal. Sharp Electronics Corporation separately urges affirmance of the summary judgment order on the alternative ground that the district court erred in ruling that the 1953 Treaty of Friendship, Commerce, and Navigation with Japan [Treaty], 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953), did not bar plaintiffs' dumping claims under the 1916 Act. The order granting partial summary judgment is before this court as appeal No. 80-2080.

Before this court resolved that interlocutory appeal, the district court dismissed all of plaintiffs' antitrust claims and Zenith's residual dumping claims[2] and entered a final judgment on these claims under Fed. R. Civ. P. 54(b). *Zenith Radio Corporation v. Matsushita Electric Industrial Company*, 513 F. Supp. 1100 (E.D.

2. Because all of NUE's claims relate to television products, the district court dismissed all of NUE's dumping claims in the first order.

Pa. 1981). We have jurisdiction over Zenith's residual dumping claims under 28 U.S.C. § 1291 (1976). This court ordered that oral argument on appeal No. 80-2080 be consolidated with argument on the appeals from the final judgment order. We address in this opinion the dumping issues presented by all those appeals.

II.

On appeal from summary judgment, plaintiffs' claims under the 1916 Act present four issues. First, we must determine whether the Treaty bars any of plaintiffs' dumping claims. If any of plaintiffs' dumping claims survive that inquiry, we must determine the degree of product comparability required by the 1916 Act. If any of the products that defendants imported or sold in the United States are sufficiently comparable under the 1916 Act to products sold in Japan, we must then determine whether evidence in this summary judgment record creates a genuine issue of fact as to whether defendants "commonly and systematically" sold or agreed to sell CEPs in the United States at prices that were "substantially" lower than the prices at which comparable products were sold in Japan. Finally, we must determine whether evidence in this summary judgment record creates a genuine issue of fact as to whether defendants acted with specific predatory intent. Our standard of review is plenary.

A. *Treaty Issue*

Sharp Electronics Corporation [SEC] is the only defendant to argue that the 1953 Treaty with Japan bars plaintiffs' claims under the 1916 Act. SEC is a New York corporation with its principal place of business in New Jersey. It is a wholly owned subsidiary of another defendant, Sharp Corporation, a Japanese corporation.

SEC imports CEPs from Japan and resells them in this country. It sells no CEPs in Japan. SEC argues that

the Treaty bars application of the 1916 Act to its domestic resale pricing of Japanese-made CEPs and maintains that all of plaintiffs' dumping claims against it should be dismissed.

SEC relies on Article XVI of the Treaty, which provides as follows:

> Products of either Party [Japan or the United States] shall be accorded, within the territories of the other Party, national treatment . . . in all matters affecting internal taxation, sale, distribution, storage and use.

SEC argues that application of the 1916 Act to Japanese-made CEPs offered for resale in the United States discriminates against those goods in violation of Article XVI of the Treaty. The district court rejected this argument and held that the Treaty does not bar plaintiffs' dumping claims against SEC. We agree with that holding for several reasons.

First, Article XVI protects imported goods from discriminatory treatment only after the importation process has been completed and the goods are "within the territory of the other Party." Plaintiffs claim that SEC has violated the 1916 Act by importing CEPs into the United States at prices substantially lower than the prices at which comparable CEPs were sold in Japan. To the extent that the 1916 Act regulates this import activity, it does not discriminate against Japanese products that are "within the territory" of the United States. As SEC concedes, the Treaty does not restrict the rights of the United States to regulate imports.

Second, Article XVI prohibits discriminatory treatment only in matters "affecting internal taxation, sale, distribution, storage and use." The Treaty does not restrict the rights of the United States to regulate unfair competition from abroad. Article XIV(4) of the Treaty provides that "[e]ither Party may impose prohibitions or

restrictions . . . in the interest of preventing deceptive or unfair practices." The 1916 Act prohibits anticompetitive price discrimination between products imported or sold in the United States and comparable products sold in the exporting country. As a restriction on unfair trade practices, the 1916 Act is clearly a regulation allowed by the Treaty.

Third, Article XVI does not require that imported and domestic goods be given identical treatment. It only requires that imported goods be accorded "national treatment." Article XXII(1) defines that term to mean "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to . . . products . . . of such Party."

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), prohibits anticompetitive price discrimination between two products of "like grade and quality" where both sales occur in the United States. *Zenith Corporation v. Matsushita Electric Industrial Company*, 402 F. Supp. 244, 248-49 (E.D. Pa. 1975). The 1916 Act likewise prohibits anticompetitive price discrimination between two comparable products where an imported product is sold at a lower price in the United States than in the exporting country. We do not believe that application of the 1916 Act to goods imported into or sold in the United States violates the mandate of Article XVI to accord "national treatment" to Japanese products sold in the United States.

For the reasons stated above, we hold that application of the 1916 Act to Japanese-made CEPs sold in the United States does not violate Article XVI of the Treaty.[3] Thus, we will affirm the partial summary

3. In *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 183 (1982), the United States Supreme Court held that a wholly owned Japanese subsidiary that is incorporated in the United States

judgment order of the district court insofar as it holds that the Treaty does not bar plaintiffs' dumping claims against SEC.

B. *Comparability*

The first element necessary to a finding of dumping under the 1916 Act is proof that a price differential exists between two comparable products, one of which is imported or sold in the United States and the other of which is sold in the exporting country. During discovery, the district court required plaintiffs to pair models of CEPs sold in the United States with comparable models sold in Japan and to supply the model-by-model price comparisons on which they intended to base their dumping claims.

After plaintiffs filed their model-by-model price comparisons, defendants moved for summary judgment. Defendants argued that the models paired in plaintiffs' price comparisons were not comparable under the 1916 Act because of the technical differences that existed between them. Plaintiffs opposed defendants' motion by submitting affidavits that stated that the differences between the paired models were technically insignificant. Plaintiffs, however, do not dispute the existence of the technical differences.

The 1916 Act requires that the prices of products imported or sold in the United States be compared to the

"is not a company of Japan under the Treaty and is therefore not covered by Article VIII(1)." Article VIII(1) allows "[n]ationals and companies" of Japan to hire specified employees of their choice, arguably exempting such companies from Title VII of the Civil Rights Act of 1964. The national status of the company determines whether that company may claim the benefit conferred by Article VIII. The dispute in this case involves Article XVI, which protects the *products* of Japan from discriminatory treatment. Thus, it is the national status of the products and not the company with which we are concerned in this case. The holding in *Sumitomo*, therefore, is inapplicable here.

"actual market value or wholesale price of such articles" sold in the exporting country. The standard of comparability is not defined in the Act. The quoted language, however, should be interpreted in a manner consistent with the legislative purpose behind the enactment. The primary aim of the 1916 Act is to prohibit anticompetitive pricing.[4] Specifically, the Act prohibits price differentials which do not reflect legally significant product differences. It therefore becomes necessary to determine what constitutes a legally significant difference.

The district court correctly held that the 1916 Act does not require a comparison only between identical products. The history of the phrase "actual market value or wholesale price of such articles" supports this holding. That phrase is a term of art borrowed directly from the Tariff Act of 1913, and is defined in that Act: "the words 'value,' or 'actual market value,' or 'wholesale price,' whenever used in this Act, or in any law relating to the appraisement of imported merchandise, shall be construed to be the actual market value or wholesale price of *such, or similar* merchandise comparable in value therewith, as defined in this Act." Tariff Act of 1913, sec. III, ¶ R, 38 Stat. 114, 189 (1913) (emphasis added).[5]

4 In requesting that Congress enact a law prohibiting dumping, Secretary of Commerce William Redfield explained that the law should not prohibit the pricing practices of normal competition, but only those based on predatory motive. Annual Report of the Secretary of Commerce 43 (1915). The legislative history suggests that the majority party in Congress at the time passed the Act to deal with unfair competition, and we will interpret the Act in light of its motivating purpose. We are not unaware, however, that protectionist sentiment ran high in Congress and the country at the time. *See Zenith, supra*, 494 F. Supp. at 1217-23.

5. Discussing product comparison under the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), which prohibits

The district court also correctly rejected plaintiffs' argument that products are comparable under the 1916 Act as long as they are functional equivalents or in the same generic category. Such an expansive reading of the comparability requirement would be inconsistent with the intent of Congress to distinguish legitimate from anticompetitive pricing. Prohibiting price differentials between two non-identical products that serve the same function but appeal to different consumer preferences is as likely to interdict competitive as anticompetitive pricing. We would certainly expect the price of a television encased in a cabinet of fine mahogany to the different from the price of a television encased in a cabinet of inexpensive plastic, yet the mahogany and plastic sets are arguably functional equivalents.

The district court nevertheless held that most of the CEPs paired in plaintiffs' price comparisons were not comparable under the 1916 Act. According to the district court, the proper standards for measuring the technical differences between the CEPs were consumer use and preference, marketability, and commercial interchangeability. 494 F. Supp. at 1241. The district court held that the technological "significance" of these differences, and the accompanying differences in production costs, were irrelevant as a matter of law. *Id.* Because certain technical differences made CEPs sold in Japan inoperable in the United States, and vice versa, the court concluded that the CEPs were noncomparable. We cannot agree with this holding.

The technical differences between the television

price discrimination in domestic sales, Attorney General Herbert Brownell explained that "any anti-price discrimination statute designed to check unfair disparity in commercial treatment must ... come into play in ... business transactions involving the sale of nearly identical goods." Report of Attorney General's National Commission to Study the Antitrust Laws 157-58 (1955).

receivers sold in the United States and Japan are required by the different broadcast frequencies and the different power supplies available in the two countries. Similarly, the technical differences between non-television products sold in the United States and Japan are required by the different power supplies and the different radio frequency bands that the two coutries assign to their FM radio transmissions. Thus, the only differences that we consider here between the products paired in plaintiffs' price comparisons result from the fact that the products sold in Japan have technical components that make them work in Japan, and those sold in the United States have technical components that make them work in the United States. Considered in terms of consumer utility -- *i.e.*, consumer use and preference, marketability, and commercial interchangeability -- the purchaser of a CEP in Japan buys the same thing as the purchaser of a CEP in the United States, an operable CEP. Because the two consumers purchase the same thing, we would, absent other factors, expect them to pay the same price. The technical differences at issue, measured as a matter of consumer utility, cannot explain a price differential, and thus the two products are, absent other differences, comparable under the 1916 Act.

We also find ourselves unable to accept the district court's decision to exclude, as a matter of law, the factors of technical "significance" and production cost in determining whether the CEPs are comparable. These factors are clearly relevant. The district court asserted that there were disputed issues of material fact as to these two factors. None of the parties challenge this assertion on appeal, and we therefore do not review it.

We now turn to consider whether, on the record before us, we may affirm dismissal of any or all of plaintiffs' dumping claims on other grounds.

C. *Void for Vagueness*

Defendants argue that a standard of comparability that permits a comparison of products possessing the technical differences discussed above renders the 1916 Act unconstitutionally vague. Under the doctrine of void-for-vagueness, "criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963).

Plaintiffs here seek only civil remedies under the 1916 Act. However, that Act is also a criminal statute, and the language on which plaintiffs base their civil claims also describes the criminal conduct that the Act proscribes. Assuming without deciding that civil legislation requires as much specificity under the Constitution as a criminal statute, we now address defendants' argument that the 1916 Act is unconstitutionally vague as applied to them.

Defendants' vagueness attack on this appeal is similar but not identical to the one made before the district court. In an early summary judgment motion before Judge Higginbotham, defendants argued that the language of the 1916 Act was so vague as to make the statute unconstitutional on its face. Judge Higginbotham rejected that argument and denied defendants' motion. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 402 F. Supp. 251 (E.D. Pa. 1975). Here, defendants argue that even if the statute is not invalid on its face, application of the 1916 Act to products possessing the technical differences discussed above makes the statute unconstitutionally vague.

For the reasons stated in Judge Higginbotham's opinion, we hold that the language of the 1916 Act is not so vague as to make the statute unconstitutional on its face. We also hold that applying the 1916 Act to products

possessing the technical differences discussed above does not make that statute unconstitutionally vague.

A statute is not unconstitutionally vague if it describes the prohibited conduct with "a reasonable degree of certainty." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). We have held above that products are comparable under the 1916 Act so long as the price differences between them are not based on such legitimate factors as production costs or consumer preference. We believe that application of this standard of comparability does not make the Act so vague as to deny rights protected by the Due Process Clause. Thus, we will not affirm the district court's dismissal of plaintiffs' dumping claims on the ground that the 1916 Act is unconstitutionally vague.

D. *Price Differential*

Assuming for the purposes of this appeal that the CEPs paired in plaintiffs' model-by-model price comparisons are comparable under the 1916 Act, plaintiffs must show that defendants sold CEPs in the United States at prices that were "substantially less" than the prices at which comparable CEPs were sold in Japan. Plaintiffs have produced several sources of evidence on this issue, all of which we have concluded are a proper part of this summary judgment record.[6]

1. *Model-by-Model Price Comparisons*

In response to the district court's Trial Management Order, plaintiffs submitted two expert witness reports that contain detailed model-by-model price comparisons of the CEPs that defendants sold in the United States and in Japan. The report of Walter Lukas was prepared on behalf of NUE and concerns only

6. *See, e.g.*, Slip Op. at section V D (reviewing the district court's evidentiary rulings).

television receivers. The report of Karl Horn and Vito Brugliera was prepared on behalf of Zenith and concerns television receivers, radios, phonographs, and tape and cassette recorders.

The experts performed an analysis of the technologies of various models of defendants' CEPs and from that analysis matched models of CEPs sold in the United States with comparable models sold in Japan. The experts then compared the prices of the paired models for various years within the alleged conspiracy. The price data contained in these model-by-model price comparisons is based on price data contained in defendants' Japanese commodity tax documents and defendants' answers to plaintiffs' interrogatories numbers 45 and 46 and supplemental interrogatories numbers 10 and 11.[7] Plaintiffs' Final Pretrial Statement [FPS] Vol. 17 at 8051.

2. *Other Expert Evidence*

Plaintiffs have also presented expert testimony explaining price data such as that presented in the model-by-model price comparisons. For example, Part VI of Horace DePodwin's expert report analyzes all of the price data on television receivers that plaintiffs compiled during discovery. DePodwin concludes from his analysis that from 1967 to 1977, defendants sold television receivers in the United States at prices that were substantially less than the prices at which comparable television receivers were sold in Japan. DePodwin Report Part VI at 1836a-65a.

7. Except to the extent that they were incorporated into Part VI of Horace DePodwin's expert report, most of these price comparisons were never objected to and were never excluded under the district court's various evidentiary rulings. *See Zenith, supra*, 505 F. Supp. at 1320 n.4. We reversed the district court's evidentiary ruling excluding Part VI of DePodwin's report in our preceding opinion. Slip op. at section V D (1)(b). Thus, all of plaintiffs' model-by-model price comparisons are currently part of this summary judgment record.

Similarly, the expert report of Stanley Nehmer analyzes price data for both television and non-television CEPs. Nehmer Report at 2352a - 2474a. Nehmer concludes from this data that defendants charged "markedly lower prices for export products sold in the United States than they did for equivalent products sold in Japan." Nehmer Report at 2337a.

From this and similar evidence of price discrimination, we conclude that an issue of material fact exists as to whether defendants sold CEPs in the United States at prices that were substantially lower than the prices of comparable CEPs sold in Japan. Thus, we cannot affirm the district court's dismissal of plaintiffs' dumping claims on this ground.

E. *Specific Intent Issue*

The 1916 Act does not require that all imports sold in the United States be priced at or above the home-market prices of comparable goods. To sustain a claim under the 1916 Act, plaintiffs must show that defendants priced the CEPs that they imported or sold in the United States with the "intent of destroying or injuring an industry in the United States." 15 U.S.C. § 72. We now consider whether evidence in this summary judgment record creates a genuine issue of fact as to whether defendants acted with the specific intent required by the 1916 Act. In considering the evidence of intent, we address separately plaintiffs' conspiracy and individual dumping claims.

1. *Conspiracy Claims*

Plaintiffs' complaints allege that defendants conspired to dump CEPs on the United States market. To prove such an agreement, plaintiffs rely on substantially the same evidence relied on to prove the conspiracy to sell products at artificially high prices in Japan and artificially low prices in the United States, as described in our preceding opinion. Proof of this

agreement, however, requires evidence that defendants agreed to sell at dumping prices, evidence not required to create a genuine issue of fact as to the conspiracy.

The district court dismissed all of plaintiffs' conspiracy claims by way of summary judgment. In our preceding opinion, we vacated that judgment and held that, except as to Sony, Sears, and Motorola, material factual issues exist on plaintiffs' claims that defendants engaged in the alleged conspiracy. Slip Op. at VI A. Based on the evidence referred to in that opinion, combined with evidence discussed above that defendants sold at dumping prices, we hold that, except as to Sony, Sears, and Motorola, material factual issues exist concerning plaintiffs' allegations that defendants agreed to sell CEPs in the United States at prices that were substantially lower than prices at which comparable products were sold in Japan. However, this is not enough to make out a claim under the 1916 Act. Plaintiffs must also show that defendants conspired to dump with specific predatory intent.

To make out a claim that defendants conspired under the antitrust laws, plaintiffs need only show that defendants conspired with general intent to restrain trade. *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978). However, a showing of general intent does not necessarily constitute a prima facie showing of the specific intent required by the 1916 Act. *See id.* (distinguishing general from specific intent). After reviewing the record in this case, we hold that the evidence supporting plaintiffs' theory that defendants entered into the alleged conspiracy also creates a genuine issue of fact as to whether defendants agreed to dump CEPs on the United States market with the specific intent to destroy or injure an industry in the United States.

Evidence supporting plaintiffs' conspiracy theory would support an inference of predation in the United

States market. This evidence is offered to show that the Japanese defendants agreed to stabilize prices at artificially high levels in Japan, insulating themselves by agreement from price-cutting competition at home. There is also evidence that defendants at the same time entered into an agreement to sell the fruits of the excess capacity of the Japanese CEP industry in the United States at low prices. We assume that the minimum price agreement, of which all the Japanese defendants were members, was mandated by the Ministry of International Trade and Industry [MITI]. Plaintiffs offer this evidence to show that defendants used the prices in that agreement as reference prices. Finally, plaintiffs point to evidence that defendants sought to conceal sales below MITI prices by a system of secret rebating.

The Japanese defendants also allegedly eliminated the possibility of price-cutting competition among themselves in the United States by agreeing to the Five-Company Rule and other customer allocation rules promulgated by the Japanese Machinery Exporters Association [JMEA], of which all the principal Japanese defendants were members. Those rules allocated to each member of the JMEA not more than five customers in the United States and prevented any two members from selling to the same customer. By thus allocating the market, defendants allegedly brought to bear the full force of their low-price conspiracy on their United States competitors in an effort to drive them out of the market.

Furthermore, plaintiffs' experts DePodwin and Nehmer summarized the evidence describing defendants' export policy. Both experts concluded that during the time of the alleged conspiracy, defendants operated an export cartel directed toward the United States with the specific intent to undersell their United States competitors and eventually to drive them out of business. *See, e.g.*, DePodwin Report at 1725a, 1865a; Nehmer Report at 2327a, 2329a.

We believe that evidence in this summary judgment record creates a genuine issue of fact as to whether defendants conspired to dump CEPs in the United States with the specific intent to injure or destroy an industry in the United States. Thus, we will not affirm the district court's dismissal of plaintiffs' conspiracy claims under the 1916 Act on this ground.

2. *Individual Claims*

Plaintiffs' complaints also charge each defendant with individual violations of the 1916 Act. Thus, we must determine whether evidence in this summary judgment record creates a material issue of fact as to plaintiffs' claim that each defendant dumped CEPs on the United States market with individual specific intent.

We have held that except as to Sony, Sears, and Motorola, there is sufficient evidence in this summary judgment record to create a genuine issue of fact as to whether each defendant was part of a conspiracy to dump CEPs in the United States. Even if the factfinder concludes that one of these defendants did not join that agreement, we hold that the evidence offered to tie each to that conspiracy creates a genuine issue of fact as to whether each dumped CEPs on the United States market with the specific intent to injure or destroy a United States industry. There is admissible evidence offered to show that each defendant joined in a conspiracy to sell at artificially high prices in Japan while at the same time selling at artifically low prices in the United States, that each defendant participated in the customer allocation rules so as to focus their predatory efforts on their United States competitors, that each defendant consistently sold CEPs in the United States at dumping prices over an extended period of time, and that each defendant except MELCO engaged in secret rebating throughout the alleged

conspiracy. Although the rebating evidence has been challenged as inadmissible against MELCO, we hold that there is sufficient other evidence creating a genuine issue of fact as to whether MELCO engaged in individual dumping with the requisite intent. Thus, except as to Sony, Sears, and Motorola, we do not affirm the district court's dismissal of plaintiffs' individual dumping claims.

Because we have held that there is insufficient evidence tying Sony, Sears, and Motorola to either the conspiracy or an agreement to dump, plaintiffs' evidence of specific intent as to the individual dumping claims against these three defendants must stand independently from the evidence of specific intent offered to support plaintiffs' dumping claims against the other defendants. Unless there is sufficient evidence in the summary judgment record to create a factual issue as to whether Sony, Sears, or Motorola each acted with specific intent, we will affirm the district court's dismissal of all plaintiffs' dumping claims against them.

Plaintiffs' evidence that each of these three defendants acted with specific predatory intent is weak. Plaintiffs have produced no direct evidence that Sony, Sears, or Motorola sold low-price CEPs in the United States with the intent to injure or destroy the CEP industry in this country. The only circumstantial evidence in this record that even marginally supports the inference that these three defendants each acted with specific predatory intent is evidence that they sold imported CEPs at substantially lower prices in the United States than the prices at which comparable CEPs were sold in Japan, and evidence that they knew that the other defendants were engaging in similar activity and that concerted dumping could injure or destroy the CEP industry in the United States. Although this evidence might support a finding of general intent, we do not believe that this evidence creates a genuine

issue of fact as to whether Sony, Sears, and Motorola each acted with the specific predatory intent required by the 1916 Act. Thus, we will affirm the district court's dismissal of all plaintiffs' dumping claims against Sony, Sears, and Motorola.

III.

To the extent that the appeals in numbers 80-2080, 81-2331, 2332, and 2333 involve dumping claims against Sony, Sears, and Motorola, we will affirm the district court's judgment of dismissal. As to the judgment dismissing the dumping claims against the remaining defendants, we will reverse and remand for further proceedings.[8]

Costs will be taxed in favor of Sony Corporation, Motorola, Inc., and Sears, Roebuck & Co. against NUE and Zenith, and in favor of NUE and Zenith against the remaining defendants. Each party is directed to furnish to the Clerk of this Court within ten (10) days of the entry of judgment a brief written statement of its views as to allocation of costs among the parties. *See* Fed. R. App. P. 39(a).

---

8. Judge Gibbons, for the reasons expressed by him in the opinion in No. 81-2331/32/33, filed simultaneously herewith, would reverse the dismissal against Sony Corporation and Sony Corporation of America as well.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2331

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D. C. MDL No. 189)

ZENITH RADIO CORPORATION,
Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D. C. Civ. No. 74-2451)

No. 81-2332

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D. C. MDL No. 189)

NATIONAL UNION ELECTRIC CORPORATION,
Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D. C. Civ. No. 74-3247)

No. 81-2333

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D. C. MDL No. 189)

ZENITH RADIO CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D. C. Civ. No. 74-2451)

NATIONAL UNION ELECTRIC CORPORATION

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D. C. Civ. No. 74-3247)

MITSUBISHI ELECTRIC CORPORATION ("MELCO")
Appellant

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Present: SEITZ, *Chief Judge* and GIBBONS and MESKILL*, *Circuit Judges*

---

* Honorable Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

JUDGMENT

1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.

2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered March 21, 1975, granting defendants' motions to dismiss Count V of the National Union Electric Corporation (NUE) complaint (D.C. Civ. No. 74-3247) and Count IV of the Zenith complaint (D.C. Civil No. 74-2451), be and the same is hereby affirmed.

3. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of the Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck & Co., on the NUE and Zenith claims under sections 1 and 2 of the Sherman Act, under the Wilson Tariff Act and under Section 7 of the Clayton Act, be and the same is hereby affirmed.

4. It is further ordered and adjudged that the order of the said District Court entered March 27, 1981, as amended by orders entered April 9, 1981 and May 14, 1981, insofar as it granted summary judgment in favor of these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451

Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451, 74-3247
Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451
Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

5. Costs to be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, per paragraph (3) of this judgment. Costs to be taxed in favor of NUE and Zenith against the other twenty defendants enumerated in paragraph (4) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judg-

ment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a).

ATTEST:
Clerk

December 5, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2080

In Re: JAPANESE ELECTRONIC
PRODUCTS ANTITRUST LITIGATION

ZENITH RADIO CORPORATION AND
NATIONAL UNION ELECTRIC CORPORATION,

Appellants

(D. C. MDL No. 189)

No. 81-2331

In Re:

JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION

(D. C. MDL No. 189)

ZENITH RADIO CORPORATION,

Appellant

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.

(D. C. Civ. No. 74-2451)

No. 81-2332

In Re:

Japanese Electronic Products
Antitrust Litigation

(D. C. MDL No. 189)

National Union Electric Corporation,
Appellant

v.

Matsushita Electric Industrial
Co., Ltd., et al.

(D. C. Civ. No. 74-3247)

No. 81-2333

In Re:

Japanese Electronic Products
Antitrust Litigation

(D. C. MDL No. 189)

Zenith Radio Corporation

v.

Matsushita Electric Industrial
Co., Ltd., et al.

(D. C. Civ. No. 74-2451)

National Union Electric Corporation

v.

Matsushita Electric Industrial
Co., Ltd., et al.

(D. C. Civ. No. 74-3247)

Mitsubishi Electric Corporation ("MELCO"),
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: Seitz, *Chief Judge* and Gibbons and Meskill*, *Circuit Judges*

---

* Honorable Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

JUDGMENT

1. These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on October 21 and 22, 1982.

2. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered April 14, 1980, as amended by orders entered April 23 and 25, 1980, be and the same is hereby affirmed insofar as it dismissed the National Union Electric Corporation (NUE) and Zenith claims under the Antidumping Act of 1916, 15 U.S.C. § 72 (1976) against the Sony Corp., Sony Corp. of America, Sears, Roebuck & Co., and Motorola, Inc.

3. It is further ordered and adjudged that the order of the said District Court entered April 14, 1980, as amended by orders entered April 23 and 25, 1980, insofar as it dismissed the NUE and Zenith dumping claims against these other defendants:

Hitachi Kaden Hanbai Kabushiki Kaisha (Hitachi Sales Corp. of Japan)	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi, Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Hitachi Sales Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Corp. of America	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Industrial Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Matsushita Electric Trading Co., Ltd.	D.C. Civ. No. 74-2451
Matsushita Electronics Corp.	D.C. Civ. No. 74-2451
Melco Sales, Inc.	D.C. Civ. No. 74-2451
Mitsubishi Corp.	D.C. Civ. Nos. 74-2451, 74-3247

Mitsubishi Electric Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Mitsubishi International Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Quasar Electronics Corp.	D.C. Civ. No. 74-2451
Sanyo Electric, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Electric Trading Co., Ltd.	D.C. Civ. Nos. 74-2451; 74-3247
Sanyo Manufacturing Corp.	D.C. Civ. No. 74-2451
Sharp Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Sharp Electronics Corp.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba America, Inc.	D.C. Civ. Nos. 74-2451; 74-3247
Toshiba Corp. (formerly Tokyo Shibaura Electric Co., Ltd.)	D.C. Civ. Nos. 74-2451; 74-3247

be, and the same is hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

4. Costs will be taxed in favor of Sony Corp., Sony Corp. of America, Motorola, Inc., and Sears, Roebuck and Company, against NUE and Zenith, and against the other twenty defendants enumerated in paragraph (3) of this judgment. Each party in these appeals is directed to furnish the Clerk of this Court, within ten (10) days of the entry of judgment, a brief written statement of its views as to the allocation of costs among the parties. *See* Fed. R. App. P. 39(a).

ATTEST:
Clerk

December 5, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

January 20, 1984

No. 80-2080, 81-2331/3

Re: In re: Japanese Electronic Products Antitrust Litigation, Zenith Radio Corporation, etc., Appellants

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

1. Motion of certain appellees that their petition for rehearing and suggestion for rehearing in banc be acted on by all Circuit Judges in regular active service.
2. For your information, the Opinions were filed and Judgments were entered on December 5, 1983.

in the above-entitled case. Any answer, which would be due by January 30, 1984, will be forwarded to you upon receipt.

Respectfully,
/s/ *Sally Mrvos*
Clerk

trk
enc.

The foregoing Motion is denied

By the Court,

/s/ *Aldisert*
Circuit Judge*

Dated: March 7, 1984

*[R]ecused from considering this appeal on the merits, who enters this order for administrative purposes only as the judge oldest in commission other than panel member Chief Judge Seitz.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2080, 81-2331, 81-2332 and 81-2333

In Re: JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION

(D. C. MDL No. 189)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, *Chief Judge*, GIBBONS and MESKILL,* *Circuit Judges*

The Judges who participated in the above entitled case having considered the petitions for rehearing and suggestion for rehearing in banc, and the answer of appellants, Zenith Radio Corporation and National Union Electric Corporation to said petitions, and no judge who concurred in the decisions having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court,

/s/ *John J. Gibbons*
JOHN J. GIBBONS, Circuit Judge

DATED: MAR. 9, 1984

* Hon. Thomas J. Meskill, United States Circuit Judge for the Second Circuit, sitting by designation.

ZENITH RADIO CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.,*
Defendants.

NATIONAL UNION ELECTRIC CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.,*
Defendants.

In re JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION.

Civ. A. Nos. 74-2451, 74-3247.
MDL 189.

United States District Court,
E. D. Pennsylvania.

March 27, 1981.

As Amended May 13, 1981.

Blank, Rome, Comisky & McCauley, by Edwin P. Rome, William H. Roberts, John Hardin Young, Arnold I. Kalman, Kathleen H. Larkin, Norman E. Greenspan, Lawrence S. Bauman, Philadelphia, Pa., for Zenith Radio Corp. and National Union Elec. Corp., plaintiffs.

Philip J. Curtis, John Borst, Jr., Glenview, Ill., for Zenith Radio Corp., plaintiff.

Mudge Rose Guthrie & Alexander by Donald J. Zoeller, John P. Hederman, Thomas P. Lynch, Howard C. Crystal, Robert A. Jaffe, Shelly B. O'Neill, Mark K. Neville, Jr., New York City, Drinker, Biddle & Reath by Patrick T. Ryan, Philadelphia, Pa., for Tokyo Shibaura Elec. Co., Ltd. and Toshiba America, Inc., defendants; defense coordinating counsel.

Duane, Morris & Heckscher by Henry T. Reath, Terry R. Broderick, Philadelphia, Pa., Crummy, Del Deo, Dolan & Purcell by John T. Dolan, Arnold B. Calmann, Newark, N.J., Seki, Jarvis & Lynch by Hoken S. Seki, Richard O. Briggs, Chicago, Ill., for Mitsubishi Elec. Corp. and Mitsubishi Elec. Sales America, Inc.

Reid & Priest by Charles F. Schirmeister, Robert J. Lynch, New York City, L. Peter Farkas, Washington, D.C., for Mitsubishi Corp. and Mitsubishi Intern. Corp., defendants.

Weil, Gotshal & Manges by Ira M. Millstein, A. Paul Victor, Joel B. Harris, Kevin P. Hughes, Robert K. Hood, H. Adam Prussin, Harry M. Davidow, Jeffrey L. Kessler, Stuart Peim, Lenore Liberman, Gayle E. Hanlon, Makoto Matsuo, New York City, Morgan, Lewis & Bockius by Raymond T. Cullen, Philadelphia, Pa., for Matsushita Elec. Indus. Co., Inc., Matsushita Elec. Corp. of America, Matsushita Electronics Corp., Matsushita Elec. Trading Co., and Quasar Electronics Corp., defendants.

Metzger, Shadyac & Schwartz by Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Stephen P. Murphy, William B. T. MOCK, Jr.; Tanaka, Walders & Ritger by H. William Tanaka, Lawrence R. Walders, B. Jenkins Middleton, Washington, D.C., Hunt Kerr Bloom & Hitchner, by Charles J. Bloom, Philadelphia, Pa., for Hitachi, Ltd., Hitachi Sales Corp. of America, and Hitachi Kaden Hanbai Kabushiki Kaisha, defendants.

Wender, Murase & White by Peter J. Gartland, Gene Yukio Matsuo, Peter A. Dankin, Lance Gotthoffer, New York City, for Sharp Corp. and Sharp Electronics Corp., defendants.

Whitman & Ranson by Patrick H. Sullivan, Dugald C. Brown, James S. Morris, Kevin R. Keating, Michael S. Press, New York City, Hunt Kerr Bloom & Hitchner by Charles J. Bloom, Philadelphia, Pa., for Sanyo Elec., Inc., Sanyo Elec. Co., Ltd., Sanyo Mfg. Corp. and Sanyo Elec. Trading Co., Ltd., defendants.

Arnstein, Gluck, Weitzenfeld & Minow by Louis A. Lehr, Jr., Stanley M. Lipnick, John L. Ropiequet, Chicago, Ill., for Sears, Roebuck & Co., defendant.

Rosenman, Colin, Freund, Lewis & Cohen by Asa D. Sokolow, Renee J. Roberts, Marc Rowin, Kaye, Scholer, Fierman, Hays & Handler by Joshua F. Greenberg, Randolph S. Sherman, Daniel D. Chazin, New York City, Wolf, Block Schorr & Solis-Cohen by Franklin Poul, Philadelphia, Pa., for Sony Corp. and Sony Corp. of America, defendants.

Kirkland & Ellis by Thomas P. Coffey, E. Houston Harsha, Karl F. Nygren, Chicago, Ill., for Motorola, Inc., defendant.

OPINION AND ORDER

(Summary Judgment Motions Related to Plaintiffs' Sherman Act, Wilson Tariff Act, Clayton Act and Robinson-Patman Act Claims)

Pretrial Order No. 307

EDWARD R. BECKER, District Judge.

TABLE OF CONTENTS

I. *Preliminary Statement*

This opinion addresses defendants' motions for summary judgment as to plaintiffs' conspiracy claims under § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, as well as their claims under § 2 of the Sherman Act, 15 U.S.C. § 2, § 73 et seq. of the Wilson Tariff Act, 15 U.S.C. § 8 et seq., § 7 of the Clayton Act, 15 U.S.C. § 18, and the Robinson-Patman Act, 15 U.S.C. § 13(a). For reasons which will be set forth herein at length, we will grant defendants' motions.[1] As will be seen, the touchstone

[1] Proof of conspiracy is essential to plaintiffs' claims under Section 1 of the Sherman Act and under the Wilson Tariff Act by virtue of the language of those statutes. In addition, for reasons explained fully *infra*, proof of con-

of this decision lies in the fact that our intensive examination of the enormous record in this case has revealed that, despite years of discovery, the plaintiffs have failed to uncover any significant probative evidence that the defendants entered into an agreement or acted in concert with respect to exports to the United States in any manner which could in any way have injured the plaintiffs.

The mission of the summary judgment procedure is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Note to 1963 Amendment of Fed.R.Civ.P. 56(e). In this case that mission has become a veritable odyssey, one upon which we embarked some twenty-three months ago, in April of 1979, when motions for summary judgment addressed to plaintiffs' conspiracy claims were first heard. At that time consideration of the summary judgment motions was postponed because the record was as yet too amorphous to permit its meaningful consideration. That situation has now changed. Thorough scrutiny of plaintiffs' proof has been made possible by the filing, with preclusionary effect, of plaintiffs' voluminous Final Pretrial Statement (FPS), setting forth the facts they intend to prove at trial; by the holding of five weeks of

---

spiracy is also essential to the particular claims plaintiffs have asserted under Section 2 of the Sherman Act, the Robinson-Patman Act, and § 7 of the Clayton Act. The only claims in plaintiffs' case which do not require proof that the defendants conspired are those under the Antidumping Act of 1916, 15 U.S.C. § 72, which we have already dismissed, with minor exceptions, for other reasons. Opinion and Order (1916 Antidumping Act), 494 F.Supp. 1190 (E.D.Pa.1980), *appeal pending*, No. 80-2080 (3d Cir.). Since we also dispose of the few remaining dumping claims herein, *see* n. 372 *infra*, our grant of summary judgment on the issue of conspiracy disposes of all the plaintiffs' outstanding claims.

During the course of this opinion we shall also make a preliminary determination, pursuant to Federal Rule of Evidence 104(a), that plaintiffs have not adduced sufficient independent evidence of the existence of a conspiracy among the defendants to permit any evidence in the nature of coconspirator declarations to be admissible against alleged coconspirators under F.R.E. 801(d)(2)(E). This determination further undermines the plaintiffs' conspiracy claims.

evidentiary hearings which considered the admissibility of plaintiffs' key evidence; and by an intensive period of preparation for and a seven-day argument of the conspiracy summary judgment motions.[2]

The pretrial evidentiary or "*in limine*" hearings were primarily designed to evaluate the admissibility of the principal evidence that plaintiffs advanced in opposition to the defendants' motions for summary judgment respecting plaintiffs' conspiracy claims. The hearings were necessary because a summary judgment motion must be decided upon evidence that would be admissible or usable at trial, and defendants had challenged the admissibility of much of plaintiffs' proposed evidence.[3] In addition, the hearings were designed to afford plaintiffs the opportunity to present sufficient evidence *aliunde* of the existence of a conspiracy and its membership to permit the admission into evidence of the hearsay statements of coconspirators under F.R.E. 801(d)(2)(E). *See* Part VI.D.6, *infra*.

---

[2] The clerk informs us that from January 1, 1980 to October 1, 1980, the parties filed some 114 briefs or memoranda, two of which (filed by plaintiffs) were roughly five hundred pages each in length. We have not counted, but estimate the total brief pages alone filed during 1980 to be in excess of 7500. Virtually all of them related to issues affecting summary judgment, including evidentiary matters. In one 10-week period (surrounding the pretrial evidentiary hearings) 59 briefs were filed.

[3] We note that Rule 56 does not in terms require that only admissible evidence may be considered in connection with a summary judgment motion. Rule 56(c) permits judgment to be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" fail to raise a genuine issue of material fact. Rule 56(e), in detailing the form of affidavits to be filed pursuant to a summary judgment motion, requires that they "set forth such facts as would be admissible in evidence," but there is no similar specific admissibility requirement for matters contained in the other materials listed in Rule 56(c). Nonetheless, the case law is plain that only materials which would be admissible or usable at trial may be considered. *See generally* 6 Moore's Federal Practice ¶ 56.11, at 56-197 to 56-209; 10 Wright & Miller, Federal Practice and Procedure, §§ 2721-24.

The hearings spawned a trilogy of lengthy and extremely detailed opinions. The first, filed August 7, 1980, 505 F.Supp. 1125, addressed the admissibility of certain public records and reports under F.R.E. 803(8)(C); the second, filed September 29, 1980, 505 F.Supp. 1190, concerned the admissibility of materials relating to activities in Japan; and the third, filed December 10, 1980, 505 F.Supp. 1313, dealt with the admissibility of plaintiffs' expert testimony. Because these opinions, which will be summarized in Part IV, *infra*, exclude the most critical evidence in plaintiffs' case, they impact significantly upon the present summary judgment motion. Therefore, we consider the evidentiary trilogy an integral part of this opinion and hereby incorporate it by reference herein.[4]

We shall not herein discourse upon the complexity of this case. Our opinion on the jury trial issue, 478 F.Supp. 889 (E.D.Pa. 1979), and that of the Court of Appeals, 631 F.2d 1069 (3d Cir. 1980), as well as our opinion on subject matter jurisdiction, 494 F.Supp. 1161 (E.D.Pa.1980), which served to introduce the summary judgment motions, more than adequately protray the complexity of the issues and sketch the contours of that other facet of the case's complexity—the paper mountain which it has generated. The evidentiary trilogy expands upon that sketch and this opinion, which concentrates upon the record, completes the picture in replete detail. We shall, however, take the time in this Preliminary Statement to describe again, albeit briefly, the parties and the issues.

The plaintiffs in this action are Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE"). NUE, the corporate successor to Emerson Radio Co., one of the pioneer manufacturers in the radio and television industry, ceased all production of television receivers in February of

[4] For a recent example of a case in which important evidentiary rulings were made in connection with a motion for summary judgment, *see Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980).

1970.[5] That December it filed the first of these suits,[6] alleging that the Japanese defendants and others had conspired to take over the American consumer electronic products (CEP) industry[7] and thereby to drive NUE out of business. In 1974 Zenith filed an action making similar allegations.[8] The NUE action was then transferred to this district for coordinated or consolidated pretrial proceedings with the Zenith action;[9] the transfer was later made unconditional and the actions were consolidated for trial.[10]

[5] After ceasing production of television receivers, NUE resold television receivers purchased from other manufacturers until discontinuing its television business entirely in 1972. The corporate history of NUE as it relates to this action is related in detail in our opinion concerning antitrust standing under the *Bangor Punta* doctrine, 498 F.Supp. 991 (E.D.Pa.1980).

[6] *National Union Electric Corp.* v. *Matsushita Electric Industrial Co.*, Civil No. 1706-70 (D.N.J., filed December 21, 1970).

[7] Although we refer herein to CEP's, this opinion deals mainly with television receivers, both color and monochrome (*i.e.*, black & white), because that evidence constitutes the overwhelming bulk of plaintiffs' case. The NUE suit is limited to television receivers; the Zenith complaint also encompasses radios, phonographs, tape and audio equipment, televisions, and electronic components. As is demonstrated in Part VIII, *infra*, plaintiffs have not seriously advanced a case with respect to other CEP's.

[8] *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, Civil Action No. 74-2451 (E.D.Pa., filed Sept. 20, 1974).

[9] *In Re Japanese Electronic Products Antitrust Litigation*, 388 F.Supp. 565 (Jud.Pan.Mult.Lit. 1975).

[10] Pretrial Order No. 182, filed June 6, 1979 in M.D.L. 189.

This case was transferred to our docket in November 1977 from the docket of Judge A. Leon Higginbotham, Jr., following his elevation to the Court of Appeals. Although the progress of the case had been slowed by the illnesses and deaths of two judges to whom the case had previously been assigned, Judge Higginbotham moved the litigation forward vigorously. One of the most important events of Judge Higginbotham's stewardship was the filing of three opinions disposing of the defendants' challenges to jurisdiction and venue, to the constitutionality of the 1916 Antidumping Act and to the extension of the Robinson-Patman Act to international price discrimination. *See Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 251 (E.D.Pa. 1975) (opinion on constitutionality of antidumping act); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 262

The ten principal defendants are seven Japanese manfuacturers of consumer electronic products (Matsushita Electric Industrial Co., Ltd. ("MEI"); Toshiba Corporation; Hitachi, Ltd.; Sharp Corporation ; Sanyo Electronic Co., Ltd.; Sony Corporation; and Mitsubishi Electric Corporation ("MELCO"));[11] a Japanese trading company (Mitsubishi Corporation) ("MC"); and two American companies (Sears, Roebuck & Co. and Motorola, Inc.). Fourteen other defendants are subsidiaries of the principal Japanese defendants. Of the twenty-four defendants, fifteen are defendants in both suits, seven in the Zenith action only, and two in the NUE action only.[12]

In addition to the twenty-four named defendants the plaintiffs have indentified scores of alleged coconspirators whose business operations traverse the globe, ranging from small Japanese companies to such world industrial giants as N.V. Philips Gloeilampenfabrieken and General Electric. The majority of the alleged conconspirators are other Japanese manufacturers and American importers.

(E.D.Pa. 1975) (opinion on personal jurisdiction and venue); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 244 (E.D.Pa. 1975) (opinion on international application of Robinson-Patman Act).

[11] This group of defendants will be frequently referred to herein as the "Japanese manufacturing defendants."

[12] Sony Corporation and its sales subsidiary, Sony Corporation of America ("SONAM"), were originally named in both suits. However, they were dismissed from the Zenith action after settling with Zenith in April 1977, and are defendants now only in the NUE action.

Seven other principal Japanese defendants are named in both actions, as are eight of their subsidiaries: Matsushita Electric Corporation of America ("MECA"); Toshiba America, Inc. ("TAI"); Hitachi Kaden Hanbai Kabushiki Kaisha ("Hitachi Kaden"); Hitachi Sales Corporation of America ("HSCA"); Sharp Electronics Corporation ("SEC"); Sanyo Electric Trading Co., Ltd.; Sanyo Electric Inc.; and Mitsubishi International Corporation ("MIC").

Sears and Motorola are named only in the Zenith suit, as are Melco Sales, Inc., Sanyo Manufacturing Corp., Matsushita Electronics Corporation, Matsushita Electric Trading Co., Ltd., and Quasar Electronics Corp., also a Matsushita subsidiary.

The particular offenses charged in the complaints span the range of the antitrust laws. The overall conspiracy is alleged to violate §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. Plaintiffs also allege actual and attempted monopolization and conspiracy to monopolize under § 2 of the Sherman Act. Additionally, they allege that the defendants have violated § 801 of the Revenue Act of 1916, better known as the 1916 Antidumping Act, 15 U.S.C. § 72, by "commonly and systematically," with predatory intent, selling their products in this country for substantially less than their actual market value or wholesale price in Japan.[13] The defendants are also charged with violating the Robinson-Patman Act, 15 U.S.C. § 13(a), by discriminating in price among American purchasers.[14] Finally, Zenith charges that Sears, Motorola, and the Matsushita and Sanyo defendants, along with their coconspirators, violated § 7 of the Clayton Act, 15 U.S.C. § 18, in connection with the Japanese companies' acquisitions of interests in United States consumer electronic products manufacturers.[15]

The plaintiffs' papers seek to portray a massive, continuing unitary worldwide conspiracy said to have lasted over a period

[13] The major aspects of this claim have been dismissed. *See* Opinion and Order (1916 Antidumping Act) 494 F.Supp. 1190 (E.D.Pa. 1980), *appeal pending*, No. 80-2080 (3d Cir.).

[14] The original complaints included counts alleging that price discrimination between Japanese and American purchasers violated the Robinson-Patman Act. These counts were dismissed for failure to state a claim. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 244 (E.D.Pa. 1975) (Higginbotham, J.).

[15] Zenith challenges two acquisitions. The first is the 1974 sale by Motorola of its consumer electronic products division and its "Quasar" tradename to Matsushita. The other is the 1976 acquisition by the Sanyo interests of a majority interest in Warwick Electronics, Inc., a manufacturer of television receivers for sale to U.S. private label customers, the largest of which was Sears. Sears had owned 25% of Warwick's common shares, and after the transactions was 25% owner of Warwick's successor, Sanyo Manufacturing Corp. (an American corporation).

of more than twenty years,[16] the purpose of which is said to be the destruction of the American consumer electronic products industry. Although plaintiffs have embellished this theme with numerous variations, to be described in Part II of this opinion, in general this objective is alleged to have been accomplished by means of a two-pronged "unitary" conspiracy: a (successful) conspiracy to charge artificially high prices to consumers in Japan which funded or "war-chested" a (successful) conspiracy to sell in the U.S. at artificially low prices.[17]

The summary judgment motion which we address herein is but one of many which have been interposed. We have already heard argument on a number of motions addressed to other discrete issues, and have disposed of most of them. We have (1) denied a motion seeking summary judgment for lack of subject matter jurisdiction, *see* Opinion (Introduction to Summary

[16] The period covered by this litigation stretches from the filing of the respective complaints backward the four-year statutory period to, in the case of Zenith, the late 70's by virtue of amendment to the complaint. NUE's damage claims were essentially cut off when they abandoned the television business.

[17] Certain of the defendants have asserted counterclaims against Zenith, attacking Zenith on two fronts. First, they allege that Zenith, acting alone and in combination and conspiracy with others, engaged in territorial allocations, price discrimination, and horizontal and vertical price fixing arrangements, and effected certain "key dealer preferences" in violation of the Robinson-Patman Act and §§ 1 and 2 of the Sherman Act. Second, they accuse Zenith and its coconspirators of seeking to interfere with its competitors, including the counterclaimants, "by every means available, including the submission of complaints, petitions, testimony and other information to various federal governmental agencies and officials, federal courts, and the United States Congress which were based upon sham, false and misleading allegations and information, without regard to the truth or merits of the claims made." The counterclaiming defendants thus invoke the "sham litigation" theory of antitrust liability recognized in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). The counterclaims are asserted by certain of the Matsushita, Mitsubishi, Hitachi, Sharp, Sanyo, and Toshiba defendants. In addition, Sears asserts a counterclaim against Zenith based on § 43 of the Lanham Act, 15 U.S.C. § 1125, charging that Zenith falsely designated certain of its goods as originating in the U.S. instead of as having been manufactured in Asia.

Judgment Motions; Subject Matter Jurisdiction), *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F.Supp. 1161 (E.D.Pa.1980); (2) granted in major part defendants' motion for summary judgment on those claims arising under § 801 of the Revenue Act of 1916, better known as the 1916 Antidumping Act, 15 U.S.C. § 72, *see* Opinion and Order (1916 Antidumping Act), *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F.Supp. 1190 (E.D.Pa.1980), *appeal pending*, No. 80-2080 (3d Cir.); (3) denied a motion for summary judgment brought by certain defendants against Zenith on the ground that Zenith was not directly injured and was therefore barred from recovery under the doctrine of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), *see* Opinion and Order (Indirect Injury—*Illinois Brick), Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F.Supp. 1246 (E.D.Pa.1980); (4) denied a motion asserting that NUE lacked standing to sue under the doctrine of *Bangor Punta Operation, Inc.* v. *Bangor & Aroostook R. Co.*, 417 U.S. 703, 95 S.Ct. 2578, 41 L.Ed.2d 418 (1974), *see* Opinion and Order (Antitrust Standing—*Bangor Punta), National Union Electric Corp.* v. *Matsushita Electric Industrial Co.*, 498 F. Supp. 991 (E.D.Pa.1980); (5) denied a motion by defendant Sears, Roebuck & Co. for summary judgement based on statute of limitation grounds, *see* Pretrial Order (PTO) 263, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co., Ltd.*, M.D.L. No. 189 (May 23, 1980); and (6) denied a motion by Sharp Electronics Corp. alleging that Zenith's claims under the 1916 Antidumping Act are barred by the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953), *see* Memorandum and Order, (1953 Treaty of Friendship Commerce and Navigation with Japan) *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F.Supp. 1263 (E.D.Pa.1980).

A summary judgment motion asserting insufficiency of the evidence of monopolization and attempted monopolization against individual defendants under § 2 of the Sherman Act

(the so-called "individual monopolization claims") has in major part dissolved. *See* pages 1318-1319, *infra*. A motion by Sony Corporation advancing its allegedly unique position as a high price, rather than a low price, seller of television sets was deferred following argument, and will be considered with the other conspiracy motions herein. We have heard argument on a motion asserting insufficiency of the evidence of price discrimination under the Robinson-Patman Act and on motions addressed to the claims under § 7 of the Clayton Act. We will decide these summary judgment issues in this opinion.

The summary judgment motions which we have just described were relatively self-contained. The present motion, on the other hand, implicates an enormous record which may be the largest summary judgment record ever developed. The anatomy of that record will be described in Part III of this opinion. That description will be followed (in Part IV) by a summary of the rulings contained in the evidentiary opinion trilogy. We shall then turn to a discussion of the applicable law, commencing in Part V with the legal standards governing the grant or denial of summary judgment, focusing on the complex case. The major portion of the legal discussion is found in Part VI, in which we engage in a discussion of the legal principles affecting plaintiffs' Sherman § 1 and Wilson Tariff Act conspiracy case. We will begin with a discussion of the law relating to plaintiffs' principal Sherman § 1 allegations, taking up: (1) agreements affecting prices; (2) market allocation; (3) membership in trade associations; (4) exchange of information concerning prices, production and inventory figures, and joint forecasting; (5) product standardization and technical research exchange; (6) secret rebates; and (7) joint activities in promoting public and governmental relations, and joint legal action in response to common problems. This section will be followed by a discussion of statutory standing under sections 4 and 16 of the Clayton Act, and then by a description of the Wilson Tariff Act, which we conclude essentially tracks the Sherman Act in the international trade context.

Another focal point of the legal discussion will be the law of conspiracy in the antitrust context, which will be our next

order of business. Our primary emphasis will be upon the legal requisites of circumstantial proof of conspiracy, both in conspiracy cases in general and in antitrust conspiracy cases in particular. We will focus particularly upon the circumstances under which conspiracy can be inferred from parallel business behavior. We shall also consider other aspects of the law of conspiracy with special attention to plaintiffs' admonition against "fragmentation" of their "unitary" conspiracy, their invocation of the "slight evidence" rule, the viability of the doctrine of vicarious liability for the overt acts of coconspirators under the case of *Pinkerton* v. *United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), and the requisites for admissibility of coconspirator declarations under F.R.E. 104(a) and 801(d)(2)(E).

Having concluded our discussion of the law applicable to plaintiffs' Sherman § 1 claims, we will turn, in Part VII, to a review of the evidence offered in support of plaintiffs' Sherman Act § 1 (and Wilson Tariff Act) case as to television receivers. This is by far the longest segment of the opinion, for the evidence as to television receivers constitutes the overwhelming bulk of plaintiffs' case. That evidence will be described in detail and measured against the applicable law, which we will already have described. During the course of each phase of the discussion, conclusions as to the legal sufficiency of the evidence will be drawn. The evidentiary review will lead us through all of plaintiffs' significant admissible evidence.[18] In

[18] While our evidentiary review will be comprehensive, it will be directed to those aspects of this evidence which are capable of creating a genuine issue of material fact or supporting an *in limine* finding of the existence of sufficient independent evidence of a conspiracy among the defendants to permit plaintiffs' conspiracy case to go forward through the use of coconspirator declarations. We have ignored background materials such as the plaintiffs' extensive workup identifying the defendants and that tracing the history of the technological development of CEP's. We have also omitted factual description of materials excluded by our evidentiary rulings because summary judgment motions turn on admissible evidence. We have made some exceptions to this approach, however, mainly in the area of "export references" in the JFTC materials. We have considered the impact of such

the course of this extensive evidentiary review we shall be concerned not just with plaintiffs' core allegations, but also with their discrete evidence against each of the twenty-four defendants, and we shall make a preliminary determination as to whether there is sufficient evidence of conspiracy to permit the introduction of coconspirator declarations. We will end this evidentiary review with a segment (Part VII.S) summarizing our conclusions as to plaintiffs' Sherman Act § 1 and Wilson Tariff Act case as to television receivers. Although we have some misgivings about a summary of such a detailed opinion, *see* p. 1299 *infra*, this section should be a useful reference for anyone who seeks a relatively concise summary of the major grounds of the grant of summary judgment.

In Part VIII we shall summarize plaintiffs' evidence with respect to each of the non-television products (radio, tape, audio, and stereo equipment, and components) about which allegations have been made and shall comment upon the sufficiency of plaintiffs' Sherman Act § 1 and Wilson Tariff Act case in these areas.

Having concluded our treatment of plaintiffs' Sherman Act § 1 (and, *a fortiori*, Wilson Tariff Act) claims, we shall take up, in Part IX, the applicable case law under § 2 of the Sherman Act and shall apply it to the record so as to assess plaintiffs' conspiracy to monopolize and actual and attempted monopolization claims. In similar fashion, we shall consider the summary judgment motions directed to plaintiffs' Robinson-Patman Act claims (Part X) and Clayton Act § 7 claims (Part XI). We shall conclude the opinion in Part XII with some final

---

references, assuming *arguendo* their admissibility, because of their enormous importance to plaintiffs' case. Neither have we included a recitation of the interrelationship, useful for purposes of agency or corporate veil-piercing analysis, between the Japanese defendants and their subsidiaries, a point stressed at length in the FPS and final summary judgment briefs, since we need not reach those matters herein. Finally, in view of our conclusion on liability, we need not summarize plaintiffs' evidence on injury and damage.

observations about plaintiffs' case and about the appropriate forum for the relief they seek.[19]

Having commented preliminarily upon both the size of the record and the breadth of our evidentiary review, a word is in order about our methodology. We have spent months and months in the tedious process of reading in chambers the significant nonbackground portions of plaintiffs' FPS, reviewing the sources cited for the various allegations contained therein, usually documents contained in the document depository,[20] and studying the voluminous memoranda addressing the evidence and arguing about its significance, *vel non*. Because of the plethora of FPS allegations and documents involved, it will not be possible to comment herein on more than a fraction of the materials we have reviewed—otherwise this enormously long opinion would have to be much longer. As a result, our conclusions on various points will often take the form of statements that we have reviewed various allegations and documents and find nothing therein which creates a genuine issue of material fact to support plaintiffs' allegations.[21]

---

[19] Because the resolution of certain critical facets of the case is so clear and dispositive, we find it unnecessary to reach three of the issues upon which the parties have dwelt most over the years. First, we need not address the defendants' contention that the export control arrangements entered into by a number of the defendants, which plaintiffs, during much of this litigation, have asserted to constitute a per se violation of the Sherman Act, were mandated by the Japanese Ministry of International Trade and Industry ("MITI") and hence are immunized from antitrust scrutiny by reason of the doctrines of Act of State and sovereign compulsion and the imperatives of international comity. Second, we need not add our "two cents" to the ongoing controversy over the Areeda-Turner marginal (or average variable) cost theory of predatory pricing. *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L. Rev. 697 (1975). Neither need we reach the subject matter jurisdiction point raised by Melco though eschewed by all other defendants. *See* our earlier opinion addressed to that issue, 494 F.Supp. 1161 (E.D.Pa. 1980).

[20] *See* discussion at p. 1132, *infra*.

[21] An observation is also in order about some of the ingredients of this opinion. This is the ninth major opinion we have filed in this case since April 14, 1979. These prior opinions total 883 (slip opinion) pages and yet, despite

We feel some discomfiture about the number of subparts and the length of this opinion. However, given the plaintiffs' invocation of their entire 17,000-page FPS, *see* Part III, *infra*, and the hundreds upon hundreds of issues raised in the summary judgment briefs, it is difficult to give the motions adequate treatment in a lesser space. Moreover, even if a brief (or briefer) opinion would suffice for purposes of disposition, in view of the certainty of appeal and the enormous burden thus thrust upon the Court of Appeals, we believe it important that we give that court a comprehensive picture of the entire record and of the legal premises which undergird our determination that there is no genuine issue of material fact.

We turn first to a description of the anatomy of the plaintiffs' conspiracy claims.

II. *The Anatomy of Plaintiffs' Conspiracy Claims*

One would expect, after ten years of litigation,[22] that there would be no difficulty in describing plaintiffs' conspiracy claims. Regrettably that is not true in this case, for plaintiffs' theory of defendants' alleged conspiracy has shifted on numerous occasions during the recent course of this litigation. Indeed, as we shall explain, the most recent shift occurred *after* the August 1980 summary judgment arguments. Plaintiffs deny that they have altered their theory, and submit that there is a core theory which they have pressed throughout, although they would at least have to admit to having played variations on the theme. We will now attempt to state their core theory and will then explain its meanderings along the way.

the excellence of the briefing by both sides, we have rarely drawn extensively from the parties' memoranda in constructing our opinions. However, in view of the vast compass of this opinion, the enormity of the record which we must canvass, and the number of arguments advanced, we have drawn from time to time upon the briefs of the parties when, after careful review, we have agreed with the statement at issue. Counsel are to be commended upon the excellence of their legal writing.

[22] The tenth anniversary of the filing of the first complaint in this case occurred on December 21, 1980.

Since the charter of plaintiffs' case is their FPS, we look there for a statement of their theory. We find it stated as follows:

> In its most basic form, the combination and conspiracy consisted, in part, of a concerted scheme to raise, fix and maintain price lines for consumer electronic products sold by defendants and their co-conspirators in Japan. At the same time, defendants and their co-conspirators conspired and combined to establish and coordinate artificially-low price levels for consumer electronic products exported by them to the United States. The defendants and co-conspirators implemented their combination and conspiracy by exporting to the United States and selling therein their consumer electronic products at the concerted depressed price levels. This concerted scheme was systematically applied to each line and category of consumer electronic products manufactured by plaintiffs.
>
> Defendants and their co-conspirators developed and implemented the combination and conspiracy by meetings and communications among their executives a various levels of management, and through the means of trade association activities participated in and directed by defendants and their co-conspirators. Defendants and their co-conspirators agreed upon prices, rebates, discounts and allowances and other terms and conditions of sale of consumer electronic products, and upon the allocation of customers among themselves. Defendants and their co-conspirators further combined and conspired to restrict, expand and allocate among themselves the absolute volume of production and sale of consumer electronic products and the volume of production and sale of particular products within the lines and categories of consumer electronic products manufactured by them. The defendants and their co-conspirators then did those things which they conspired and combined to do.

FPS at 3453.

Plaintiffs' style their Japanese high price-U.S. low price conspiracy as a "unitary" conspiracy, with home market and export facets, the aim of which was to effect a complete takeover of the U.S. CEP market, thereby destroying the U.S. CEP industry. The home market portion of the conspiracy is said to

have been conceived at and implemented by a host of "conspiratorial" meetings among officials of the Japanese defendants and of other Japanese CEP manufacturers. It is said to have been abetted by the closed Japanese market, a function of a skein of government regulations and economic traditions, which effectively shut off foreign competition in the home market and enabled the gouging of the Japanese consumer to subsidize the export aspect of the conspiracy. The nexus between the home market and export aspects of the "unitary" conspiracy is supplied by the notion which we refer to as "war-chesting." In brief, the plaintiffs allege that the high price home market conspiracy supplied the funds with which to finance or "war-chest" the predatory export raid on the U.S. market.

The export portion of the conspiracy is said to be composed of two essential elements. The first is the Ministry of International Trade and Industry (MITI)-related export control arrangements or Manufacturers' Agreements, referred to by plaintiffs as "cartel agreements," which were signed by the Japanese manufacturing defendants and a number of other firms and which, *inter alia*, established minimum or "check" prices on the shipment of various CEP's to the U.S. As an adjunct to these agreements were certain rules of the Japanese Machinery Exporters Association (JMEA), most notably the "Five Company Rule" pursuant to which the Japanese exporter was purportedly limited to five U.S. customers at a time and was required to register his customers with the Association. Plaintiffs contend that these agreements have the intention and effect of affecting prices in the U.S., thus constituting a per se violation of the Sherman Act, and that the Five Company Rule constitutes a customer allocation or "split of product" in further violation thereof.

The second of the twin foci of plaintiffs' export conspiracy case is, *mirabile dictu*, an agreement by the Japanese defendant exporters and by American importers (including defendants and other alleged coconspirators) to *disregard* the check prices and to sell their products in the U.S. at lower prices

through the vehicle of concealed rebates and discounts. The check price is thus referred to as a "reference" or "benchmark" price, although the plaintiffs never explain how one gets from the reference price to the actual selling price except by asserting that the defendants agreed to sell at "whatever prices were necessary to make the sale."[23] The concealment was intended both to hide from MITI the fact that the defendants were selling in the U.S. below the check prices and to deceive U.S. Customs as to the actual price. While the higher sales prices reported to Customs resulted in higher customs duty, in plaintiffs' submission defendants thereby avoided imposition of still higher dumping duties. Under plaintiffs' theory the rebate scheme was collusive, in that defendants agreed upon a program of concerted depressed pricing for the purpose of destroying the U.S. CEP industry. The scheme is said to have been aimed at the U.S. private label market and only at American manufacturers. The Japanese defendants are said to have acted as a unit and not to have competed among themselves.

Plaintiffs assert that defendants "dumped" their goods in the U.S., selling at predatory levels and at lower levels than for comparable goods in Japan. They also make allegations of sales below cost. Plaintiffs assert that defendants' practices resulted in the sharp lowering of "pricing points" in the U.S., rendering NUE unable to compete in its lower-price market niche and resulting ultimately in the elimination of numerous U.S. CEP manufacturers and the reduction of profitability levels of the others, including Zenith. Plaintiffs assert that defendants further implemented their scheme and consolidated their gains by the acquisition of a number of U.S. manufacturers and the establishment of manufacturing facilities in the U.S.

Although plaintiffs make some attempt to assert direct evidence of this "unitary conspiracy," for reasons which have already surfaced in our evidentiary trilogy and will further appear in this opinion, that effort has totally failed. It is plain

[23] This notion defendants find far more redolent of competition than of conspiracy. *See* Part VI.A.2(a) and Part VII.K, *infra*.

(and essentially conceded by plaintiffs) that their case is a circumstantial one, built upon the mountain of documents referenced in their FPS. Plaintiffs seek to draw inferences of conspiracy from a plethora of sources, including those set forth in their most comprehensive and presumably definitive listing of the evidence of the alleged conspiracy, which appears at pp. 3474-77 of their FPS and includes the following:

1. the export control agreements entered into by the Japanese manufacturers of consumer electronic products;
2. the rules of the Japan Machinery Exporters' Association (JMEA), which implemented the export control agreements and included provisions allocating the U.S. market by restricting each manufacturer to five customers and requiring the registration of trademarks;
3. a number of speeches by high executives of Japanese defendants proclaiming the necessity of stabilizing the Japanese CEP market by cooperative action and evincing a desire to achieve preeminence in export trade with the United States and other countries;
4. the text of the "rationales" of various export control agreements explaining the necessity of stabilizing the export trade;
5. passages in a number of diaries of Japanese officials, in internal company memoranda seized by the Japanese Fair Trade Commission (JFTC), and in some other documents produced in discovery, all of which are said to be probative of agreements to fix prices or to allocate the market, hence of conspiratorial activities of a number of groups and associations to which executives of the Japanese manufacturing defendants belonged. (The allegedly offending groups include the Electronic Industries Association of Japan (EIAJ) and its committees and subdivisions; the JMEA and its committees and subdivisions; the Market Stabilization Council; the Four Associations Conference; the Okura Group; the Palace Group; the Palace Preparatory Group; the Twentieth Day Group; the Tenth Day Group; the MD Group; the TS Group; and the Television Export Council);

6. the mere fact of membership of various defendants in these groups, many of which concededly operated sub rosa;
7. the inference to be drawn from the "sharing" by groups and associations of "every vital piece of information in every phase of the business among the Japanese manufacturers of consumer electronic products";
8. the activities of the defendants in the Japan Light Machinery Information Center (JLMIC) in New York City;
9. the evidence before the JFTC in the "Six Company Case," Case No. 6, 1966, including documentary evidence, affidavits, testimony, admissions by respondents through their counsel, and findings of fact by trial examiners;[24]
10. various schemes by the defendants and their coconspirators fraudulently to conceal their conduct, including secret rebating; false submissions to United States Customs Service; plans to destroy documents, to keep from taking minutes, and to change the names of the conspiratorial groups in Japan; plans to thwart the investigation of the United States Tariff Commission by importers and private label purchasers; and the fraudulent reporting of statistics to the government of Japan;
11. the findings of the JFTC in 1957 against the Market Stabilization Council and its participants;
12. the findings of the United States government, including the dumping findings by the Treasury Department and the finding by the International Trade Commission of injury sustained by U.S. manufacturers of television receivers;

---

[24] The Six Company Case was a price-fixing case brought by the JFTC against six of the Japanese manufacturing defendants in this litigation, but which was terminated without disposition. We described this case in detail in our Japanese Materials Evidentiary Opinion, PTO 295, 505 F.Supp. 1190 at 1209 n.2. We discussed at length in that opinion the evidence from the Six Company Case which is proffered by plaintiffs in this litigation, and held that virtually all of it was inadmissible here. *See* Part VII.G., *infra*.

13. the inference to be drawn from the "parallel, interdependent rebating schemes" in which the defendants and their conconspirators participated;

14. the inferences to be drawn from the materials which are said to evidence the knowledge of each defendant of the operation, including rebating practices, of the export systems of each other defendant, and their resulting knowing participation in the rebate scheme;

15. the inferences to be drawn from what is said to be the similar conduct of defendants in selling consumer electronic products in the United States at prices substanially lower than those at which the same merchandise is sold in Japan, and at below cost;

16. the inference to be drawn from the supposed fact that the Japanese defendants' United States subsidiaries similarly and consistently operated at a loss, as reported in their tax returns and financial statements;

17. the sealing off of the Japanese home market from outside competition;

18. the "pattern" of take-overs and acquisitions of U.S. CEP manufacturers by Japanese defendants, including Matsushita's acquisition of Motorola just before Motorola was to begin selling its console color television receivers in Japan;

19. alleged discriminatory pricing by the Japanese manufacturers of consumer electronic products to customers in the United States;

20. the opinion of plaintiffs' experts that defendants constituted a cartel and engaged in both the home market and export facets of the alleged conspiracy; and

21. the notions that it "belies reality" to believe that the defendants, with so much access to each other at trade association and other meetings, did not conspire and that otherwise an American company like Emerson (NUE's predecessor), with such a good name, would not have been driven out of business.

We will, of course review the evidentiary basis for all of these contentions, as well as others made in the FPS and in the briefs, *infra*. We have attached as Appendix C to this opinion the table of contents to the FPS, which lists all evidentiary areas covered therein.

Having set forth the many facets of plaintiffs' conspiracy theory, we must turn to our analysis of their core allegations, and the metamorphosis thereof, for those are critical matters. Shortly after the assignment of the case to our docket, in search of issue definition, we required counsel (PTO 88) to file detailed statements of their respective positions in the case in the form of preliminary pretrial memoranda (PPTM). In plaintiffs' PPTM, filed in two stages and consuming some 410 pages, and in their contemporaneous comments at pretrial conferences, plaintiffs characterized this as a "simple price-fixing case," with the MITI-related export control arrangements as its "heart," "foundation," and "starting point."[25] The outer layers of plaintiffs' theory consisted of the allegations referenced above that, through conspiratorial meetings supposedly documented in the diaries and other documents seized by the JFTC (and certain other documents produced in discovery), the Japanese manufacturing defendants had acted in concert to fix prices at a high level in Japan in order to finance or "war chest" the predatory export raid on the U.S. market. Both the PPTM and Plaintiffs' Brief in Reply to the Motion for Summary Judgment of Melco and Melco Sales, Inc., filed October 16, 1978, are dominated by this theory.[26] There is but scant men-

---

[25] *See* PTO 113 at 33 (statement of Edwin P. Rome). Indeed, at one point, when the case was pending in the District of New Jersey, plaintiffs actually moved for summary judgment based upon these arrangements alone, but later withdrew that motion.

[26] That is plaintiff's first brief addressed to a motion or summary judgment. Twenty of the 29 pages in the Statement of Facts contained in that brief are devoted to a description of the activities of the so-called conspiratorial groups—the Okura, Palace, Tenth Day, and Twentieth Day Groups, the Statistics Committee of the EIAJ, and the TV Export Council. The activities of these groups, extracted mostly from the JFTC documents, were said to prove both the home market and export conspiracies. The

tion of what later came to dominate plaintiffs' theory of the case—the practice by Japanese manufacturers of granting rebates to American purchasers—although certain rebate transaction are mentioned.

By the time of the April 1979 summary judgment arguments, plaintiffs' theory had changed. Although the conspiratorial activities of the groups and associations were still stressed, the "rebate scheme" had emerged as a co-equal factor in the conspiracy. But when pressed as to the price or price level or price formula at which the predatory low price conspiracy operated, plaintiffs would say only that defendants sold at "whatever price was necessary to get the sale."

By the time final summary judgment argument arrived in August 1980, emphasis on the rebates had increased while mention of the direct conspiratorial evidence and "war chesting" had decreased markedly. As plainitffs' lead counsel, Edwin P. Rome, put it:

> I suggest that the cartel agreements and the rebate system as a unitary entity constituted a mechanism, the mechanism which enabled the defendants to pursue a course of conduct for depressing prices in the United States, as the result of which, aided by their five-company rule, they were permitted and enabled to concentrate each particular defendant's competitive thrust against a particular mass merchandise customer in the U.S. and thereby deny the capability of an American manufacturer to do business with that customer.

PTO 291 at 128. Under this theory, the export control arrangements and conspiratorial group meetings play an entirely different role from that alleged in the PPTM and brief in reply to Melco's motion. Now, the export control arrangements, instead of being the "heart" of the conspiracy, merely provide a forum through which defendants agreed to a "system" of secret rebates designed to nullify those very same export control

remaining 9 pages are devoted to the activities of the "cartel" in the U.S. (with emphasis on Melco) and to the alleged effects of the conspiracy on plaintiffs and the U.S. industry.

arrangements so as to take over the market for sales of television receivers to private label and original equipment manufacturers (OEM) in the United States.[27] As Mr. Rome explained, the export control arrangements and the existence of secret rebates are now the *sole* ingredients of the conspiracy claim:

> The Court: But be that at it may, I still don't see in terms of conspiracy proof what your theory is except by virtue of the concusion that you draw as to the inextricable intertwining of the cartel agreements and the rebate system.
>
> Is that what you said? Did you have another ingredient in that?
>
> Mr. Rome: That is it.
>
> The Court: The cartel agreements and the rebates.

PTO 291 at 113.[28]

Under this formulation, the check price becomes a "reference price" or benchmark price. Defendants are said to have sold above, at, and below the check price, but we are never told of the relationship between the check price and the actual price. Perhaps the best description of this theory, which we treat as plaintiffs' principal theory notwithstanding our com-

[27] Private label customers are retailers, such as Sears, Roebuck or J.C. Penney, who put their own label on the Japanese TV receiver. OEM customers are U.S. TV manufacturers, such as Motorola or GE, who put their label on a Japanese TV receiver of a size or model that they do not make or need more of (usually due to a shortage in production capacity, but sometimes for other reasons).

[28] By this formulation plaintiffs may possibly have conceded sub silentio a massive portion of their case, for there is no evidence of rebates for any sales other than those to private label or OEM purchasers. At the very least, plaintiffs' claims of illegal collusive conduct concerning sales of defendants' branded products—which in Matsushita's case were a large percentage of total sales to the U.S. from 1968-1977 and which in Sony's case represent its entire U.S. sales—are undermined. However, because plaintiffs have advanced other theories which might be argued to support their nonprivate label/OEM claims, we do not consider them abandoned and will deal with them in this opinion.

ments *infra*, is that plaintiffs charge a conspiracy to sell in the U.S. at depressed or predatory prices. The role of the conspiratorial meetings in Japan, although not abandoned as a basis for plaintiffs' claim, is hardly mentioned.[29] Plaintiffs do, however, stress certain meetings in the U.S. of counsel for U.S. customers designed to formulate a common strategy to combat U.S. Treasury Department proceedings under the 1921 Antidumping Act. They also stress the alleged knowledge of each defendant and defendants' U.S.-importer customers about the rebate scheme and their alleged knowing participation in it. Little is said at this stage about "war-chesting," apparently because plaintiffs finally recognized that there is no evidence of it in the record.

We were also told by Mr. Rome at the final summary judgment argument that the conspiracy was "protean" (PTO 291 at 115). Perhaps nothing better explains the elusive nature of plaintiffs' conspiracy claims than Mr. Rome's use of the word "protean" to describe them. According to Webster, protean means "capable of change; exceedingly variable . . . readily assuming different shapes or forms . . . capable of acting many different roles; . . . possessed of infinite variety . . ." Although the formulation itself undermines the integrity of plaintiffs' claims, its usage was fitting.

Finally, in a post-argument submission in the form of an affidavit by their leading expert, Dr. Horace DePodwin, *see* Expert Testimony Opinion 505 F.Supp. 1313 at 1334 n.24, plaintiffs seem to revert to their original theory, for there is a clear emphasis upon the check price; the lower (net-net) price after deduction of rebates is said to be involved only in "selec-

[29] We note however that in two post-final summary judgment argument submissions, the plaintiffs relied upon the conspiratorial meetings as extremely important. In one submission plaintiffs referred to the diaries of the Japanese excutives seized by the JFTC (and excluded from evidence in our Japanese Materials Evidentiary Opinion) as the "Abscam videotapes" of this case. Plaintiffs' Supplemental Post-Argument Memorandum of Sept. 22, 1980 at 211. In the other, they again invoked Mr. Yajima's diary and other references to the *sub rosa* meetings described at length in Part VII.G, *infra*.

tive" cases. Whether this reversion is ascribable, on the one hand, to plaintiffs' discovery of a large number of sales at check price *(see* DePodwin affidavit at 4.9-.10) and the fact that the check price was itself lower than NUE's price (*see* DePodwin affidavit at 4.11-.12), or, on the other, because the first two opinions in our evidentiary trilogy held inadmissible the critical documents upon which much of plaintiffs' theory of conspiracy as stated in their first two summary judgment briefs rests, we cannot say. We do not dwell upon this theory in the opinion because it is plainly an afterthought, because it is outside the mainstream of plaintiffs' case, and because, in any event there is no evidence that the check price was itself a low price. *See* discussion *infra*.[30]

Although in the latter stages of the proceedings the emphasis on the export control arrangements was reduced, those agreements remain important, for they form the cornerstone of plaintiffs' evidence of defendants' opportunity and intention to conspire. With the agreements as background, in plaintiffs' submission, all defendants' activities take on a conspiratorial hue.

[30] Having tried to the extent we can to explain what plaintiffs' theory is, it is important also to explain what their theory is not. Plaintiffs have not alleged a series of individual conspiracies between related companies such as, for example, Toshiba and TAI, or MEI, MET, and MECA. Indeed, it is probable that they could not, and still attempt to try all of them together as part of a single action. *See Blumenthal* v. *United States*, 332 U.S. 539, 558, 68 S.Ct. 248, 257, 92 L.Ed. 154 (1947); *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *United States* v. *Cambindo Valencia*, 609 F.2d 603, 621-25 (2d Cir. 1979), *cert. denied*, 446 U.S. 940, 100 S.Ct. 2163, 64 L.Ed.2d 795 (1980); *United States* v. *Boyd*, 595 F.2d 120, 123 (3d Cir. 1978); *United States* v. *Continental Group, Inc.*, 456 F.Supp. 704, 716 (E.D. Pa. 1978), *aff'd*, 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980). While these cases all arose in the criminal context, they establish that, when the evidence shows no common, overriding goal or purpose among the various defendants in a conspiracy case, but instead is probative of multiple, discrete conspiracies with individual ends, those actions may not be tried simultaneously when substantial rights of the defendants might be affected. We shall not subject the evidence herein to the kind of analysis which would be required if plaintiffs were asserting such an approach. It is at all events too late to do so because of the strictures of PTO 154, *see* Part III, *infra*.

The final facet of plaintiffs' conspiracy theory worth mentioning is a function of their approach to the burden of proof on a summary judgment motion. Plaintiffs have asserted time and again throughout the latter course of the proceedings that evidence of the existence of the alleged conspiracy is to be found in the *failure* of defendants to file affidavits to explain what went on at numerous meetings which defendants admit occurred and at which plaintiffs allege that conspiratorial activity took place. Indeed, in their final briefs plaintiffs set forth a litany of "critical issues" about which the defendants have been "silent," implying that defendants should have been required to produce information on these subjects even though the plaintiffs deliberately, throughout eight years of discovery, failed to take a single deposition of any individual who attended the allegedly conspiratorial meetings. *See* discussion at 1200-1202 *infra* regarding plaintiffs' litigation strategy. For reasons set forth *infra*, this approach is unavailing.

Because plaintiffs are entitled to the benefit of any theory that will get them past a summary judgment motion, we will consider all the variations on their theme.

Having described the nature and evolution of plaintiffs' conspiracy claims—at least as best we can—we turn to a description of the summary judgment record. This task will also require us to say something about the role of the more important case management orders we have entered.

III. *The FPS, Final Stage Case Management, and the Summary Judgment Record*

We have observed that this case is before us on what may be the most ample record for summary judgment purposes ever before a court. The keystone of this record is plaintiffs' roughly 11,500-page FPS, with its roughly 6000-page appendix, which cross-references approximately 250,000 pages of documents. In some respects, the length of the FPS is misleading. First, for reason of convenience in preparation, plaintiffs limited many pages to a single point covering but 20 to 35 percent of the page. Second, extensive portions of the FPS are devoted to

enormously detailed—and generally uncontested—background material which supplies historical, financial, and personnel-related detail about the various defendants.[31] Nonetheless, in terms of sheer size and effort of preparation, the FPS is a formidable document. Notwithstanding its domination by damning conclusory statement, which, as we shall see, are generally not substantiated by the referenced supporting documents, the FPS contains a valuable compendium of plaintiffs' allegations and of the critical documents upon which plaintiffs rely, many of them virtually rescribed in the FPS. It also contains important and useful appendices, such as model by model comparisons of T.V. receivers and certain other CEPs, originally ordered in PTO 145.

The FPS, which has won the approbation of both parties as a necessary management tool (for this case), was required by PTO 154, our master case management order, which is reprinted at 478 F.Supp. 889, 946 (E.D.Pa.1979), and which was fashioned in collaboration with counsel.[32] Paragraph III.C. of PTO 154 orders the parties, both plaintiffs and defendants, to set forth:

> each fact that the party intends to prove at trial either affirmatively or by way of defense, together with a list of: (1) the witnesses (including expert witnesses) whose testimony will be advanced to prove that fact; (2) the documents . . . which will be offered to prove that fact; and (3) line by line references to any portions of depositions and to answers to interrogatories and requests to admit which will be offered to prove that fact. (footnote omitted).

Pretrial Order 154 continues:

---

[31] For example: (1) there are hundreds of pages describing the corporate hierarchy of each defendant; and (2) several of the voluminous appendices are devoted merely to listing the dates of meetings of various groups and associations to which various defendants belonged and the names of corporate officials who attended these meetings. These matters are not in dispute.

[32] Given the problems which plaintiffs' FPS ultimately presented, *see infra*, the parties, after the fact, had some reservations about the requirement, as did we, *see infra*.

> By this formulation we do not intend that the parties must provide a script for trial. We do, however, intend that the parties set forth in narrative form not just the ultimate facts, but all the facts they will prove, including all subsidiary or supporting facts. In so doing they will make, at a minimum, the kind of submission they would make if they were writing detailed requests for findings of fact setting forth what the evidence has established in a nonjury case. . . . In view of the primacy of the conspiracy claims in plaintiffs' case and defendants' counterclaims, the FPS shall itemize all overt acts to be proved at trial. In particular, the FPS shall enumerate with specificity the facts (i.e. the evidence *aliunde*) upon which they rely to prove that each defendants . . . knowingly joined in the alleged conspiracy and all facts, separately as to each defendant, upon which they rely as to each defendant's participation in the alleged conspiracy. Where any facts will be offered against fewer that all parties, the FPS shall identify the parties against which the facts are or are not offered.

The FPS was required in part as a surrogate for inadequate responses to discovery by the plaintiffs, who had theretofore failed, despite several voluminous waves of interrogatories, including so-called "contention interrogatories" which we authorized for that purpose, to set forth adequately the specifics of their claims. Plaintiffs had never made specific allegations as to how and when this conspiracy was conceived, how it operated, and when and how each defendant became a participant, and had also failed to specify what evidence they had against each defendant. The FPS was designed to fill in these gaps and, under the preclusionary provision of PTO 154, no fact not set forth in the FPS could be adduced at trial except for good cause shown. Thus we now have something cognate to a trial record.[33]

No sooner had defendants' counsel commenced their reading of the FPS that they began vigorously to complain that it failed

[33] Defendants have also filed their counterclaim FPS. The time periods for the filing of the FPS's were staggered, and by order several months ago we stayed the requirement for filing response FPS's pending the filing of this opinion.

to accomplish its purpose. We thereupon, at our next regulary scheduled pretrial conference,[34] conducted an FPS "walk-through"—a detailed spot survey of the FPS. As we found at the walk-through and in our subsequent reading of the FPS, it contained for the most part conclusory statements keyed to references to large numbers of documents. Because plaintiffs' case rests basically upon those documents, and because the conclusory statements in the FPS were not helpful, resort to the documents themselves became necessary. As a result we ordered, by PTO 219, the creation of a document depository to be located in our jury room into which the parties were to deposit all the documents which they referenced in their summary judgment papers or upon which they would rely at summary judgment argument or at trial. As many of the documents were Japanese language documents, we also ordered that an English translation be attached.[35]

The parties negotiated over the manner of creating the depository and the division of the cost. Because the documents referenced in the FPS were at immediate issue, the plaintiffs assumed the onus of placing the documents in the depository, with the parties dividing the cost. The document depository was "completed" in the Spring of 1980. We surround "com-

[34] It became our practice to hold pretrial conferences with counsel at least 2 or 3 days per month. This enabled us to rule on countless disputes about discovery and other matters without the necessity of written motions. Some of the conferences were by telephone conference call, but all conferences were reported and denominated with PTO numbers. A PTO number may thus refer to a written order, or it may refer to a transcript of a pretrial conference or hearing at which we made a given ruling, or at which a particular argument was advanced.

[35] In PTO 116, we had ordered the phased exchange by the parties of translations of documents on which they planned to rely. Because of persistent disputes over the quality of plaintiffs' translations, in PTO 143 we appointed two special translation masters, Dr. Toshio G. Tsukihira and Dr. Hiroshi Myaji, to resolve such disputes. It soon appeared that there were problems with both plaintiffs' and defendants' translations. However Drs. Tsukihira and Myaji did an excellent job in resolving the translation difficulties and thereby performed an important service to the Court. We hereby commend them and express our appreciation.

pleted" with quotation marks because the summary judgment argument and our study of the record in conjunction with the preparation of this opinion have demonstrated that many documents relied upon by plaintiffs are not in the depository and that countless documents have not been translated. The document depository with all its contents is, both for what it contains and for what it does not, an important part of the summary judgment record.[36]

Defendants' also complained, with justification, that the plaintiffs, despite the requirements of PTO 154, had failed to identify in their FPS, discretely as to each defendant, the evidence *aliunde* which linked it to the conspiracy. We therefore ordered plaintiffs to submit a list of their evidence *aliunde*, *i.e.*, of the key documents or other materials which constituted independent evidence of the existence of a conspiracy among the defendants. Regrettably, the results of that order were disappointing. Plaintiffs indeed filed an evidence *aliunde* list, but it consisted of some seven volumes piled over three feet high containing nothing but 250,000 or so numbers—the document numbers of virtually all the documents referenced in the FPS. Thus plaintiffs' list of evidence *aliunde*, intended to inform each defendant with particularity of the evidence against it, did not "advance the ball." Rather, it left the case where it had been for many years, with the plaintiffs invoking a boxcar full of documents as evidence against all defendants on the theory that they were coconspirators, but without any semblance of specificity.[37] The situation was complicated by the fact that, at least from the beginning of our stewardship in the case, the defendants persistently asserted not only that plaintiffs' documents were inconsequential, but also that the bulk of them were inadmissible in evidence. Melco had formally asserted these evidentiary objections in its Motion for Summary Judgment filed in March 1978.

In sum, despite our fervent and carefully considered case management efforts, which commenced with the PPTM and were codified in PTO 154,[38] neither the FPS nor the evidence *aliunde* list was helpful in giving plaintiffs' case the kind of sharp focus necessary for dealing with a motion for summary judgment, because neither of these submissions contained the precise marshalling of the evidence which we had ordered. Rather, each was little more than a carefully organized compendium of virtually every colorably relevant document which had been produced during discovery and copied by the plaintiffs. Moreover, plaintiffs took the position (to which they apparently still adhere) that it is not their burden to detail the evidence in support of their claims, but rather that "the Court must consider the entire FPS in reaching a determination on the issue of conspiracy and in evaluating defendants' Motion for Summary Judgment."[39] Although we are attempting to do just that, it is fundamental that the Court should not be required to do plaintiffs' job of marshalling the evidence to demonstrate a genuine issue of material fact which would preclude summary judgment.

Rule 56(e) requires that a party opposing a motion for summary judgment must, "by *affidavits* or as otherwise provided in this rule, . . . *set forth specific facts* showing that there is a

[36] We cannot consider documents referenced in the FPS but not found in the depository. When plaintiffs have become aware of "missing" documents, they have asserted that because defendants' paralegals are the ones who used the depository, not plaintiffs', the responsibility for missing documents (or translations) must lie with defendants. We have seen no evidence to support any claim of neglect by defendants' personnel and shall treat missing documents as plaintiffs' responsibility. Nor do we deem it incumbent upon us to call plaintiffs to request copies of missing documents. They have had more than enough time to supply them, and it would be disruptive of our work schedule to require us to do so and await the document before proceeding.

[37] Melco moved to strike the evidence *aliunde* list. While there was much to be said for Melco's position, we declined to do so, relying on the then forthcoming pretrial evidentiary hearings and the anticipated labor of reviewing the critical documents as the means to flesh out plaintiffs' case.

[38] During the first two years of our stewardship in this case, case management was a subject at virtually every pretrial conference, and issue definition and contention description were constant topic of dialogue.

[39] Letter to the Court from Edwin P. Rome at p. 2 (August 27, 1980).

genuine issue for trial." (emphasis added).[40] It also ties summary judgment proceedings to admissible evidence, *see* note 26, *supra*. Mindful of those principles, we concluded early in 1980 that in order for us meaningfully to deal with the summary judgment motions, two devices would be especially helpful: (1) a pretrial evidentiary hearing; and (2) a summary judgment argument of sufficient length that plaintiffs would have an opportunity to call to the Court's attention any document in the record which would create a genuine issue of material fact. We proceeded to implement both.

As we have suggested, it was obvious to us by this time that only by examining the actual documents could we assess the viability of plaintiffs' case. Such an examination would enable us to evaluate each document's authenticity and admissibility as well as its efficacy in creating a genuine issue of material fact. The announced charter for the evidentiary hearings was thus to aid in determination of the summary judgment motions. However, prior to their commencement we clearly stated of record that they would also have a second purpose—to serve as *in limine* hearings pursuant to F.R.E. 104(a) so that we could make a pretrial determination whether there was sufficient independent evidence (evidence *aliunde*) of a conspiracy among the various defendants to permit the in-

[40] Plaintiffs have made much of the alleged failure of defendants to move forward in the first instance with their own affidavits. It is not true, as plaintiffs suggest, that no defendants have done so. To the contrary, a number of defendants have filed affidavits. However, it is plain that a defendant is entitled to move for summary judgment, supported by accompanying memoranda, asserting that there is nothing which has been produced in discovery or otherwise which supports plaintiffs' claims. *See* F.R.Civ.P. 56(b) ("A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment") and F.R.Civ.P. 56(e) (". . . When a motion for summary jdugment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.") We discuss standards for summary judgment, including burden of proof issues, in Part V, *infra*.

troduction of "coconspirator" declaration under F.R.E 801(d)(2)(E).[41] *See* Part VI.D.6, *infra*. This was an important matter since it was clear to all, and tacitly acknowledged by plaintiffs' counsel, that without the introduction of alleged coconspirators' declarations, plaintiffs might not be able to make out a conspiracy case against most, if not all, of the defendants. Acknowledging that such a charter for hearings might entitle, and indeed require, plaintiffs to put on much of their case-in-chief, or at least the most important parts of it, we placed no time limitation upon the hearings.[42]

The pretrial evidentiary or "*in limine*" hearings have been fully described in our Public Records Opinion (PTO 283). Suffice it to say that plaintiffs marshalled their key documents, assigning each a DSS (Document Submission Sheet) number,[43] and argued the admissibility of most of them to the Court. Defendants replied and extensive briefs were submitted by both sides. The hearings resulted in the three lengthy and extremely detailed opinions mentioned above, the results of which will be summarized in Part IV of this opinion. Since the DSS submissions are what plaintiffs have represented to be their most important documents, they are an important part of the summary judgment record.

At the outset of the August 1980 argument on the motions for summary judgment, we informed the parties that our prin-

[41] Although we had earlier labelled the hearings as "evidence *aliunde* hearings," we had abandoned that charter in favor of a more limited charter, *i.e.*, to aid in the disposition of the summary judgment motions. Then, on the eve of the commencement of the hearings, we reversed ourselves and established the scope of the hearings as set forth in the text.

[42] The hearings lasted for five weeks, with frequent evening sessions, and it was understood that we would sit as long as necessary to receive any additional materials that the parties wished to offer. In addition, at the close of the hearings, we granted leave to plaintiffs to submit memoranda on those documents we did not reach during the hearings, as well as leave to submit, in connection with both facets of the pretrial evidentiary hearings, as many additional DSS's as they desired. Plaintiffs have made a number of submissions and defendants have replied thereto.

[43] A sample of the DSS is attached to the Public Records Opinion. Actually, most DSS's contained a number of document pages.

cipal concern at that time was not with the legal aspects of the case, but rather with its factual basis. We invited counsel to take as much time as was necessary to go through the entire record and call our attention to any documents, testimony, or other evidence which bore on the existence of a genuine issue of material fact. The defendants accepted our invitation and took over four days to analyze a very large number of the important documents proffered by plaintiffs, arguing that they created no genuine issue of material fact. We found that presentation most helpful. The plaintiffs, on the other hand, declined our invitation and studiously avoided dealing with any specific documentary evidence during their oral argument.[44]

The summary judgment record before us then is a "mixed bag." It includes the preclusive FPS with all its appendices, the documents referenced therein,[45] and all the DSS's. It also includes all the exhibits offered by plaintiffs in connection with the summary judgment proceedings in April 1979,[46] and it

---

[44] Frustrated by this stratagem, particularly as it was accompanied by plaintiffs' customary blanket invocation of the entire FPS and the documents referenced therein, we offered to sit still longer to review any documents plaintiffs cared to present. *See* PTO 291 at 7-11. The offer was not accepted by the plaintiffs, who still declined to delve into specifics.

We will discuss the tenor of the plaintiff's summary judgment presentation in Part VII.P, *infra*. Notwithstanding their lack of specificity in the argument, plaintiffs, after its conclusion, submitted an additional list of documents upon which they were relying. Moreover, in their 439-page post-hearing brief, which supplemented their 578-page pre-hearing brief, they invoked still other documents. The results of our investigation into those documents is instructive and will be described *infra*.

[45] This includes all the documents in the document depository (a rough count suggests well over 50,000).

[46] There are three important "subtractions" from the record as thus far enumerated. First, notwithstanding the requirements of PTO 116, *see* n. 35 *supra*, we have gone to the document depository on numerous occasions to search out a group of documents only to find no translation. We fail to understand how plaintiffs can seriously rely upon documents whose translation they have not bothered to place in the depository; hence we shall not consider them. Second, we cannot consider documents referenced in the FPS but not lodged in the document depository. *See* n. 36, *supra*. Third, we shall not consider those documents which we have held inadmissible in our evidentiary opinion trilogy.

includes the various affidavits submitted to us by both plaintiffs and defendants and the various appendices thereto, some of which are not contained in the document depository. We shall also consider the voluminous depositions submitted for our consideration, along with the even more voluminous answers of defendants to plaintiffs' interrogatories, the most "visible" of which are those relating to membership in and attendance at meetings of various groups and associations. Additionally, the record includes those portions of plaintiffs' expert reports which we held admissible in our Expert Testimony Opinion.

This description includes a veritable mountain of documents and other materials. However, not all of them have been demonstrated or even asserted to be of any significance on the summary judgment motion. Many of them relate to plaintiffs' damages and are not at issue at this stage; others are purely background material. Countless others, despite inclusion in the FPS, are plainly irrelevant, at least to our determination here. Even after elimination from consideration of those documents, there are many documents, cumulative, marginal, or otherwise, upon which plaintiffs do not seriously rely, notwithstanding their having been referenced in the FPS and placed in the depository. These documents we shall not seriously consider in our evidentiary review.

We do not pretend to have read all 250,000 documents which plaintiffs have referenced in their FPS. We do not think it incumbent upon us to read documents whose importance plaintiffs have not in some way demonstrated. To posit the contrary would make a mockery of the litigation process and render the court hostage to any party who cavalierly sought to bury the court under a mountain of documents in a complex case. Accordingly, our attention will primarily be focused upon the documents (or categories of documents) called to our attention by plaintiffs' (and defendants') counsel in their oral arguments and extensive memoranda. However, we will also consider a considerable number of documents, not specifically relied upon, to which we were referenced by the FPS and which we found arguably germane.

IV. *Summary of Pretrial Evidentiary Rulings*

For the reasons noted above, the three opinions which arose out of the pretrial evidentiary hearings are incorporated by reference in this opinion. Because of their great length, as a matter of convenience, we summarize herein the ultimate disposition of the major categories of evidence addressed therein.

In the first of those opinions, entitled "Admissibility of Public Records and Reports," Pretrial Order No. 283, 505 F.Supp. 1125 (filed Aug. 7, 1980), 6 Fed.Evid. Rep. 801 (cited herein as Public Records Opinion), we considered the admissibility of a number of public documents proffered principally under F.R.E. 803(8)(C). The first category of documents, promulgated by the U.S. Treasury Department and the U.S. Tariff Commission in connection with proceedings under the 1921 Antidumping Act, 19 U.S.C. § 160 *et seq.* (repealed 1980), included: (1) Treasury Department Determination of Sales at Less than Fair Value, 35 F.R. 18549 (1970); (2) Determination of Injury by the U.S. Tariff Commission Investigation No. AA1921-66 (undated); (3) The Treasury Department Finding Of Dumping, 36 F.R. 4597 (1971); and (4) numerous Customs Forms 29's, appraising dumping duties against various defendants and other importers. The thrust of these documents as proffered by the plaintiffs was that: (1) television receivers from Japan were being sold in the United States at less than fair value; (2) an industry in the United States was being injured by reason of such sales; (3) dumping had thus occurred in violation of the 1921 Antidumping Act; and (4) dumping duties had been assessed against specific importers (on the Customs Form 29). The time frames of these documents are within the frame of reference of plaintiffs' claims. However, all of these documents were excluded: (1) as hearsay and not admissible under the relevant exception to the hearsay rule (F.R.E 803(8)(C)); (2) as irrelevant to the present case; and (3) as at all events excludable under F.R.E. 403 on the grounds that any minimal probative value the documents may have had was far outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury, and by considera-

tions of undue delay, waste of time, and needless presentation of cumulative evidence.

The second category of evidence addressed in the Public Records Opinion was composed of documents, including certain findings, promulgated by the U.S. Tariff Commission and its successor, the U.S. International Trade Commission (I.T.C.), and by the Secretaries of Labor and Commerce under §§ 301(b)(1) and (c)(1) and (2) of the Trade Expansion Act of 1962 and §§ 201(b) and 221 of the Trade Act of 1974. These documents contained various findings of injury to United States industry. All of the documents were excluded as hearsay, as irrelevant, and under F.R.E. 403.

Third, the Public Records Opinion dealt with certain purported findings and related documents arising out of proceedings in two cases before the Japanese Fair Trade Commission (JFTC). The first was a 1957 case brought against the Home Electric Appliance Market Stabilization Council, some of whose members are defendants in this action, alleging industry-wide price fixing. The second case, brought in 1967, alleged retail price maintenance against defendant MEI. In plaintiffs' submission, these materials are probative of the role of various defendants in the alleged home market aspects of the "unitary" conspiracy. However, all of them were excluded as hearsay and inadmissible under the 803(8)(C) exception to the hearsay rule. Moreover, certain "decisions" of the JFTC were also excluded as inadmissible under F.R.E. 408 and 410.

Plaintiffs also sought admission under F.R.E. 803(8)(C) of the findings of Judge A. Leon Higginbotham, Jr., our predecessor in this case, found at 402 F.Supp. 262 (E.D.Pa. 1975), regarding personal jurisdiction and venue. However, we held that Judge Higginbotham's findings did not come within the ambit of Rule 803(8)(C) and that they were therefore inadmissible.

Finally, we dealt in the Public Records Opinion with certain statistical data from the statistical office of the United Nations and a report of the Organization for Economic Cooperation and

Development. We found this data, which is in part technological (relating to electronic components) and in part statistical (relating to television production figures of various countries), to be admissible.

The second opinion in our evidentiary trilogy was entitled Admissibility of Materials Relating to Activities in Japan, PTO 295, 505 F.Supp. 1190 (filed September 29, 1980), 6 Fed.Evid. Rep. 1329 (cited herein as Japanese Materials Evidentiary Opinion). That opinion dealt with the admissibility of three major groups of documents: (1) materials seized by the JFTC in "raids" on the offices of several of the defendants here who were respondents in the Six Company Case; (2) testimony and statements or "protocols" given by officials of the respondent companies during the course of the JFTC proceedings in the Six Company Case; and (3) materials produced in discovery from the files of the Japanese defendants and others relating to activities in Japan of Japanese manufacturers of consumer electronic products or of associations of manufacturers. Our rulings were all predicated on either Article VIII (hearsay) or Article IX (authentication) of the Federal Rules of Evidence.

We first dealt with the diaries or notebooks of officials of several of the Japanese defendants, which were said to contain evidence of the alleged conspiracy.[47] We next considered the admissibility of a number of internal memoranda of certain of the defendants,[48] minutes of certain EIAJ officers' meetings, supposed minutes of the TV Export Council meetings, and the so-called Japan Victor document, allegedly emanating from the EIAJ Statistics Committee. We held all these documents to be hearsay and inadmissible under any of the exceptions to the hearsay rule. As we have noted, we also considered the admissibility of the formal testimony of executives of the Japanese companies before the JFTC, as well as of the pro-

[47] These included the diaries of Mr. Yajima of Toshiba, Messrs. Yamada [illegible] Yamamoto of Hitachi, Mr. Okuma of Melco, and Mr. Tokizane of Mat-[illegible]hita.

[48] These included the so-called Shimizu Memorandum and various Toshiba internal memoranda.

tocols given by them to the JFTC investigators. We held the JFTC testimony admissible against the defendants in the "Six-Company Case" only, except for any so-called "export" or "war-chesting" references, which we held with minor exceptions to be inadmissible. We held that the protocols were admissible against the employer of the maker of the protocol only.

In the third opinion in our evidentiary trilogy, entitled Admissibility of Expert Testimony, PTO 301, 505 F.Supp. 1313 (filed December 10, 1980) (cited herein as Expert Testimony Opinion) we considered the admissibility of the opinions of five of the plaintiffs' expert witnesses, as set forth in compendious reports prepared by those experts. The reports at issue were: (1) "Economic Study of the Japanese Television Industry," by Dr. Horace J. DePodwin, Dr. David Schwartzman, and Marcio Teixeira of Horace J. DePodwin Associates, Inc., an economic consulting firm (the DePodwin Report); (2) "The Pervasive Use of Collusive and Company Group (*Keiretsu*) Activities in Achieving the Rapid Increase of Japanese Exports of Television Receivers to the United States," by Professor Kozo Yamamura, Chairman, Japan Studies Program and Professor of Economics and East Asian Studies at the University of Washington (the Yamamura Report); (3) "Economic Analysis of Evidence Relating to Japanese Electronic Products Antitrust Litigation," by Stanley Nehmer of Economic Consulting Services, Inc. (the Nehmer Report); (4) "The Impact of Japanese Financial and Employment Practices on Japanese Production, Marketing, and Price Behavior," by Professor Gary R. Saxonhouse, Professor of Economics, University of Michigan (the Saxonhouse Report); and (5) "Vertical Restraint by Japanese Television Manufacturers: Anticompetitive Effects," by Professor John Owen Haley, Associate Professor of Law at the University of Washington (the Haley Report).[49]

[49] Five additional expert reports referenced in plaintiffs' FPS were not the subject of dispute during the pretrial evidentiary hearings and were not

We did not undertake to rule upon the admissibility of these experts' reports *qua* reports nor upon the admissibility of all of the opinions expressed in their reports. Rather, we culled from the reports the salient opinions of the experts with possible bearing upon the outcome of the motions for summary judgment. In terms of methodology, each of the experts had reviewed the documentary materials provided him by plaintiffs' counsel, drawn upon his economic knowledge, and then in essence concluded that defendants were engaged in precisely the conspiracy posited by plaintiffs.

In our Expert Testimony Opinion, we excluded the great bulk of these expert opinions, holding admissible only background materials relating to the structure of the Japanese market, including its trade barriers, the technological development of the consumer electronic products industry, and basic economic principles and methodology.[50] We reserved our ruling on one calculation of price differentials between the Japanese and American market presented in Part V of the DePodwin Report. *See* Expert Testimony Opinion 505 F.Supp. 1313 at 1348. Most of the remaining material is attacked by defendants on relevancy grounds, and is discussed in the pertinent sections, *infra*.

Our Expert Testimony Opinion was two-pronged. To summarize, we first found that most of the experts' crucial opinions, notably those which concluded that defendants in this action were acting collusively, were so pervaded by reliance upon untrustworthy materials, including materials excluded

addressed in our Expert Testimony Opinion. These reports are an opinion of Milton L. Davies, Certified Public Accountant; an opinion with attachments by Morris J.Cohen & Co., Certified Public Accountant; a report of Walter Lukas, Consulting Engineer; a report of Karl Horn and Vito Brugliera, of Zenith Radio Corporation; and an opinion by the Japanese law firm of Braun, Moriya, Hoashi & Kubota concerning Japanese commodity tax law.

[50] By PTO 305, 505 F.Supp. 1313, dated February 19, 1981, we denied plaintiffs' motion for reconsideration and clarification of the expert testimony opinion. That motion was addressed primarily to the admissibility of certain price comparisons in the DePodwin Report, described in n.201, *infra*.

from evidence in our two previous evidentiary opinions, as to render them inadmissible under F.R.E. 703. In addition, we concluded that the experts, by providing a narrative factual description and summary of the evidence before the court, and drawing (factual) conclusions upon which they in turn founded their opinions, were not utilizing any expertise in a manner helpful to the jury under F.R.E. 702, but were instead acting not as economists but as conspiracyologists engaged in inadmissible "oath-helping."

Our discussion at this juncture of the numerous documents and opinions which we have *excluded* from evidence is important because of the necessity for perspective. First, the excluded evidence includes the most important documents in plaintiffs' original submissions and, in a very real sense, an evaluation of the plaintiffs' case is aided by an understanding of the extent to which its original integral parts are now missing. Second, because of the importance of the excluded documents, we may have occasion from time to time to observe whether the outcome would have been different had the documents not been excluded. Third, the reason for the exclusion in the Japanese Materials Evidentiary Opinion of the most critical of these documents—lack of foundation—reflects upon the integrity of plaintiffs' conspiracy case, a subject upon which we will comment further *infra*.

Perhaps the most graphic description of the impact on plaintiffs' case of our trilogy of evidentiary opinions comes from analysis of a portion of Plaintiffs' Memorandum in Reply to the Motions for Summary Judgment of Certain Defendants,[51] Matsushita Defendants, and Sears, Roebuck & Co. (filed April 2, 1979), 8½ years after the filing of the NUE action. In Part III.B. of that memorandum the plaintiffs purported to review

[51] "Certain Defendants" is the rubric under which a shifting group of defendants collaborated on briefs. The summary judgment motion referenced in the text was filed by the Toshiba, Hitachi, and Sanyo defendants, who generally formed the core of the "certain defendants" group. They were often joined by Sharp, MC, and MIC.

the evidence of the overall combination and conspiracy, advancing the view that the defendants had completely failed to rebut plaintiffs' evidence. The major categories of evidence which plaintiffs advanced at that time were:

1. Data on the early development of the Japanese electronics industry;
2. Matsushita-Philips' agreements creating Matsushita Electronics Corporation for the production, sale, and exportation of electronic components;
3. The formation of the defendants' trade associations, including the EIAJ and JMEA;
4. Excerpts from publications of the JMEA in its "Association News" and from the EIAJ's publication "Denshi";
5. The admission that there were meetings of the Chairmen of the Board and other officials of the defendant companies (the so-called conspiratorial groups), coupled with the evidence from the "Six-Company Case"; and
6. Evidence from the JFTC Market Stabilization Council Case.

Yet, the evidence from the Market Stabilization Council and from the "Six-Company Case" which includes the vast bulk of the evidence about the conspiratorial groups and all the "export references," have been excluded from evidence by our trilogy of evidentiary opinions.[52]

[52] The point is more dramatically made if we examine plaintiffs' reply to Melco's motion for summary judgment, filed October 16, 1978, when discovery was nearly complete, plaintiffs' Preliminary Pretrial Memorandum had been filed, and the case was almost eight years old. The principal items listed in plaintiffs' evidentiary review were: (1) the 1957 decision of the JFTC in the Market Stabilization Council case; (2) the "United States Treasury Department Less Than Fair Value" finding, dumping finding, and CF 29 assessments against Melco; and (3) the documents seized in the Six Company Case. Yet, *all* of these items have been excluded by the evidentiary opinions.

We consider in this opinion such admissible or significant evidence as is left from plaintiffs' presentation.[52A] The short of it, however, is that the evidentiary rulings we have just described have not just narrowed markedly the scope of the viable record before us, but have virtually emasculated plaintiffs' case.

We turn now to an explication of the legal principles which will govern our analysis of those portions of plaintiffs' case that remain.

V. *Standards Governing Summary Judgment*

The parties, principally the plaintiffs, have devoted extensive portions of their briefs to descriptions of the law governing the grant or denial of summary judgment. For example, the plaintiffs, in their August 11, 1980, brief in opposition to defendants' summary judgment motion devoted eighteen pages to the point. The thrust of plaintiffs' argument is that summary judgment has almost never been granted in complex antitrust cases where "state of mind" is an issue. We explain herein the principles in this area we will apply.

The general principles governing the grant or denial of summary judgment are well known. We set forth those principles, at least as they have been announced in the Third Circuit, in

[52A] We will have frequent occasion to observe that many of the documents referenced in the FPS and considered in this opinion (but not taken up during the pretrial evidentiary hearings) are similar in character to those excluded in the Japanese Materials Evidentiary Opinion. In all such instances, we nonetheless assume the admissibility of those documents arguendo. We believe that we fairly could exclude these documents if we were disposed to make formal rulings thereon. In so declaring we do not, we think, assert that a party opposing a summary judgment motion must try his case pretrial and establish the admissibility of all the documents on which he relies. What we do say is that where, as in this case, the admissibility of these documents is actually, and in good faith, challenged, and where a strong showing of inadmissibility is made, the burden of establishing admissibility is fairly put on the party opposing the motion.

our Opinion and Order (1916 Antidumping Act), 494 F.Supp. 1190, 1239-40 (E.D.Pa.1980):

> Rule 56 of the Federal Rules of Civil Procedure permits the grant of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). The burden of demonstrating that there is no genuine issue of material fact rests on the moving party. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Summary judgment may not be granted if there is "the slightest doubt" about material facts. *Tomalewski* v. *State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir. 1974). Consequently, a motion for summary judgment may not be granted on the ground that if a verdict were rendered for the adverse party the court would set it aside as against the weight of the evidence. *Perks* v. *Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979), *quoting Rosenthal* v. *Rizzo*, 555 F.2d 390, 394 (3d Cir.) *cert. denied*, 434 U.S. 892, 98 S.Ct. 268, 54 L.Ed.2d 178 (1977). Similiarly, summary judgment is not appropriate if the resolution of a material issue of fact turns on the credibility of witnesses. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); *Remak* v. *Quinn*, 611 F.2d 36 (3d Cir. 1979). All inferences from the evidence must be drawn in favor of the party opposing the motions—here, the plaintiffs. *Small* v. *Seldows Stationery*, 617 F.2d 992 (3d Cir. 1980).

(footnote omitted).

In support of their position plaintiffs rely mainly upon the famous decision in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), in which the court stated:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . Trial by affidavit is no substitute for trial by jury.

368 U.S. at 473, 82 S.Ct. at 491 (footnote omitted). While *Poller* has never been overruled, the gloss that plaintiffs place upon it has been significantly dulled in recent years. The number of antitrust cases in which the Supreme Court and courts in the Third Circuit have granted or upheld the grant of summary judgment on the merits, either partial or complete, since the *Poller* decision in 1962 is extremely large.[53] It is now settled

---

[53] *First Nat'l Bank of Arizona* v. *Cities Serv. Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Mannington Mills, Inc.* v. *Congoleum Indus. Inc.*, 610 F.2d 1059 (3d Cir. 1979) (affirmed summary judgment for defendants on § 2 claims; reversed summary judgment on § 1 conspiracy claim); *Midwest Paper Prod. Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978); *Evans* v. *S. S. Kresge Co.*, 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977); *Sound Ship Bldg. Corp.* v. *Bethlehem Steel Co.*, 533 F.2d 96 (3d Cir.), *cert. denied*, 429 U.S. 860, 97 S.Ct. 161, 50 L.Ed.2d 137 (1976); *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62 (1970); *Gold Fuel Serv., Inc.* v. *Esso Standard Oil Co.*, 306 F.2d 61 (3d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S.Ct. 506, 9 L.Ed.2d 500 (1963); *Daley* v. *St. Agnes Hosp.*, 490 F.Supp. 1309 (E.D.Pa.1980); *Sims* v. *Mack Truck Corp.*, 488 F.Supp. 492 (E.D.Pa. 1980); *Herrin* v. *L.M. Collins & Assoc., Inc.*, 483 F.Supp. 288 (W.D.Pa. 1980); *Indian Coffee Corp.* v. *Proctor & Gamble Co.*, 482 F.Supp. 1104 (W.D.Pa. 1980); *Raitport* v. *General Motors Corp.*, 450 F.Supp. 1349 (E.D.Pa. 1978); *Altemose Constr. Co.* v. *Building & Constr. Trades Council*, 443 F.Supp. 492 (E.D.Pa. 1977); *Frankford Hosp.* v. *Blue Cross*, 417 F.Supp. 1104 (E.D.Pa. 1976), *aff'd*, 554 F.2d 1253 (3d Cir.), *cert. denied*, 434 U.S. 860, 98 S.Ct. 186, 54 L.Ed.2d 133 (1977); *In re REA Express, Inc.*, 412 F.Supp. 1239 (E.D.Pa. 1976); *V. & L. Cicione* v. *C. Schmidt & Sons, Inc.*, 403 F.Supp. 643 (E.D.Pa. 1975), *aff'd*, 565 F.2d 154 (3d Cir. 1977); *Chuy* v. *Philadelphia Eagles*, 407 F.Supp. 717 (E.D.Pa. 1976); *Famous Foods, Inc.* v. *General Foods Corp.*, 399 F.Supp. 705 (W.D. Pa. 1972), *aff'd*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976); *Doctors, Inc.* v. *Blue Cross*, 431 F.Supp. 5 (E.D.Pa. 1975), *aff'd*, 557 F.2d 1001 (3d Cir. 1976); *Kaiser* v. *General Motors Corp.*, 396 F.Supp. 33 (E.D.Pa. 1975), *aff'd*, 530 F.2d 964 (3d Cir. 1976); *Thomas* v. *Amerada Hess Corp.*, 393 F.Supp. 58 (M.D.Pa. 1975); *Mogul* v. *General Motors Corp.*, 391 F.Supp. 1305 (E.D.Pa. 1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976); *Gasperi* v. *Cinemette Corp.*, 391 F.Supp. 826 (W.D.Pa. 1975); *Goldinger* v. *Boron Oil Co.*, 375 F.Supp. 400 (W.D.Pa. 1974), *aff'd*, 511 F.2d 1393 (3d Cir. 1975); *MDC Data Centers, Inc.* v. *IBM*, 352 F.Supp. 63

that summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in extensive discovery, fail to produce "significant probative evidence" in support of the allegations in their complaint. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968). The *Cities Service* Court stated:

> Essentially all that the lower courts held in this case was that Rule 56(e) placed upon Waldron [the plaintiff] the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them. That holding was correct. To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigant's rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

391 U.S. at 291, 88 S.Ct. at 1593. *See also Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 579 (3d Cir. 1979).

(E.D.Pa. 1972); *Minersville Coal Co.* v. *Anthracite Export Ass'n*, 335 F.Supp. 360 (M.D.Pa. 1971); *Record Club of America, Inc.* v. *CBS*, 310 F.Supp. 1241 (E.D.Pa. 1970); *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F.Supp. 1291 (D.Del. 1970); *Collidotronics, Inc.* v. *Stuyvesant Ins. Co.*, 290 F.Supp. 978 (E.D.Pa. 1968), *aff'd*, 412 F.2d 1186 (3d Cir. 1969); *Peerless Dental Supply Co.* v. *Weber Dental Mfg. Co.*, 283 F.Supp. 288 (E.D. Pa. 1968); *United States* v. *Johns-Manville Corp.*, 245 F.Supp. 74 (E.D.Pa. 1965); *United States* v. *Johns-Manville Corp.*, 237 F.Supp. 885 (E.D.Pa. 1964); *Fiumara* v. *Texaco, Inc.*, 204 F.Supp. 544 (E.D.Pa.), *aff'd*, 310 F.2d 737 (3d Cir. 1962). *See generally, Rogers, Summary Judgment in Antitrust Conspiracy Litigation*, 10 Loy. U. of Chi.L.J. 667 (1979).

The most recent case in this area is *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980), where the plaintiff relied heavily upon *Poller* to argue that summary judgment may not be granted in a complicated antitrust case. After discussing the Supreme Court's holding in *Poller* and ascribing to *Cities Service* a significance equal thereto, the court proceeded to affirm the grant of summary judgment, noting:

> It is clear that this circuit as heeded the language in *Cities Service*. When faced with defendants' sworn denial of the existence of a conspiracy, it is incumbent upon the plaintiff to produce significant probative evidence demonstrating that a genuine issue of fact exists as to this element of the complaint.

Id. at 554. We perceive the Third Circuit to be in accord.

The interpretation which these and other antitrust plaintiffs have attempted to give to *Poller* was criticized by the National Commission for the Review of Antitrust Laws and Procedures in its Report to the President and the Attorney General dated January 22, 1979, 80 F.R.D. 509, 566-67:

> Rule 56 of the Federal Rules of Civil Procedure and the accompanying Advisory Committee notes indicate a uniform summary judgment standard for all cases and no special category for antitrust or other complex actions. Some courts, however, have been much more reluctant to grant summary judgment in antitrust cases. This result, in our opinion, stems from overly restrictive interpretation of certain Supreme Court cases. . . . This language [quoted *supra* at 1139-1140] may have served at the time to correct overly eager use of summary judgment in some antitrust cases, and the Commission is not recommending a return to pre-*Poller* practice. Some cases since *Poller*, however, appear to have gone to the opposite extreme.
>
> Under *Poller* and other Supreme Court decisions, failure by the movant to disprove conclusively a disputed material fact or factual inference requires denial of a motion for summary judgment. This formulation has led to overly strict application in some instances. Some appellate courts have stated, for example, that summary judgment

should not be granted if there is the "slightest doubt" as to any material fact. This is an unwarranted gloss on the "genuine issue" requirement. Opinions relying on the slightest doubt standard have been declining, however, and some circuits, including the Second Circuit, have explicitly rejected the more restrictive language found in older cases.[54]

The *Poller* decision, when properly applied, should discourage the use of summary adjudication only where such action encompasses subjective evidence such as motive, intent, credibility, and the like. In assessing the contribution of summary judgment to the expedition of complex antitrust cases, the Commission does not wish to invite the sort of abuses of summary judgment that the *Poller* decision effectively condemned. On the other hand, the appellate courts should more realistically evaluate the availability and proper application of summary judgment.

Since we view the present language of Rule 56 as compatible with more effective use of summary adjudication, we do not recommend a change in the Rule. If, however, future decisions do not enhance the availability of summary judgment, an amendment to the Rule may be needed.

(footnotes omitted). The Ninth Circuit put the point well in *Zweig* v. *Hearst Corp.*, 521 F.2d 1129, 1135-1136 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975):

> Summary judgment has, as one of its most important goals, the elimination of waste of the time and resources of both litigants and the courts in cases where a trial would be a useless formality. Courts must, of course, proceed with caution in determining litigation by summary judgment; this is especially true where grave, important and novel questions of law are involved. *However, the mere fact that the issues may be complex is not a valid reason to deny summary judgment when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.*

[54] The Third Circuit has, however, espoused the "slightest doubt" test. *See* pp. 1139-1140 *supra*.

(emphasis added). We agree.

Against this background, the courts have repeatedly held that when, despite adequate discovery, plaintiffs cannot come forward with admissible and probative evidence of an antitrust violation, summary judgment is appropriate. *See, e.g., Comet Mechanical Contractors, Inc.* v. *E. A. Cowen Construction Inc.*, 609 F.2d 404 (10th Cir. 1980); *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102, 109-10 (2d Cir. 1975); *Consolidated Farmers Mutual Insurance Co.* v. *Anchor Savings Ass'n*, 480 F.Supp. 640 (D.Kan.1979), *aff'd*, 1980 Trade Cases ¶ 63,530 (10th Cir. 1980), *cert. den.*, ___ U.S. ___, 101 S.Ct. 863, 66 L.Ed.2d 804; *Raitport* v. *General Motors Corp.*, 450 F.Supp. 1349, 1355 (E.D.Pa. 1978) (summary judgment granted where plaintiff had "more than ample opportunity to conduct discovery" and yet "offered only unsubstantiated conspiratorial allegations in support of his claims"); *Merit Motors, Inc.* v. *Chrysler Corp.*, 417 F.Supp. 263 (D.D.C.1976), *aff'd*, 569 F.2d 666 (D.C.Cir.1977); *Chuy* v. *Philadelphia Eagles*, 407 F.Supp. 717, 721-22 (E.D.Pa.1976) (summary judgment granted where plaintiff had three years of discovery and "ample opportunity to cross-examine hostile witnesses," but had "turned nothing up"). Indeed,

> [w]hen it becomes plain that the allegedly unlawful acts do not exist, and the plaintiffs' claims are without merit, the Court has a *duty* to grant summary judgment.

Natrona Service, Inc. v. *Continental Oil Co.*, 435 F.Supp. 99, 106 (D.Wyo.1977), *aff'd*, 598 F.2d 1294 (10th Cir. 1979) (emphasis added); *Capital Temporaries, Inc.* v. *Olsten Corp.*, 365 F.Supp. 888 (D.Conn.1973), *aff'd*, 506 F.2d 658 (2d Cir. 1974).

As we have noted, to avoid summary judgment, plaintiffs must advance "significant probative evidence" as to each of the elements of the antitrust conspiracy claim. *First National Bank of Arizona* v. *Cities Service Co., supra*. In order to be

probative, the evidence must at least be admissible. *See* n.3, *supra*. Moreover, the term "significant probative evidence" excludes speculation. Where speculative evidence is the only support for plaintiffs' claims, courts have not hesitated to grant summary judgment. In *Robin Construction Co.* v. *United States*, 345 F.2d 610, 614 (3d Cir. 1965), the Third Circuit upheld the grant of summary judgment where the plaintiff had nothing to offer but speculation and possibilities:

> It is not enough to rest upon the uncertainty which broods over all human affairs or to pose philosophic doubts regarding the conclusiveness of evidentiary facts. In the world of speculation such doubts have an honored place, but in the daily affairs of mankind and the intensely practical business of litigation they are put aside as conjectural. In the words of Judge Learned Hand in *DeLuca* v. *Atlantic Refining Co.*, 176 F.2d 421, 423 (2d Cir. 1949), *cert. denied*, 338 U.S. 943 [70 S.Ct. 423, 94 L.Ed. 581] (1950), . . . "[b]ut if a motion for summary judgment is to have any office whatever, it is to put an end to such frivolous possibilities when they are the only answer."

Similarly, in *Bolt Associates, Inc.* v. *Alpine Geophysical Associates, Inc.*, 365 F.2d 742, 747 n.4 (3d Cir. 1966), the Third Circuit, citing *Robin Costruction*, stated that "counsel's speculations are not sufficient to resist a motion for summary judgment." And in *British Airways Board* v. *Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979), the court stated that:

> [a] party opposing a motion for summary judgment must introduce "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing version of the truth at trial." *First National Bank* v. *Cities Service Co.*, *supra*, 391 U.S. at 288-289, 88 S.Ct. at 1592. . . A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation.

See also United States v. *Dibble*, 429 F.2d 598, 601 (9th Cir. 1970).[55]

Turning to the question of burden of proof, the law is clear that it is the burden of the moving party (in this case the defendants) to show that there is no genuine issue of material fact. On the other hand, it is clear from *Cities Service* that the burden of demonstrating that there is significant probative evidence is on the party opposing the motion, in this case the plaintiffs. Plaintiffs cannot attempt to shift that burden by the spurious claim that the defendants must show a lack of significant probative evidence. As will be seen, this is a case in which, despite more than adequate discovery—close to a decade's worth—the plaintiffs have failed to meet their burden of showing significant probative evidence of a conspiracy, as opposed to the fruits of mere speculation.

---

[55] The courts have also granted directed verdicts at the close of plaintiffs' case when the only evidence presented was speculative. *Lisa-Jet, Inc.* v. *Duncan Aviation, Inc.*, 569 F.2d 1044, 1048 (8th Cir.), *cert. denied*, 439 U.S. 828, 99 S.Ct. 100, 58 L.Ed.2d 121 (1978); *Shunk* v. *Bosworth*, 334 F.2d 309, 311-12 (6th Cir. 1964). In *Lisa-Jet*, where the issue was who was at the controls when the plane crashed, the court dismissed because the evidence was equally consistent with one theory as with another:

> If the proven facts give equal support to each of two inconsistent inferences, then judgment must go against the party upon whom rests the necessity of sustaining one of these inferences. The essential inference cannot be left to conjecture and speculation.

569 F.2d at 1048, *quoting Ford Motor Co.* v. *Mondragon*, 271 F.2d 342 (8th Cir. 1959). Similarly, in *Shunk*, where the issue was which of two people shot the plaintiff, the court dismissed the case when plaintiff's evidence did not suffice to establish which was the guilty one. The court specifically rejected plaintiff's suggestion that defendants should be required to clear up the mystery:

> To hold one of the defendants, or both of them, guilty of negligence in shooting the plaintiff, would only be wild speculation on the part of the jury. There is a complete lack of testimony or evidence from which the negligence of the defendant could be inferred. . . .
> *We find no basis or authority in this case for holding the burden of proof shifted from plaintiff to defendant.*

334 F.2d at 311-12 (emphasis added).

It is also important to observe that this is an exceptionally appropriate case for summary judgment treatment for several reasons. First, our description *supra* of the summary judgment record before us suggests that it may well be one of the most complete summary judgment records ever put before any court. Second, the trilogy of evidentiary opinions and this opinion taken together reflect extremely intense scrutiny. Third, plaintiffs' case is based primarily on documents, rather than on testimony, a factor which further narrows the distinction between summary judgment and, for example, a directed verdict, because of the limited potential here for credibility judgments.[56]

Although the plaintiffs have relied heavily upon *Poller*, resolution of the matters before us does not turn upon a liberal or grudging construction of the principles enunciated therein, for in this case, the plaintiffs have not come forth with sufficient evidence to put issues of motive or intent to the test. A motive or intent question does not arise simply because plaintiffs' counsel say that it does, or because plaintiffs proffer documents, statements, or expert opinions[57] which are inadmissible

[56] It has been suggested that what we have before us is not summary disposition at all. Because of the presence of the FPS, in which plaintiffs' entire case is set forth with preclusive effect, the record before us on these motions has been said more closely to resemble that which is usually before a trial court on a motion for directed verdict under Rule 50(b) than that which is typically before the court on a summary judgment motion under Rule 56. Indeed, Melco has already moved for a directed verdict on the basis of the preclusive FPS. However, we do not equate the motion before us to a Rule 50 motion and consider the present motion uner the traditional Rule 56 standards.

[57] The parties have engaged in an extensive dialogue on the issue whether, in the absence of other evidence, an expert's opinion is sufficient to create a material issue of fact and to thereby defeat summary judgment. Defendants root their argument in the requirement of F.R.Civ.P. 56(e) that affidavits opposing a summary judgment motion must be based on "personal knowledge." An expert opinion based upon secondary sources, even if admissible, to explain or interpret matters bearing upon a factual issue, does not, in defendants' view, *create* that issue. In support of their theory, defendants urge upon us *Mapco, Inc.* v. *Carter*, 573 F.2d 1268 (Em.App.), *cert. denied*,

or which do not themselves put motive or intent genuinely in issue. There must be some evidence offered which will raise the motive or intent issue, and in this case there is none.[58]

Having set forth the standards we will apply to our summary judgment determination, we turn to an explication of the legal principles affecting plaintiffs' Sherman § 1 and Wilson Tariff Act claims.

VI. *Legal Principles Affecting Plaintiffs' Sherman Act § 1 and Wilson Tariff Act Conspiracy Case*

A. *Sherman Act § 1*

1. *Introduction and Basic Principles*

We commence our discussion of the legal principles applicable to this case with Section 1 of the Sherman Act, 15 U.S.C.

437 U.S. 904, 98 S.Ct. 3090, 57 L.Ed.2d 1134 (1978); *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666 (D.C.Cir. 1977); *Kern* v. *Tri-State Insurance Co.*, 386 F.2d 754 (8th Cir. 1967); and *United States* v. *Johns-Manville Corp.*, 259 F.Supp. 440 (E.D.Pa. 1966). Plaintiffs counter with the Third Circuit case of *Paton* v. *La Prade*, 524 F.2d 862 (3d Cir. 1975), which they maintain totally undermines defendants' theory. Plaintiffs contend that their experts' opinions regarding the existence of a conspiracy are sufficient in and of themselves to defeat summary judgment.

This dialogue raises interesting questions which have not been definitively determined since enactment of the Federal Rules of Evidence. However, because we ruled the critical opinions of plaintiffs' experts inadmissible in our Expert Testimony Opinion (PTO 301, 505 F.Supp. 1313, Dec. 10, 1980), we need not reach this issue. The remaining admissible portions of the expert reports—the background materials and methodology—do not, as will be seen, give rise to an inference of conspiracy.

[58] Although not a basis for any decision we make, a word about the other of *Pollers* twin foci, the notion of complexity, is in order. We agree that this case is complex, but we cannot help but observe that plaintiffs' *Poller*-based argument is at least partially "bootstrapped." That is because a significant part of the complexity of this case is a function of the plaintiffs having referenced some 250,000 documents in their FPS, the vast bulk of which have not even marginal relevance to the case, or at least to the core of the case, and many of which have never been translated.

§ 1, because the core of plaintiffs' case rests on allegations of combination or conspiracy in violation of that section. Unlike the manner in which we have detailed the applicable principles of law in our parallel series of evidentiary opinions, it is unnecessary to spell out in great detail the basic principles governing section 1 of the Sherman Act for two main reasons. First, these principles are exceedingly well-known, and have been set forth in a multitude of opinions and treatises. Second, plaintiffs' case is more notable for the extent to which it does not fit the classical Sherman § 1 mold than for the extent to which it does.

The basic principles governing application of § 1 of the Sherman Act have been concisely stated by the Third Circuit:

> In order to sustain a cause of action under § 1 of the Sherman Act, the plaintiff must prove: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and georgraphic markets;[59] (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy. . . .
>
> Unless the particular restraint falls within a category that has been judicially determined to be illegal per se, the legality of a restraint challenged under § 1 of the Sherman Act must be assessed under the rule of reason. Under the rule of reason standard, only those restraints upon interstate commerce which are unreasonable are proscribed by § 1 of the Sherman Act.

Martin B. Glauser Dodge Co. v. *Chrysler Corp.*, 570 F.2d 72, 81-82 (3d Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 413 (1978) (citations omitted).[60]

[59] The requirements of proving the relevant product and geographic markets are not at issue in this case.

[60] In *Board of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918) (*Chicago Board of Trade*), Justice Brandeis states what has become the classical formulation of the "rule of reason" analysis, which

The per se approach, by which a type of conduct is viewed as per se violative of the Sherman Act without regard to its justification, has been applied in three basic situations: (1) price-fixing, *see United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); (2) market division agreements, *see United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); and, although less clearly, (3) group boycotts, *see Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 75 S.Ct. 705, 3 L.Ed.2d 741 (1959). Generally speaking, all other agreements are assessed using the rule of reason analysis. We emphasize that the core requirement of §1 of the Sherman Act, and the one with which we are primarily concerned herein, is that there be a "contract, combination, or conspiracy"—*i.e.*, an agreement—in restraint of trade.

In this segment of the opinion, we shall explicate those facets of § 1 (as set forth in the applicable case law) which are called into play by the patterns of conduct said by plaintiffs to give rise to an inference of concerted action and therefore to constitute a basis for liability.[61] In Part VI.D., *infra*, we shall take

must be undertaken to determine whether a particular restraint is unreasonable and therefore unlawful:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

[61] We shall not discuss the law in terms relevant to the determination whether defendants' activities in the Japanese domestic market would, if carried out in the U.S., constitute a violation of the Sherman Act. Rather,

up the related matter of the law of conspiracy in the antitrust context, explaining the means of proving an agreement in restraint of competition.

2. *Price Agreements*

It is often said that all agreements which "affect" price are per se illegal, but it is plain that such a formulation overstates the law. *Socony-Vacuum, supra*, explained that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." 310 U.S. at 223, 60 S.Ct. at 844. Thus, the agreement must not only affect price, but must have been entered with the *purpose* to affect price. Moreover, the Sherman Act by its very terms requires that the agreement, to be unlawful, must be "in restraint of trade"—*i.e.*, the agreement must in some manner inhibit competition. As expressed by Professor Sullivan, "[t]he Act is not intended to make unlawful arrangements which affect price by improving competition." L. Sullivan, *Handbook of the Law of Antitrust* 200 (1977). Thus, while "naked" restraints described in *Socony-Vacuum* are indeed per se forbidden, agreements having only an indirect or "incidental" effect on price are not, and are examined utilizing something more akin to a rule of reason approach.

In making its determination whether conduct has the purpose or effect of restraining price competition as required by *Socony-Vacuum* in order to make the practice per se illegal, the court must carefully analyze the facts of the allegedly offending arrangements. Professor Sullivan has summarized the factual patterns of those cases in which such a purpose or effect to dampen price competition has been found as follows:

> First, the practices examined are related to the market in such a way that if they have any effect at all they will have an effect on price formation. Second, they lack any significant degree of integration of functions among the competitors. Third, the arrangements are not ones which help to make or improve a market by facilitating trading, or exchanging information, or standardizing product, or the like, and which thus may aid competition. Since price formation is affected if there is any consequence at all, and since there is no improvement in the market and no integration, it is entirely fair and functionally accurate to treat arrangements like these as naked restraints.

what we must enunciate are the principles applicable to the "unitary" conspiracy averred by plaintiffs and explained in Part II, *supra*.

L. Sullivan, *supra*, at 201-02 (footnote omitted). *See, e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *National Macaroni Manufacturers' Ass'n* v. *FTC*, 345 F.2d 421 (7th Cir. 1965); *United States* v. *Gasoline Retailers' Ass'n*, 285 F.2d 688 (7th Cir. 1961); *Plymouth Dealers' Ass'n* v. *United States*, 279 F.2d 128 (9th Cir. 1960); *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645 (1954); *United States* v. *Nationwide Trailer Rental System, Inc.*, 156 F.Supp. 800 (D.Kan.), *aff'd per curiam*, 355 U.S. 10, 78 S.Ct. 11, 2 L.Ed.2d 20 (1957); *United States* v. *United Liquors Corp.*, 149 F.Supp. 609 (W.D.Tenn. 1956), *aff'd per curiam*, 352 U.S. 991, 77 S.Ct. 577, 91 L.Ed. 884 (1957).

In contrast, arrangements which have some effect on price but which also may have the purpose and effect of making or improving a market are not per se illegal, even though they may indirectly affect price, and are judged under a rule of reason standard. The leading case in this area is Chicago Board of Trade, quoted at n.60 *supra*, which set forth the classical rule of reason formulation.[62] Other cases which have adopted a

[62] The Chicago Board of Trade had established a "call rule" which required members of the commodity exchange to purchase, or offer to purchase, grain "to arrive" during off-hours at the same price as the closing bid price of that day's last "call" session, which immediately followed the regular floor sessions. Although the rule thus "fixed" the night and weekend price, it did not fix the level of that price, and was upheld by the Court. Justice Brandeis explained that the rule had "no appreciable effect on general market prices"

rule of reason approach on the grounds that the questioned conduct improves the competitive market include those dealing with regulation of tobacco auction warehouses, *see, e.g., Danville Tobacco Ass'n* v. *Bryant-Buckner Assoc., Inc.*, 372 F.2d 634 (4th Cir.), *cert. denied*, 387 U.S. 907, 87 S.Ct. 1688, 18 L.Ed.2d 624 (1967); *Winn Ave. Warehouse, Inc.* v. *Winchester Tobacco Warehouse Co.*, 339 F.2d 277 (6th Cir. 1964), and those involving bid depositories for the building trades, *see e.g., Mechanical Contractors Bid Depository* v. *Christiansen*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918, 86 S.Ct. 1365, 16 L.Ed.2d 439 (1966).

A second major category of cases which escape per se treatment despite having some effect on price is that in which economies of scale can be achieved through partial integration of competitors' functions. Such arrangements include joint selling agencies, *see, e.g., Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933), and joint purchasing arrangements, *see, e.g., Instant Delivery Corp* v. *City Stores Co.*, 284 F.Supp. 941 (E.D.Pa.1968); *Parmelee Transportation Co.* v. *Keeshin*, 186 F.Supp. 533 (N.D.Ill.1960), *aff'd*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944, 82 S.Ct. 376, 7 L.Ed.2d 340 (1961). To qualify for rule of reason treatment on this "economies of scale" theory, a price restraint must be a direct result of the integration of functions, and must not significantly reduce marketwide competition. *See generally* L. Sullivan, *supra*, at 206-10. When the integration of functions could be accomplished without the price restraint, the restraint which results will still be per se illegal. *See United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967).

and that it did not "materially affect the total volume of grain coming to Chicago." Instead, it helped to improve market conditions by, *inter alia*, regulating the exchange's hours of business, limiting the advantage previously held by those few dealers doing business at night (thus improving the chances of county dealers and farmers), and making the daytime market more perfect.

Plaintiffs in this litigation have at various times espoused a number of different theories as to behavior by defendants which is alleged to be "price-fixing" and therefore per se violative of the Sherman Act. We address each of these theories, applying the foregoing principles, but we do so only briefly, for we find the result in each case to be plain.

(a) *The "Price Necessary to Get the Sale"*

As described in Part II, *supra*, plaintiffs have often characterized defendants' alleged conspiracy as one in which defendants agreed to charge "whatever price was necessary to make the sale." We agree with defendants that if such an agreement could be proved, it would merely be an agreement to compete, and hence would improve, rather than restrain, competition. Such an agreement would not have the purpose or effect of "raising, depressing, fixing, pegging, or stabilizing" prices, as required by *Socony-Vacuum*.

(b) *Agreement to Increase Market Share*

Plaintiffs have also averred that defendants are guilty of agreeing to increase their market share. We see such an agreement, if it could be shown, as little different from (a) above; a mere decision to obtain a greater share of the business by competing would not violate the Sherman Act. For example, if a group of companies "agreed" to have a price war so as to increase their market share, this would not violate the antitrust laws in the absence of some agreement to raise prices again after successful market penetration. As will be seen *infra*, plaintiffs have offered no evidence that defendants' prices rose after they achieved market penetration. Thus, in the absence of some other related agreement, we see an agreement to attempt to increase market share as another form of an agreement to compete.

(c) *Agreement to Fix Minimum Prices*

An agreement to fix a minimum price would also be a per se violation of section 1 of the Sherman Act. While a consumer or

the government might bring an action to attack such an agreement, as we explain in Part VI.B., *infra*, competitors, such as the plaintiffs, have no standing to attack such agreements, for they can show no antitrust injury flowing therefrom.

(d) *Agreement to Price Predatorily*

Plaintiffs further allege that defendants agreed to engage in collusive predatory pricing, although without fixing any particular price. Such an agreement, we believe, would be a per se violation of § 1, in that it would in *Socony-Vacuum* terms, have the intent and effect of depressing the price. We note, however, that in the absence of direct proof, such an agreement may be impossible to prove by indirect evidence under the standards set forth by the Third Circuit in *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975) and *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978), discussed in Part VI.D., *infra*.

(e) *Agreement to Fix Low or Depressed Prices*

An agreement to charge "low" or depressed prices, as opposed to an agreement to fix a particular price, would nonetheless have the effect of stabilizing prices, and would, if proved, be per se illegal. Such an agreement is, of course, similar but not identical to an agrement to price predatorily.

(f) *Agreement to Fix Minimum Prices and a Second Agreement to Violate the First*

Plaintiffs allege that defendants agreed to fix minimum prices—an agreement which, as we explain in Part VI.B., *infra*, plaintiffs have no standing to attack. They further allege, however, that defendants then agreed to violate that price-fixing agreement by engaging in a scheme of secret rebates in varying amounts which resulted in a net price lower than the minimum price. Such an agreement, if it existed, would be in intent and purpose the same as an agreement to compete, discussed in (a), *supra*. An agreement to violate a

price-fixing agreement by returning to the competitive *status quo* can only enhance competition. *See also* Part VI.A.7, *infra*.

(g) *Agreement to Deceive Government Authorities With Respect to Price*

Plaintiffs finally have alleged that an agreement to commit customs fraud by misleading government authorities as to the actual price charged is violative of the Sherman Act. We do not believe such an agreement, if proved, is one that affects price. Such agreements are discussed at VI.A.7, *infra*.

3. *Market Allocation*

Plaintiffs contend that the Five Company Rule, promulgated by the JMEA and discussed in detail *infra*, which purports to restrict each Japanese exporter to five U.S. Customers, is a horizontal market division which is per se illegal under section 1 of the Sherman Act. They thus invoke *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), in which the Supreme Court explicitly ruled that market divisions are per se illegal, whether or not they are ancillary to some price-fixing or other competition-restraining agreement. *See also United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951).

We need not discuss this principle in detail, however, for as will be seen *infra*, the Five Company Rule did not operate to divide the market. Rather, because each manufacturer could include its American subsidiary as one of its five customers, and because the subsidiary had no concomitant market restrictions but could sell to anyone, the rule was without practical effect. *See* Part VII.F.2, *infra*. Moreover, plaintiffs could not have been injured by an agreement such as the Five Company Rule whose effect would be to reduce competition and keep prices up. *See* Part VI.B., *infra*.

4. *Membership in Trade Associations and Attendance at Meetings*

While to our knowledge plaintiffs have never explicitly contended that mere active membership in a trade association constitutes an agreement which violates section 1 of the Sherman Act, they have, on numerous occasions, implied that such a principle obtains in the present context. Arguing almost by innuendo, they appear to be suggesting that, given the fact that virtually all the Japanese manufacturing defendants were conferees, participation in meetings of groups such as the Tenth Day Group or even the EIAJ can give rise to an inference of collusive activity on the grounds that it is impossible to imagine what else was being accomplished at such meetings. We therefore consider the potential antitrust import of such membership.

It is plain that mere membership in a trade association, including attendance at meetings, is insufficient without more to give rise to an inference of conspiracy. *See, e.g., Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977); *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975); *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99 (1962); *Metropolitan Bag & Paper Distributors Ass'n* v. *FTC*, 240 F.2d 341, 344 (2d Cir. 1957), *cert. denied*, 355 U.S. 819, 78 S.Ct. 24, 2 L.Ed.2d 35 (1957); *Trist* v. *First Federal Savings & Loan Ass'n*, 466 F.Supp. 578, 587 (E.D.Pa.1979); *Hunt* v. *Mobile Oil Corp.*, 465 F.Supp. 195, 231 (S.D.N.Y.1978), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979); *Harlem River Consumers Cooperative, Inc.* v. *Associated Grocers of Harlem, Inc.*, 408 F.Supp. 1251, 1280 (S.D.N.Y. 1976); *Vandervelde* v. *Put & Call Brokers & Dealers Ass'n, Inc.*, 344 F.Supp. 118, 155 (S.D.N.Y.1972); *cf. Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1312-13 (3d Cir. 1975) (mere contact through phone calls insufficient).

All of these cases, in rejecting the notion that mere membership in a trade association gives rise to an inference of conspiratorial conduct by a particular member, even when the association itself has been found to have engaged in illegal conduct, emphasize that there must be proof of knowing, intentional participation in the illegal scheme. The Ninth Circuit has stated, for example:

> It thus clearly appears that in order for a member of a trade association to become guilty in a criminal case or liable in a treble damage case he must have "knowingly, intentionally and actively participated in an individual capacity in the scheme."

Kline v. *Coldwell, Banker & Co., supra*, 508 F.2d at 232, *quoting Northern California Pharmaceutical Ass'n* v. *United States, supra*. Similarly, Judge Weinfeld stated:

> [M]ere association with conspirators and presence at the scene of a conspiracy, even coupled with knowledge that wrongful conduct by others is being engaged in, are not by themselves sufficient to support the inference of knowing and intentional attachment to an illegal enterprise.

Hunt v. *Mobil Oil Corp., supra*, 465 F.Supp. at 231.

Nor can plaintiffs attempt to draw an inference of conspiracy from the fact that the meetings provide a forum for collusive action. "Opportunities to conspire are not probative of whether firms did in fact conspire; an opportunity to conspire will exist always." *Brown* v. *Cameron-Brown Co.*, 1980-2 Trade Cases ¶ 63,400 at p. 76,040 (E.D.Va.1980).

These quotations typify the thrust of the case law. In the absence of proof of knowing, intentional participation in illegal activities, plaintiffs cannot draw an inference of conspiratorial conduct from the active membership by defendants in various trade associations.

5. *Exchange of Information Concerning Prices, Production and Inventory Figures, and Joint Forecasting*

Plaintiffs have stressed time and time again that, as they put it in their final post-argument brief, "one aspect of the overall

conspiracy which demonstrates its pernicious effect on competition is defendants' exchange of information." In plaintiffs' submission, the various groups and associations of which defendants were members functioned as fora for the exchange of information on past, current, and future prices, production, shipments, export levels, inventory levels, and conditions of sales. The information was then used by defendants, plaintiffs' theory continues, to coordinate future production and prices. Plaintiffs contend that this information exchange is per se illegal under the Sherman Act, citing, *inter alia*, *United States* v. *Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 519, 21 L.Ed.2d 526 (1969).

Plaintiffs' suggestion that defendants' information exchange is a per se violation of the Sherman Act can charitably be viewed only as disingenuous, for no case—including *Container Corp.*—has ever held mere exchange of information, without an associated price-fixing agreement (which has on occasion been inferred from certain information exchanges), to be per se illegal.[63] Rather, the question is whether the information exchange has a tendency unreasonably to restrain competition. Hence, the cases that address data dissemination do so employing a "rule of reason" analysis.

The Third Circuit has succinctly summarized the case law in this area:

> The Supreme Court has dealt several times with the limits imposed by the Sherman Act on exchanges of information among competitors. In *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284 (1921), the Court held that section 1 of the Sherman Act condemned the exchange of specific price information with regard to specific customers, where the clear purpose was to stabilize prices. The Court reached the same result in *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 43 S.Ct. 607, 67 L.Ed. 1035 (1923). Then in 1925, two cases

[63] While there was some hint that *Container Corp.* might have established such a rule, subsequent Supreme Court cases explicitly dispelled the suggestion. See discussion at pp. 1152-1153, *infra*.

> upheld the exchange of information among competitors. In *Maple Flooring Ass'n* v. *United States*, 268 U.S. 563, 45 S.Ct. 578, 69 L.Ed. 1093 (1925), the Sherman Act was held to permit the exchange of average cost data relating only to closed transactions, despite an apparent stabilizing effect on price, where no intent to constrain individual competitive activity was found. And the Court in *Cement Manufacturers Protective Ass'n* v. *United States*, 268 U.S. 588, 45 S.Ct. 586, 69 L.Ed. 1104, approved the exchange of specific price information concerning specific customers, despite possible effects on prices, where the purpose of the dissemination scheme was to prevent buyers from defrauding sellers.
>
> The Supreme Court has drawn a narrow line in deciding the data dissemination cases under section 1 of the Sherman Act. The difficulty derives from the fact that in competitive markets, information exchanges promote competition, while in oligopolistic markets, they depress competition. *United States* v. *Container Corp. of America*, 393 U.S. 333, 342-43, 89 S.Ct. 510 [515], 21 L.Ed.2d 526 (1969) (Marshall, J., dissenting); P. Areeda, Antitrust Analysis 13-16 (1974). Thus, the Court has attempted to fashion rules that will reach the latter, yet not amount to broad proscriptions embracing the former.

United States v. *United States Gypsum Co.*, 550 F.2d 115, 122 (3d Cir. 1977), *aff'd*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978).

United States Gypsum was concerned only with the exchange of pricing information. The cases discussed therein, however, also considered the exchange of other types of information. Thus, *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284 (1921), invalidated a program of a trade association in the hardwood industry which called for daily reporting of not just prices, but of sales, purchases, production, shipment, and inventory data as well, all subject to audit by association representatives. The Court inferred an agreement in restraint of trade from the elaborate nature of the scheme, concluding that the "purpose and effect . . . were to restrict competition . . . by concerted action in curtailing production and in increasing prices." 257 U.S. at 411-12, 42 S.Ct. at 121.

The court relied upon *American Column* to invalidate an even more comprehensive system of information exchange in *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 43 S.Ct. 607, 67 L.Ed. 1035 (1923). But in *Maple Flooring Manufacturers Ass'n* v. *United States*, 268 U.S. 563, 45 S.Ct. 578, 69 L.Ed. 1093 (1925), the court employed a similar purpose and effect analysis to reach a contrary result, where the information exchanged was averaged and disseminated without identification of the particular member or transaction, and where the prices were not uniform. No agreement to affect production, or to fix or maintain prices, or to conform to published averages, was ever alleged. The Court explained:

> Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry, who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information.

268 U.S. at 584, 45 S.Ct. at 585. *American Column* and *American Linseed* were distinguished on the basis that they presented situations in which the activity "necessarily" resulted in illegal concerted action. The Court recognized that information dissemination could be the basis of concerted action in restraint of trade, as in those earlier cases, but held:

> We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption as did these defendants and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

Id. at 586, 45 S.Ct. at 586. We will refer to *Maple Flooring* on a number of occasions in Part VII, *infra*, because its holding, and the quoted language, is apposite to this record.

Maple Flooring's companion case, *Cement Mfrs.' Protective Ass'n* v. *United States*, 268 U.S. 588, 45 S.Ct. 586, 69 L.Ed. 1104 (1925), went one step further, upholding a scheme which was essentially similar, but in which specific sales were identified and which had resulted in production limitation and substantial price uniformity. The Court was persuaded that price uniformity could "inevitably result from active, free and unrestrained competition": when the product is fungible and the buyers knowledgeable. *Id.* at 592, 45 S.Ct. at 587. Moreover, the Court believed that when the data exchanged enabled sellers to counter the fraudulent practices of some dealers, as was the case in the *Cement* case, the exchange could not be held to be an unlawful restraint. Ultimately, the Court rested on its *Maple Flooring* reasoning: there was no agreement, and in the absence thereof, the information exchange activities were not in themselves unlawful. *See also Sugar Institute, Inc.* v. *United States*, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859 (1936), in which the court reaffirmed its *Maple Flooring* position to the effect that

> competition does not become less free merely because of the distribution of knowledge of the essential factors entering into commercial transactions. The natural effect of the acquisition on the wider and more scientific knowledge of business conditions on the minds of those engaged in commerce, and the consequent stabilizing of production and price, cannot be said to be an unreasonable restraint or in any respect unlawful.

297 U.S. at 598, 56 S.Ct. at 642. *The Sugar Institute* Court explained the difference between the *American Column* cases and the *Maple Flooring* cases as follows:

> [W]hile the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct

> of fair commerce, a combination to gather and supply information as part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, has been condemned.

Id. at 599-600, 56 S.Ct. at 642-643.

Professor Sullivan has summarized the rules of these early cases as follows:

> Where there is no commitment to comply with published prices, where individual transactions are not identified, where information goes to buyers as well as sellers, and where no audit procedure, common analysis suspicious exhortation is associated with price reporting, a purpose and effect analysis focused only on program details will tend to validate the program.

L. Sullivan, supra, at 269.

Perhaps the most troubling of the Supreme Court's opinions in the area is *United States* v. *Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), upon which plaintiffs rely heavily. *Container Corp.* invalidated an arrangement in the corrugated container industry whereby each defendant requested from its competitors the most recent price charged or quoted, whenever it needed such information and the information was not otherwise available. The information requested was generally provided with an expectation that reciprocal information would be furnished when needed. The result was a downward stabiliztion of price. Justice Douglas' two-page opinion briefly examines the market structure, noting that defendants accounted for 90% of the market, that the product was essentially fungible and the demand inelastic, and that entry costs were low, and concludes that the "inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition." 393 U.S. at 337, 89 S.Ct. at 512. Price was held to be "too critial . . . to allow it to be used in an informal manner to restrain competition." *Id.* at 338, 89 S.Ct. at 513. To this final statement was appended a footnote which pointed out, *inter alia*, that *Socony-Vacuum* had held all forms of price fixing to be per se violative of the Sherman Act.

This final footnote, with its textual statement, led to confusion as to whether the *Container Corp.* majority was obliquely announcing a per se rule banning all exchange of pricing information. Justice Fortas, concurring, joined the majority opinion on the explicit understanding that no such rule was being enunciated, Justices Marshall, Harlan, and Stewart, however, dissented becase they disagreed with what they read as the majority's use of a per se rule.

This confusion was subsequently dispelled by the explicit statement that "the dissemination of price information is not itself a per se violation of the Sherman Act." *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 113, 95 S.Ct. 2099, 2115, 45 L.Ed.2d 41 (1975), citing *Maple Flooring*, *Cement Mfrs.*, and *Container Corp.* itself. *See also United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 n.16, 98 S.Ct. 2864, 2875 n.16, 57 L.Ed.2d 854 (1978).[64] Thus we know, contrary to plaintiffs' suggestion, that information exchange, including the exchange of price information, remains subject to a rule of reason analysis.

The *Container Corp.* opinion is, at best, opaque, and the line it draws between information exchange programs which violate the Sherman Act and those which do not is indistinct.[65]

---

[64] We do not read the Court's statement in *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80, 99 S.Ct. 925, 933, 59 L.Ed.2d 153 (1979), that "the court has held that the exchange of price information by competitors violates the Sherman Act," citing *Container Corp.* as stating a per se rule. It is plain that *some* exchanges of information do indeed violate the Sherman Act.

[65] The case might be read to say that liability can rest upon a showing of anticompetitive effect, without proof of anticompetitive purpose, at least in an oligopolistic industry. *See U.S. Gypsum, supra*, 438 U.S. at 446, n.22, 98 S.Ct. at 2878, n.22. And *Container Corp.* can perhaps be harmonized with the earlier cases by noting Justice Douglas' use of the language quoted above: "The inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry." 393 U.S. at 337, 89 S.Ct. at 512. This language can be viewed as analogous to the distinction drawn in *Maple Flooring* to the effect that *American Column* and *American Linseed*

Plaintiffs rely on *Container Corp.* primarily for the per se point, which, as we have seen, has been repudiated. In any event, *Container Corp.* is clearly distinguishable from the case at bar on its facts, in that it involved the exchange, upon request, of specific, current, identifiable price data. Because the fact patterns are so different, and because *Container Corp.* plainly did not overrule *Maple Flooring* and *Cement Mfrs.*, it is not helpful to plaintiffs. Accordingly, when we examine the record as to defendants' exchange of information, our focus will be on the reasonableness *vel non* of the conduct.

We note in summary that cases which have found violations have either involved an exchange of detailed, individually identifiable, actual price data, a concentrated industry, and a purpose or effect to restrain competition, or some other evidence of an actual agreement to restrain competetion. Exchange of aggregate data and most nonprice data, such as market conditions, trends, and forecasts, has generally been permitted, at least in the absence of some evidence of an agreement to use the information to fix prices, adjust production, or allocate market shares.

6. *Product Standardization and Technical Research Exchange*

Plaintiffs have also suggested that defendants' efforts at product standardization and exchange of technical research are indicative of conspiratorial activity violative of the Sherman Act. Product standardization alone, without a related price-fixing allegation, has not been frequently litigated. Those courts that have considered the issue have found standardization programs that improve product quality or re-

---

were situations where the activity "necessarily" implied illegal conduct. While *Container Corp.* focused on the anticompetitive effect and the earlier cases had drawn inferences of anticompetitive purpose, it may be that together they could be interpreted as saying that when the conduct or effect cannot be otherwise explained, an anticompetitive agreement can be inferred from exchange of detailed current price information.

duce costs, eliminate waste, and provide the basis for easier price comparison by consumers, thus enhancing increased price competition, to be reasonable. *See, e.g., Tag Mfrs. Institute* v. *FTC*, 174 F.2d 452 (1st Cir. 1949); *Structural Laminates, Inc.* v. *Douglas Fir Plywood Ass'n*, 261 F.Supp. 154 (D.Or.1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024, 89 S.Ct. 636, 21 L.Ed.2d 569 (1969); *United States* v. *Johns-Manville Corp.*, 259 F.Supp. 440 (E.D.Pa.1966).

On the other hand, programs have been ruled unreasonable, hence illegal, when pursued for an anticompetitive purpose, or when linked with other factors to become tantamount to price-fixing. In *National Macaroni Manfacturers Ass'n* v. *FTC*, 345 F.2d 421, 426 (7th Cir. 1965), for example, the court agreed with the FTC that "where all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements as it has been laid down by the Supreme Court." Similarly, the court in *Bond Crown & Cork Co.* v. *FTC*, 176 F.2d 974, 979 (4th Cir. 1949), explained that product standardization "would be innocent enough by itself but not when taken in connection with standardization of discounts and differentials, publication of prices with agreements not to charge less than a minimum . . ., freight equalization . . . and such uniformity of prices throughout the industry as to leave no price competition of any sort anywhere." *See also C-O Two Fire Equipment Co.* v. *United States*, 197 F.2d 489 (9th Cir.), *cert. denied*, 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690 (1952); *Milk & Ice Cream Can Institute* v. *FTC*, 152 F.2d 478 (7th Cir. 1946).

7. *Secret Rebates*

Plaintiffs have, at various times and by way of a number of formulations, contended that defendants' practice of granting secret rebates was illegal under the Sherman Act, noting that the rebate scheme served to circumvent the MITI-related export control agreements and the 1921 Antidumping Act, and

that it furthermore engendered widespread customs fraud against the United States. The problem with this theory is that it describes in ultimate essence a pro-competitive scheme: the rebates are, if proved, in contravention of provisions expressly designed to reduce competition, at least so long as there is no evidence of concerted rebate activity. An agreement to compete, as we said *supra*, cannot violate the Sherman Act.

A claim analogous to that presented by plaintiffs here was considered and rejected by the Supreme Court in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975). In that case, defendants, an Atlanta bank and its affiliated entities, embarked upon a program of *de facto* branching designed to circumvent the anti-competitive effect of Georgia state regulations which prohibited banks located in cities from opening branches in suburban areas. The defendants entered into *de facto* control arrangements with various banks in Atlanta suburbs and, after a change in state law, proceeded to acquire several of them. In response to a Justice Department challenge to the program, the Court held that the common control and sharing of information and facilities between the defendants and their *de facto* branches were an integral part of defendants' pro-competitive attempt to circumvent Georgia's anti-competitive regulatory scheme, and thus could not be considered unreasonable restraints of trade under the antitrust laws:

> To characterize these relationships as an unreasonable restraint of trade is to forget that their whole purpose and effect were to *defeat* a restraint of trade. Georgia's antibranching law amounted to a compulsory market division. . . .
>
> . . . C&S devised a strategy circumvent this statutory barrier. By providing new banking options to suburban Atlanta customers, while eliminating no existing options, the *de facto* branching program of C&S has plainly been procompetitive.

422 U.S. at 118-19, 95 S.Ct. at 2117-2118.

Plaintiffs' claims here, that defendants conspired to offer prices which allegedly were lower than, and therefore in violation of, the minimum price provisions of the export control arrangements and dutiable under the 1921 Antidumping Act, are similar to the claims rejected by the Supreme Court in *Citizens & Southern National Bank*. Such an agreement—to circumvent government barriers to import competition—would, if proved, be pro-competitive in purpose and effect and could not support plaintiffs' antitrust claims.

Similarly, plaintiffs' attempt to cast anticompetitive aspersions upon defendants' alleged rebating is without foundation. The Supreme Court has noted the pro-competitive virtues of secret price cutting. *See, e.g., United States Gypsum Co., supra*, 438 U.S. at 456, 98 S.Ct. at 2883. ("Price concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concessions are made publicly known, other competitors are likely to follow and any advantage to the initator is lost in the process."). Secret price cutting can be a pro-competitive strategy to be encouraged, not condemned, under the antitrust laws.

Indeed, the contention that secret rebating to avoid anticompetitive, government-imposed regulatory schemes constitutes an antitrust violation was specifically rejected by the Third Circuit in *Knuth* v. *Erie-Crawford Dairy Cooperative Ass'n*, 463 F.2d 470 3d Cir. 1972), *cert. denied*, 410 U.S. 913, 93 S.Ct. 966, 35 L.Ed.2d 278 (1973). In that case, plaintiffs, milk producers, brought an antitrust action against the cooperative which sold their milk on consignment (of which plaintiffs were members) and the dairies which purchased the milk, on the ground that the cooperative was granting secret rebates to the dairies in order to sell the milk at prices below those established by the Pennsylvania Milk Control Commission. Despite the fact that the alleged rebates were illegal under Pennsylvania law, the court held that plaintiffs had failed to state a cause of action under the antitrust laws. *Id.* at 476.[66]

---

[66] The court stated: "Such individual sales contracts, negotiated at arm's length without knowledge on the part of the purchasers of the prices being charged others similarly situated, cannot be regarded as contracts or combi-

Thus the rebating scheme alone cannot, by virtue of its character as a device to circumvent governmental regulation, support a Sherman Act violation.

8. *Joint Activities in Promoting Public and Governmental Relations and Joint Legal Action in Response to Common Problems*

Plaintiffs allege that defendants violated Section 1 of the Sherman Act by virtue of their concerted dealings with the governments of both the U.S. and Japan. For example, plaintiffs claim that defendants (1) jointly sought to influence American and Japanese legislative regulation concerning export-import duties and commodity taxes; (2) conducted publicity campaigns to promote governmental relations; (3) participated in a joint defense of their rebate practices in actions brought by the Customs Office in the Department of Treasury under the Antidumping Act of 1921; and (4) conspired to institute litigation to enjoin those actions. These allegations require that we consider the extent to which courts have considered concerted lobbying action with the legislative or executive branches of government, either by trade associations or similarly situated corporations, and concerted legal action in the courts to combat problems common to all companies in the trade or industry, as violative of Section 1 of the Sherman Act.

Concerted action by trade associations to influence or promote legislative, judicial, or administrative action has generally been regarded as necessary under the First Amendment to safeguard the free expression of political viewpoints and the right to petition government officials, and has been regarded as an exemption from antitrust liability. This exemption, which has come to be known as the Noerr-Pennington doctrine, applies even if the ultimate governmental actions sought would limit economic competition in the industry.

---

nations in restraint of trade. While the individual contracts may have been illegal under Pennsylvania law, they were not illegal under the antitrust laws." 463 F.2d at 476. *See also Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969).

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 864 (1961), a railroad association conducted a publicity campaign that consisted of the circulation of propaganda disparaging the trucking industry and included extensive lobbying for legislation injurious to the trucking industry, with the purpose of destroying trucking as competition in the long-distance freight business. The truckers alleged that the publicity campaign amounted to an illegal conspiracy to eliminate competition in violation of the Sherman Act. The Supreme Court dismissed the truckers' complaints, holding that a concerted but genuine attempt to influence legislation, even when conducted with an anti-competitive purpose, does not give rise to Sherman Act liability. Moreover, the Court extended the protection of joint activities for government action even to deceptive public relations practices. The Court supported its holding on two grounds. First,

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act.

365 U.S. at 137, 81 S.Ct. at 529. Secondly, the Court stated:

> The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 138, 81 S.Ct. at 530.

The Court repeated its Sherman Act exception for trade assocation activities aimed at influencing governmental action

in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965),[67] declaring that:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

Although the language of *Noerr* and *Pennington* sweeps broadly, the doctrine is not unlimited. The Court in *Noerr* recognized that the broad exemption from liability would not apply where trade activities purported to influence governmental action were a "mere sham," noting:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actualy nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

365 U.S. at 144, 81 S.Ct. at 533.

The Supreme Court elaborated on this "sham" exception to the Noerr-Pennington doctrine in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). In that case, several highway carriers alleged that a competing truckers' association had conspired to institue sham administrative and judicial proceedings opposing their competitors' applications for operating rights. Plaintiffs maintained that as one result of the conspriacy they had been denied unlimited access to the courts and administrative agencies. The Court declared:

> A combination of entrepreneurs to harass and deter their competitors from having "free and unlimited access" to

[67] In *Pennington*, a coalition of mine operators and a miners' union successfully persuaded the Secretary of Labor to establish higher minimum wages for employees of smaller coal companies, in an effort to reduce competition in the industry. The Court held that this kind of activity was not subject to the Sherman Act regardless of whether the association had purposefully conducted its activities to cause an anti-competitive effect.

> the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. . . . If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.

404 U.S. at 515, 92 S.Ct. at 614. yet while the Court found that attempts by trade associations to effectively bar opponents from equal participation in administrative and judicial proceedings were illegal, the Court at the same time reaffirmed and broadened the *Noerr-Pennington* doctrine by applying it in the administrative and judicial arenas. The Court concluded that:

> it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interest *vis-a-vis* their competitors.

Id. at 510-11, 92 S.Ct. at 611-612.[68]

The Court thus recognized that joint litigation by trade associations, if not pursued merely as a sham, is accorded the same immunity from Sherman Act liabilty as is given to the expression of political views in connection with legislative and executive actions. *A fortiori* the doctrine should apply to joint defense of legal proceedings as well. In applying the doctrine to judicial proceedings, lower courts have protected a trade association's right to bring a lawsuit against competitors and to attack a statute favorable to competitors, so long as the litigation has not been pursued in bad faith as a sham. *See e.g.*, *Handgards, Inc.* v. *Ethicon Inc.*, 601 F.2d 986 (9th Cir. 1979),

[68] We note that certain defendants have filed a counterclaim in this case alleging that plaintiffs have engaged in sham litigation, thus invoking the theory of antitrust liability recognized in *California Motor Transport Co.*, *supra*, and in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

cert. denied, 444 U.S. 1025, 100 S.Ct. 688, 62 L.Ed.2d 659 (1980); *Bracken's Shopping Center, Inc.* v. *Ruwe,* 273 F.Supp. 606 (S.D. Ill.1967).

Thus we see that a trade association's joint lobbying and legal activities are protected under the *Noerr-Pennington* doctrine unless those activities can be found to constitute a sham, even if they have an anticompetitive intent or effect. We turn now to a discussion of the requisites for standing under §§ 4 and 16 of the Clayton Act.

B. *Statutory Antitrust Standing Under § 4 and § 16 of the Clayton Act*

The statutory source of the antitrust treble-damage remedy is Section 4 of the Clayton Act, which specifically limits this remedy to "[a]ny person who shall be *injured* in his business or property *by reason of* anything forbidden in the antitrust laws." 15 U.S.C. § 15 (emphasis added). This statute, by its terms, limits recovery to those plaintiffs who can show that their injury was caused by the defendants' violations. As the Supreme Court has recently stated, plaintiffs must show that their injury "flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Plaintiffs cannot prevail unless they can demonstrate, by direct or circumstantial evidence, that this "necessary causal relation" exists. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 125, 89 S.Ct. 1562, 1577, 23 L.Ed.2d 129 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 697-700, 82 S.Ct. 1404, 1409-1411, 8 L.Ed.2d 777 (1962). *See also Bowen* v. *New York News, Inc.,* 522 F.2d 1242, 1255-56 (2d Cir. 1975), *cert. denied,* 425 U.S. 936, 96 S.Ct. 1667, 48 L.Ed.2d 177 (1976); *Rea* v. *Ford Motor Co.,* 497 F.2d 577, 589 (3d Cir.), *cert. denied,* 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 106 (1974).

The Third Circuit has recently summarized the controlling principles of law:

> Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), allows recovery only to a plaintiff who is injured "by reason of" a violation of the antitrust laws. The plaintiff has the burden of proving that the established illegality was a material cause of injury. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 114 n.9 [89 S.Ct. 1562, 1571-1572 n.9, 23 L.Ed.2d 129] (1969). As we said in *Sound Ship Building Corp.* v. *Bethlehem Steel Co.,* 533 F.2d 96 (3d Cir.), *cert. denied,* 429 U.S. 860 [97 S.Ct. 161, 50 L.Ed.2d 137] (1976), "[e]ven if a defendant's acts are shown to be violative of the statute, . . . a plaintiff may not recover uless a nexus to its own injury is also demonstrated." *Id.* at 98. Similarly, in *Deaktor* v. *Fox Grocery Co.,* 475 F.2d 1112 (3d Cir), *cert. denied,* 414 U.S. 867 [94 S.Ct. 65, 38 L.Ed.2d 86] (1973), the district court directed a verdict for the defendant at the conclusion of the plaintiff's case because the evidence demonstrating the connection between the alleged antitrust violations and the damages was too speculative to submit to the jury. *Id.* at 1114. We affirmed agreeing that although there was testimony about various reasons that might have caused the plaintiff's losses, no specific cause was assigned by the plaintiff's expert. *Id.* at 1117.
>
> . . . It is not enough that the public has been harmed by a violation of the antitrust laws. The plaintiff seeking to recover trebel damages must further establish as a matter of proof that the illegal conduct was a material cause of its injury. *Rea* v. *Ford Motor Co.,* 497 F.2d 577, 589-90 (3d Cir.), *cert. denied,* 419 U.S. 868 [95 S.Ct. 126, 42 L.Ed.2d 106] (1974); L. Sullivan, Handbook of the Law of Antitrust § 251 (1978).

Van Dyk Research Corp. v. *Xerox Corp.,* 631 F.2d 251, 254-55 (3d Cir. 1980).[69]

---

[69] In the *Sound Ship* case quoted in *Van Dyk,* the Third Circuit affirmed the grant of summary judgment against a Sherman Act plaintiff solely because plaintiff failed to bring forward any evidence to support its allegation of a causal link between the alleged antitrust violation and its alleged damages. 533 F.2d at 98-100.

Plaintiffs in this case seek treble damages, but they also seek injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, which authorizes such relief for any person who demonstrates "threatened loss or damage by a violation of the antitrust laws." This provision imposes a lower threshold requirement than § 4 of the Clayton Act, which requires a showing of actual injury to "business or property." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 92 S.Ct.885, 31 L.Ed.2d 184 (1972); *Bogus* v. *American Speech & Hearing Ass'n*, 582 F.2d 277 (3d Cir. 1978). *Cf. NAACP* v. *New York Clearing House Ass'n*, 431 F.Supp. 405 (S.D.N.Y. 1977). However, § 16 requires a plaintiff at least to demonstrate that any threatened loss or damage has been or will be proximately caused by the alleged violations, within the traditional legal concept of proximate cause. *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 591-92 (3d Cir. 1979). The causation and standing issues which we consider herein involve basic concepts of proximate causation, rather than niceties in the interpretation of any particular statute. Accordingly, our discussion of standing issues in this opinion is fully as applicable to plaintiffs' standing to seek injunctive relief under § 16 as it is to their standing to seek damage relief under § 4 of the Clayton Act.[70]

Defendants attack plaintiffs' standing under § 4 of the Clayton Act with respect to three different issues. First, they

[70] In *Van Dyk, supra*, the Court of Appeals did not use the term "standing," but rather spoke in terms of "causation" or "fact of injury." Nor did the Supreme Court in *Brunswick, supra*, which spoke in terms of "antitrust injury." Traditionally, however, proof of causal nexus between an alleged antitrust violation and injury resulting therefrom has been considered an aspect of plaintiff's standing under § 4. *See* 2 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 334-35 (1978). Many courts do use "standing" terminology. *See, e.g., Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936, 96 S.Ct. 1667, 48 L.Ed.2d 177 (1976). It is of course true, as the Third Circuit has noted, that statutory antitrust standing is analytically distinct from constitutional Article III standing. *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 447 n.6 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978). We suspect that the different

claim that the plaintiffs have no standing to attack the Manufacturers' Agreements and JMEA Rules, which set minimum prices for exports to the U.S. and purportedly limited the number of U.S. customers to which Japanese exporters could sell, because as competing manufacturers, plaintiffs could not have been injured by an agreement to set minimum prices or to limit the number of customers. Second, they claim that Zenith's failure to identify any damages flowing specifically from the defendants' alleged violations of the Robinson-Patman Act, except insofar as it claims to have been injured by the alleged "unitary conspiracy" as a whole, is fatal to Zenith's claims under the Robinson-Patman Act. Finally, defendants reiterate the latter argument with respect to Zenith's claim under § 7 of the Clayton Act, contending that Zenith has failed to identify any injury to it as a result of the two acquisitions which it challenges under § 7. We discuss the first of these issues here, but defer our discussion of Zenith's standing to assert its claims under the Robinson-Patman Act and § 7 of the Clayton Act until our separate discussion of those claims in Parts X and XI *infra*, respectively.

Plaintiffs have aimed much of their rhetorical fire at the Manufacturers' Agreements and JMEA Rules, which they have characterized as "written cartel agreements." Defendants rejoin that plaintiffs have no standing to attack these agreements because the agreements set *minimum* prices for exports to the U.S. and *limit* the number of U.S. customers of the signatory companies.[71] Defendants contend that neither of

terminologies may be a function of the differences in procedural posture of particular cases, with objections based upon "standing" arising at earlier stages of the litigation than those based upon lack of injury or causation. The concepts, however, are virtually identical. We use the term "standing" herein as a synonym for "fact of injury" or "causation of damages."

[71] The standing issues with respect to these Agreements and Rules arise only under § 4 of the Clayton Act. Plaintiffs' claim for injunctive relief is moot as it applies to these Agreements and Rules, which are no longer in effect, and there is therefore no justiciable claim for injunctive relief under § 16 of the Clayton Act.

these provisions could conceivably injure the plaintiffs who, as competing manufacturers, could only be benefitted by higher prices and fewer competitors. We turn to the customer-limiation provision first.

The customer-limitation provision of the JMEA Rules the so-called Five Company Rule, apparently limited a Japanese exporter of television receivers to a total number of five U.S. customers. As we explain in our more extensive discussion of the Rule in Part VII.F.2, *infra*, it was in practice wholly ineffective because each of the defendants was able under the rule to register as one of its five customers its U.S. subsidiary, which could in turn resell to any customer without limitation. Even if the Rule had operated effectively, however, we believe the plaintiffs would lack standing to attack it.

The economic effect of a customer limitation provision is inevitably to keep prices up by reducing competition; accordingly, antitrust decisions which condemn horizontal market division speak in terms of injury to consumers because of reduced price competition. *See, e.g., Burke* v. *Ford*, 389 U.S. 320, 321-22, 88 S.Ct. 443, 444, 19 L.Ed.2d 554 (1967); *United States* v. *Sealy, Inc.*, 388 U.S. 350, 356, 87 S.Ct. 1847, 1852, 18 L.Ed.2d 1238 (1967); L. Sullivan, *Handbook of the Law of Antitrust*, § 82 (1978). In *Bowen* v. *New York News, Inc.*, 522 F.2d 1242, 1255-56 (2d Cir. 1975), *cert. denied*, 425 U.S. 936, 96 S.Ct. 1667, 48 L.Ed.2d 177 (1976), the Second Circuit held that the plaintiff had no standing to attack an exclusive territory arrangement among some of its competitors because the only possible effect of that arrangement was to reduce competition, to the plaintiffs' benefit. *See also Dahl, Inc.* v. *Roy Cooper Co.*, 448 F.2d 17, 20 (9th Cir. 1971); *Seago* v. *North Carolina Theaters, Inc.*, 42 F.R.D. 627 (E.D.N.C.1966), *aff'd*, 388 F.2d 987 (4th Cir. 1967), *cert. denied*, 390 U.S. 959, 88 S.Ct. 1039, 19 L.Ed.2d 1153 (1968). The same principle precludes plaintiffs' standing here to attack the Five Company Rule.

Plaintiffs' lead counsel, Mr. Rome, faced with this analysis during final summary judgment argument, sought to fend the point as follows:

> Now, with that as a factor in connection with it, I suggest that the cartel agreements and the rebate system as a unitary entity constituted a mechanism, the mechanism which enabled the defendants to pursue a course of conduct for depressing prices in the United States, as the result of which, aided by their five-company rule, they were permitted and enabled to concentrate each particular defendant's competitive thrust against a particular mass merchandise customer in the U.S. and thereby deny the capability of an American manufacturer to do business with that customer.

Pretrial Order No. 291 at 128. And again:

> Since under the five-company rule they really were not competing for a particular customer against each other—and Your Honor will recall that only Toshiba and Sanyo dealt with Sears as an example—there was no need to agree upon an amount of rebate. As a practical matter, there was only the need to focus the attention of the competition against any potential U.S. manufacturer who was not a member of the cartel. As long as a particular defendant could come in at a depressed price below that which the U.S. manufacturer was proffering to try to get the business, that was enough.

Pretrial Order No. 291 at 120. The problem with the argument is that, where there is less competition, prices are inevitably kept up. We know of no rational explanation, and, although we pressed for it, plaintiffs have offered us none, why decreased competition would tend to bring prices down; rather, it is only increased competition, which the plaintiffs maintain the Japanese manufacturing defendants were attempting to avoid by the Rule, which could bring prices down, the low price being the evil about which plaintiffs are complaining.[72] While a con-

---

[72] We came to this conclusion only after much reflection upon plaintiffs' argument that they may attack the Rule because it facilitated the coordination of defendants' efforts jointly to penetrate the U.S. market, for there is

sumer, or the attorney general, would have standing to object to high prices brought about by a limitation rule, these plaintiffs cannot be injured thereby, and accordingly lack standing to attack the Rule.

Turning to matters of price, the plaintiffs, in effect, concede that they would have no standing to bring an action based solely on the so-called "cartel agreements." It is self-evident that an agreement which places a floor under the price one's competition can charge keeps the price up, leaving one free to compete above that price. While injuring the consumer, such an agreement cannot injure the competitor.

In *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066, 92 S.Ct. 1500, 31 L.Ed.2d 796 (1972), for example, the Seventh Circuit, per Judge (now Justice) Stevens, upheld the defendants' antitrust counterclaim against the plaintiff under § 2 of the Sherman Act, but remanded on the question whether the plaintiffs' illegal conduct had injured the defendant so as to permit it to maintain a claim under § 4 of the Clayton Act, 15 U.S.C. § 15. 452 F.2d at 597-600. Notwithstanding the remand for further factual development as to several claims of injury, the court summarily rejected the defendants' claim that, as competing

---

an initial attractiveness to it. Indeed, we found the point troubling and expressed our qualms at oral argument. We conclude, however, that it is plain that in purely price terms the Rule must be deemed pro-competitive, that is unless one starts with a (bootstrapping) assumption that the Rule is the product of a conspiracy. We note that plaintiffs' "facilitation" argument might be plausible if some other potential benefit to the Japanese manufacturers could be identified, such as marketing cost-savings from increased efficiency. However, plaintiffs have identified no evidence in the record to support such an argument, and we cannot hypothesize such a situation in an industry in which, as far as the record shows, competition was by price alone. Plaintiffs have just not elucidated their theory with any degree of clarity. We deal further with this point at p. 1213, *infra*.

manufacturer, it could have been injured by th plaintiffs' increased prices. Judge Stevens wrote:

> Defendant has also argued that plaintiff's dominant position, coupled with its restrictive licensing practices, has enabled it to enhance the price level. If this be so, defendant, as a competing manufacturer of machines, would not have been injured.

Id. at 600 (footnote omitted). *Accord, Bendix Corp.* v. *Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973); *Kemp Pontiac-Cadillac, Inc.* v. *Hartford Automobile Dealers' Ass'n*, 380 F.Supp. 1382, 1386 (D.Conn.1974).

Plaintiffs have never articulated any theory as to how the minimum-price provisions of the agreements injured them. Instead, they make three arguments in response to defendants' attack on their standing. First, they contend that the minimum price level set by the agreements was itself unduly low. Second, they say that the minimum prices were not actually minima, but were "benchmark" or "reference" prices which were used by the defendants as points of reference for some lower figure arrived at by deducting a rebate or discount. Finally, they argue that the agreements are only one part of a "unitary conspiracy," and that it is pointless to quibble over their standing to attack one piece of a vast conspiracy.

Plaintiffs' argument that they have standing to attack the agreements because of the allegedly low level at which the minimum prices were set is without merit. No matter at what level the prices were set, the parties to the agreements remained free to sell at any price which equalled or exceeded the minimum price. Thus, the agreements curtailed each signatory's independent freedom of action only insofar as it prohibited prices below the minima. The agreements had no impact on prices except in those instances when the signatories, if they had exercised their independent judgment, would have charged prices lower than the minima. In those instances, the agreements had the effect of raising prices. Since nothing in the agreements had the effect of lowering prices, no matter at

what level the minimum prices were set, plaintiffs' contention that the minimum prices were unduly low is of no significance.

Nor can the plaintiffs derive standing to attack the agreements from the contention that the prices set in accordance therewith were not actually minimum prices at all. As we have indicated, the evidence shows that many of the defendants, although they were parties to the Manufacturers' Agreements or the JMEA Rules, paid rebates to their U.S. customers so that the actual transaction prices, taking the rebates into account, were lower than the official minimum prices set under those agreements. We will consider *infra* whether there is any significant probative evidence to support plaintiffs' contention that these rebates were made as the result of concerted action among the defendants.[73] In any case, the fact that some defendants, whether independently or in concert, violated the written minimum-price agreements does not affect the narrow issue which we are now considering: whether the plaintiffs have standing to base an antitrust action on the written agreements themselves. The agreements on their face plainly set only minimum prices, and plaintiffs produced no evidence that, despite their language, the intent and purpose of the agreements was to require each signatory to sell at or below the minimum. Thus, plaintiffs' suggestion that they have standing to attack the agreements themselves because some of the signatories violated them is without merit.

The plaintiffs' third and most vociferous ground of opposition to the challenge to their standing is based on their theory of "unitary" conspiracy. Plaintiffs argue that the written agreements are only one element of proof in their conspiracy case, and that it makes no sense to discuss their "standing" with respect to a single piece of the pie. Moreover, any such analysis of one part of their conspiracy case, they submit, is

[73] The defendants have not challenged the plaintiffs' standing to attack concerted rebating practices maintaining, however, that no such concerted scheme for rebating existed.

"fragmentation" forbidden by *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

Because plaintiffs' "fragmentation" argument is interposed with respect to their entire case, we have treated it separately in Part VI.D.2, *infra*. In that discusion, we conclude that *Continental Ore* does not bar a detailed analysis of plaintiffs' conspiracy case and supporting evidence. Accordingly, we hold that plaintiffs have no standing to attack the minimum price agreements or the Five Company Rule because it is inconceivable that they could be injured thereby. Since plaintiffs have no standing to attack the minimum-price agreements, those agreements cannot form the "core" of their conspiracy case. The essence of the case must instead (as plaintiffs themselves now assert) line in the alleged conspiracy to violate the agreements. Yet it is obvious that the agreements themselves cannot be evidence of a conspiracy to violate those same agreements. While the agreements may be admissible to provide background on the defendants' conduct, they are of no probative force in establishing the existence of the entirely different conspiracy which might indeed have injured the plaintiffs, if it existed, and which plaintiffs do have standing to attack.

C. *The Wilson Tariff Act*

In addition to plaintiffs' claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, plaintiffs allege that certain defendants' conduct in importing electronic products into the United States violated § 73 of the Wilson Tariff Act, 15 U.S.C. § 8. Section 73 of the Wilson Tariff Act provides in relevant part that

> Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States and when such combina-

> tion, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter.

15 U.S.C. § 8. Plaintiffs have never clearly stated the nature of their claim under the Wilson Tariff Act. However, given the tenor of what the parties have written on the point, we appear to be confronted with the constructional question whether the Wilson Tariff Act is broader than, narrower than, or coextensive with the Sherman Act's antitrust provisions.

Plaintiffs intimate, though they do not clearly state, that the Wilson Tariff Act may have protectionist aspects, and hence a broader scope that the Sherman Act. In their scores of briefs, they devote only one short segment to explication of their interpretation of the Wilson Tariff Act. There they emphasize the remarks of the sponsor of Section 73 of the Wilson Tariff Act that the provision punishes "the intent to abuse the importation laws of the United States." 26 Cong.Rec. 7118 (1894). Defendants take a polar position, asserting that the Wilson Tariff Act is narrower in scope than the Sherman Act and applies only to high price conspiracies. They argue that Congress established in the Wilson Tariff Act its own per se rule as to price fixing conspiracies designed to *increase* the price of imports to the United States. This provision, they continue, only demonstrated the intention of the 1894 Congress to prevent unreasonably *high* import prices and not, as plaintiffs would have it, "unreasonably" *low* prices.

Although the position advocated by plaintiffs has been advanced before, the defendants' argument is novel. However, we have no difficulty with the points and reject both contentions in favor of the view that the Wilson Tariff Act is coextensive with Sherman Act § 1 (in the international context).

We address plaintiffs' claims first. The legislative history of the Wilson Tariff Act confirms that the purpose of Section 73

was substantively identical to the Sherman Act. The Senate Reports on the bill designate Section 73 as an antitrust provision by referring to it as "a substitute" for Sections 1-3 of the Sherman Act. S.Rep.No.698, 53rd Cong. 2d Sess. (Aug. 20, 1894); S.Rep.No.707, 53rd Cong. 2d Sess. (Aug. 28, 1894). Senator Morgan of Alabama, sponsor of the amendments to the tariff bill that eventually became Sections 73-76 of the Wilson Tariff Act, repeatedly emphasized that the language of the amendments clearly and effectively accomplished "the end that is desired—that is to say, the repression of trusts, as they are called, in respect of the importation of goods from foreign countries." 26 Cong.Rec. 7117, 53rd Cong. 2d Sess. (July 3, 1894). Senator Morgan went on to elborate:

> So under the bill we are now considering is afforded distinct opportunity for the formation of thousands of trusts. You can not exclude them from this country except by means of direct and positive legislation which reaches the abuse of the importing right and prevents it from entering into such combinations with capital as will enable the importer or the person interested in imports to control the prices in the market; in other words, in common parlance, to monopolize the market.

Id., 26 Cong.Rec. 7118 (1894). This is, of course, antitrust language. Nowhere in his speeches on the Senate floor did Senator Morgan mention any protectionist intent to aid American manufacturers.

The case law has been consistent in treating the Wilson Tariff Act as an antitrust statute, and as nothing more than that. Judge Schwartz gave an accurate description of prior case law under the Wilson Tariff Act in *Outboard Marine Corp.* v. *Pezetel*, 461 F.Supp. 384 (D.Del.1978). The plaintiff in *Pezetel*, an American manufacturer of electric golf carts, noting that the defendants, the manufacturer, importer, and distributors of golf carts made in Poland, had set prices for the carts in the American market against which most American manufacturers were unable to compete, alleged *inter alia* a violation of the Wilson Tariff Act. The plaintiffs argued that "since the Sherman Act by its terms applies to foreign trade, the scope of the Wilson Tariff Act is rendered superfluous

unless it is interpreted independently of the Sherman Act." *Id.* at 407. Apparently this claim, like plaintiffs' claim in this case, was vague enough to imply that the Wilson Tariff Act was more than an antitrust statute, containing an intent to protect American manufacturers by outlawing conduct which the Sherman Act did not. The court dismissed plaintiffs' contention that the Wilson Tariff Act be given a wider scope than the Sherman Act:

> [A]lthough superficially attractive, the argument is without the support of either the legislative history or case law. Rather it appears that the Wilson Tariff Act sought to make clear that import trade was subject to the scrutiny of the antitrust laws—a subject on which the Sherman Act was silent.

Id.[74]

Judge Schwartz' opinion reflects the consensus among the commentators and in the case law that the Wilson Tariff Act is not broader than the Sherman Act.[75] Where courts have found sufficient allegations of violations of the Sherman Act in the import context, they have invariably found sufficient allegations of violation of the Wilson Tariff Act as well.[76] If allegations are insufficient to maintain an antitrust claim, the Wilson Tariff Act provisions also fail.[77]

[74] While the court refused to accept plaintiff's position, it also refused defendants' motion to summarily dismiss the Wilson Tariff Act claim, so long as plaintiff was still able to prove a claim under Section 2 of the Sherman Act.

[75] *See generally* Kintner and Joelson, *An International Antitrust Primer* 16 (1974) "The statue [the Wilson Tariff Act] has had little independent use and has, as we have seen, been utilized primarily to accompany Sherman Act allegations." *See also* L. Sullivan, *supra*, at 714 n.2.

[76] *See U.S.* v. *Sisal Corp.*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1927) (government application for an injunction against companies conspiring to increase the price of sisal on the U.S. market was sufficient to allege a cause of action under both the Sherman and Wilson Tariff Acts); *U.S.* v. *General Dyestuff Corp.*, 57 F.Supp. 642 (S.D.N.Y. 1944) and *U.S.* v. *General Electric Co.*, 80 F.Supp. 989 (S.D.N.Y. 1948) (indictment alleging purpose of conspiracy was to restrain import trade in violation of the Sherman Act was also sufficient to allege a violation under the Wilson Tariff Act, despite the lack of a specific allegation of actual intent).

Having concluded that the Wilson Tariff Act is not broader in scope than the Sherman Act, the second question presented, and not addressed in previous cases, is whether the Wilson Tariff Act applies only to alleged high price conspiracies and hence is narrower than the Sherman Act. Defendants bottom their argument that the purpose of the Wilson Tariff Act was only to prevent "unreasonably high import prices" and not "unreasonably low prices" upon certain observations by Judge Frank in his dissenting opinion in *Adams-Mitchell Co.* v. *Cambridge Distributing Co.*, 189 F.2d 913, 920 (2d Cir. 1951). Judge Frank therein stated:

> [The Wilson Tariff Act] was pro-consumer legislation, designed to cut the cost of living by lowering the high protective tariffs on imported goods. But if foreign monopolists could fix high prices on their products, manifestly the Act would fail of its purpose, for high prices, whether due to monopoly or tariffs, would permit domestic producers to charge non-competitive prices, far above cost, for their wares, thereby obtaining higher profits at the expense of the consumer.

The majority in *Adams-Mitchell* had held that the Miller-Tydings Amendment, which exempts from the Sherman Act retail price maintenance agreements when permitted by state law, superseded the Wilson Tariff Act as well, because "the Sherman Act and the Tariff Act are each embraced like prohibitions on restraint of foreign commerce. *Id.* at 916. Judge Frank was alone in contending that the Wilson Tariff

[77] *See Reliable Volkswagen Sales Service Co.* v. *Worldwide Automobile Corp.*, 182 F.Supp. 412 (D.N.J. 1960) (failure to state a claim under the Sherman Act constitutes failure to state a claim under the Wilson Tariff Act); *Fosburgh* v. *California & Hawaiian Sugar Refining Co.*, 291 F. 29 (9th Cir. 1923) (contracts for the sale of sugar between a refiner and a candy manufacturer which agreed to use the sugar only for its own manufacturing needs held not to violate Section 1 of the Sherman Act and therefore also not the Wilson Tariff Act).

Act should apply to such resale price maintenance agreements when the Sherman Act would not.

Judge Frank's construction of the legislative history is buttressed by the following statement by Senator Morgan in the Senate debates on the amendments:

> This amendment relates to preventive justice. It prevents men, by penalties imposed upon their transactions, from abusing the revenues of the United States, its dignity, its honor, its peace, and prevents them also from imposing heavy burdens upon those who must consume either imported articles or those which are made under the shelter of this law of taxation and importation.

26 *Cong.Rec.* 7118 (1894). Care, however, must be taken to assure that Senator Morgan's comments are not used out of context or to offend the plain meaning of the statute. It is true that the text of the statute explicitly outlaws high price conspiracies, prohibiting importers from conspiring "to increase the market price in any part of the United States, of any article or articles imported . . . into the United States, or of any manufacture into which such imported article enters or is intended to enter." 15 U.S.C. § 8. But that does not carry the negative implication that low price conspiracies are permissible, for the referenced clause is joined to the immediately preceding language by the disjunctive "or" which, closely paralleling the Sherman Act, prohibits conspiracies "intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce." That language reaches, as does the Sherman Act, conspiracies that result in both low and high prices in the American market.

We thus reach the conclusion that the Wilson Tariff Act is of the same scope as the Sherman Act, neither broader as plaintiffs would like, nor narrower as defendants claim. Plaintiffs' claims under Section 73 of the Wilson Tariff Act will therefore be treated in the same manner as their claims under the Sherman Act. If plaintiffs' Sherman Act § 1 claims are sufficient to survive summary judgment, then defendants' motions addressed to the Wilson Tariff Act claims should be denied.

However, if plaintiffs' Sherman Act § 1 claims cannot so survive, neither can their Wilson Tariff Act case. Given this construction, we shall refer discretely to the Wilson Tariff Act in this opinion only occasionally; for the most part we shall speak in Sherman Act terms.

D. *The Law of Conspiracy in an Antitrust Context*

1. *In General*

One of the essential elements of a cause of action under section one of the Sherman Act is proof of "contract, combination, or conspiracy" in restraint of trade. (Similarly, the Wilson Tariff Act requires proof of a "combination, conspiracy, trust, agreement, or contract.") In addition, for reasons described more fully *infra*, because of the fashion in which they are stated, plaintiffs' claims under § 2 of the Sherman Act, § 7 of the Clayton Act, and the Robinson-Patman Act all require proof of the underlying conspiracy which plaintiffs attack in their Sherman Act § 1 claim.[78]

It is the agreement among competitors itself which § 1 of the Sherman Act condemns, and no overt act need be proved in

[78] Briefly, plaintiffs' Sherman Act § 2 claims depend upon their establishing conspiracy because they do not claim that any defendant individually monopolized or attempted to monopolize, but only that the defendants conspired to monopolize and collectively monopolized or attempted to monopolize relevant markets. Zenith's Clayton Act and Robinson-Patman Act claims require proof of conspiracy because, *inter alia*, plaintiffs have alleged no separate damages from the Clayton or Robinson-Patman violations which they charge the defendants with having committed, except for the damages which they claim to have incurred as a result of the alleged conspiracy as a whole. NUE has advanced no domestic Clayton Act or Robinson-Patman claims.

In addition, Zenith has sought to establish the liability of all the members of the purported conspiracy for Clayton Act § 7 and Robinson-Patman Act violations committed by one or more of the members of the conspiracy, under the doctrine of vicarious liability of coconspirators which it finds in *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). This point is discussed in Part VI.D.5, *infra*.

order to establish a violation.[79] *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59, 60 S.Ct. 811, 845 n.59, 84 L.Ed. 1129 (1940); *Nash* v. *United States*, 229 U.S. 373, 378, 33 S.Ct. 780, 782, 57 L.Ed. 1232 (1913). Moreover, as the Supreme Court has stated, "[n]o formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words." *American Tobacco* v. *United States*, 328 U.S. 781, 809-10, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). *See Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939). However, the fact which must be proved, whether circumstantially or directly, before any violation of the Sherman Act § 1 prohibition can be established is that two or more business firms reached some kind of agreement:

> The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. But this Court has never held that proof of parallel business behavior conclusively establishes agreements or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

Theatre Enterprises, Inc. v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41, 74 S.Ct. 357, 259, 98 L.Ed. 273 (1954) (citations and footnote omitted). *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv.L.R. 655 (1962).

[79] Of course, a private treble damage plaintiff must show that he was injured in his business or property by reason of the violation in order to have standing to bring an action. 15 U.S.C. § 15. *See* Part VI.B, *supra*.

The U.S. Court of Appeals for the Third Circuit has recently reiterated these basic propositions of Sherman Act law. *Edward J. Sweeney & Sons* v. *Texaco, Inc.*, 637 F.2d 105, 110-11 (3d Cir. 1980). In affirming the district court's grant of a directed verdict for the defendant under the Sherman Act, the Court of Appeals said:

> Unilateral action, no matter what its motivation, cannot violate § 1. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 [39 S.Ct. 465, 468, 63 L.Ed. 992] (1919); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F.2d 1068, 1072 (3d Cir. 1978); *Tripoli Co.* v. *Wella Corp.*, 286 F.Supp. 264, 266 (E.D.PA.1968), *aff'd*, 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 [91 S.Ct. 62, 27 L.Ed.2d 62] (1970). By its terms, § 1 requires proof of a "contract, combination . . . or conspiracy." 15 U.S.C. § 1. We have noted that the statutory language presents a single concept about common action, not three separate ones: " 'contract . . . combination or conspiracy' becomes an alliterative compound noun, roughly translated to mean 'concerted action.' " *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 445-46 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 [98 S.Ct. 1280, 55 L.Ed. 791] (1978) (quoting L. Sullivan, *Law of Antitrust* 312 (1977)).
>
> To establish the existence of concerted action, appellants had to submit evidence from which a jury could reasonably infer that Texaco and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. *Klein* v. *American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963); *United States* v. *Standrd Oil Co.*, 316 F.2d 84, 890 (7th Cir. 1963). Direct proof of an express agreement is not required. On the contrary, the plaintiff may rely on an inference of a common undersanding drawn from circumstantial evidence: "The picture of conspiracy as a meeting by twilight of a trio of sinister persons pointed hats close together belongs to a darker age." *William Goldman Theatres* v. *Loew's, Inc.*, 150 F.2d 738, 743 n.15 (3d Cir. 1945). Nevertheless, appellants had the burden of adducing sufficient evidence from which the jury could find illegal concerted action on the basis of reasonable inferences and not mere speculation. *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1312 (3d Cir. 1975).

In this case, plaintiffs have attempted to prove the existence of a conspiracy both by circumstantial evidence and by putative direct proof.

There are several legal issues in dispute between the parties which relate specificlly to the law of conspiracy in an antitrust context. First, the parties disagree on the significance of the Supreme Court's warning in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), against "fragmentation" of a plaintiff's proof of conspiracy. Second, the plaintiffs and defendants disagree on the meaning of the rule in this and other circuits which in plaintiffs' submission requires only "slight evidence" of a defendant's participation in an alleged conspiracy to make him liable for conspiratorial activity. Third, there is a dispute concerning the requisites of proof of conspiracy by inference from circumstantial evidence, and, in particular, on the requirements for proving conspiracy by means of consciously parallel business behavior. Fourth, there is a dispute concerning the vicarious liability of all members of the purported conspiracy for Robinson-Patman Act and Clayton Act § 7 violations committed by one or more members of the conspiracy, under the doctrine of vicarious liability of coconsirators which Zenith finds in *Pinkerton* v. *United States*, 328 US. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Fifth, the parties disagree as to the requisites for admissibility of coconspirator declarations. We address these five issues in the order stated.

2. *Fragmentation of the Plaintiffs' Conspiracy Allegations*

Repeatedly throughout this litigation, the plaintiffs have resisted attacks on the legal sufficiency of their conspiracy allegations by quoting the Supreme Court's admonition in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962):

> In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . .[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States* v. *Patten*, 226 U.S. 525, 544, 33 S.Ct. 141 [145-146], 57 L.Ed. 333 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co.* v. *United States*, 147 F.2d 93, 106 (C.A.6th Cir.)

For example, the plaintiffs oppose the defendants' claim that plaintiffs lack standing to attack the Manufacturers' Agreements, arguing that defendants should not be permitted to isolate one part of what plaintiffs claim is a "unitary" conspiracy, therey fragmenting plaintiffs' conspiracy case and denying them "the full benefit of their proof" in contravention of *Continental Ore*. As we shall explain, it is clear from the facts and reasoning of *Continental Ore* itself that the Supreme Court never intended the quoted language to bar a probing analysis of antitrust conspiracy claims. Accordingly, we reject plaintiffs' interpretation of the quoted language.

In *Continental Ore*, the Supreme Court reversed the decision of the Ninth Circuit, which had held that a verdict for the defendants should have been directed because the plaintiff failed to prove that the defendants were members of a conspiracy which was actionable under the Sherman Act. The plaintiffs in *Continental Ore* claimed that six defendants and others conspired to restrain and to monopolize trade and commerce in ferrovanadium and vanadium oxide, two compounds used chiefly in the manufacture of steel. Specifically, the complaint in *Continental Ore* alleged that the defendants' conspiracy had frustrated four different efforts which plaintiffs had made to enter and maintain themselves in the vanadium business, largely by obstructing plaintiffs' access to raw materials, and had also excluded the plaintiffs from the Canadian market.

The Court of Appeals had affirmed a jury verdict for the defendants, holding that the trial court should have directed a verdict for the defendants becuse there was insufficient evidence to justify a jury finding that the defendants' alleged illegal acts were in fact the cause of Continental's failure in the

vanadium business. The Court of Appeals had analyzed separately each of the four incidents upon which the plaintiffs based their claim, finding that in each case the plaintiffs had failed to show that their failures in the vanadium business were causally connected to the defendants' obstruction of access to suppliers. With respect to the fifth incident involving alleged interference with plaintiffs' Canadian sales, the Court of Appeals ruled that the claim was not "within the purview of the Sherman Act" because of the involvement of the Canadian government. 289 F.2d at 94.

The Supreme Court commented:

> It is apparent . . . that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper.

370 U.S. at 698-99, 82 S.Ct. at 1410. Immediately following this comment, the Court stated the warning against "compartmentalizing" a conspiracy case which we have previously quoted. The import of that admonition, read against the background of the *Continental Ore* decision, is that the jury, which "weighs the contradictory evidence and inferences," *id.* at 701, 82 S.Ct. at 1411, was entitled to give whatever weight it chose to the repetitive nature of the alleged injuries to the plaintiffs. We, of course, accept the import of that teaching here.

However, the *Continental Ore* warning plainly was not intended to preclude analysis of the legal basis of the conspiracy allegations of an antitrust plaintiff. In *Continental Ore* itself, the Supreme Court engaged in a detailed analysis of the record with respect to three of the four ventures which the Court of Appeals had addressed on their facts, concluding with respect to each of the three separately that there was enough evidence of causation to preclude a direct verdict. *Id.* at 702-08, 82 S.Ct. at 1412-1415. If the warning against "compartmentalizing" an antitrust conspiracy case were meant to prevent a court from breaking down a plaintiff's allegation of a "unitary" conspiracy into its component parts for purposes of analysis, the Court would not have engaged in the "forbidden" analysis in the very

same opinion in which it issued the warning. We conclude that the *Continental Ore* admonition against fragmentation of a conspiracy case does not preclude our analysis of the alleged "unitary" conspiracy.

Our conclusion is supported by the reasoning of other courts which have interpreted the *Continental Ore* warning. The most recent case is *California Computer Products, Inc.* v. *International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979), in which the Ninth Circuit upheld the grant of a directed verdict against an antitrust plaintiff which which claimed that it was injured by the defendant's violations of § 2 of the Sherman Act. After analyzing the evidence with respect to each of the acts upon which the plaintiff based his claim, and concluding that the district judge was correct in taking the case from the jury, the court commented:

> Nor does viewing the various acts of IBM collectively change our conclusion. The number of legal and evidentiary issues has required us to consider each instance of IBM's alleged monopolizing conduct separately for purposes of analytical clarity. However, we are mindful of the fact that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962); *see Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 814 (9th Cir. 1976). But there can be no synergistic result such as CalComp claims from a number of acts none of which show causal antitrust injury to CalComp.

613 F.2d at 746. We will have occasion to echo these comments *infra*.

In *Overseas Motors, Inc.* v. *Import Motors Ltd.*, 375 F.Supp. 499 (E.D.Mich.1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 304 (1975), the district court directed a verdict against the plaintiff, which

alleged that it was injured by a conspiracy in violation of § 1 of the Sherman Act. That court observed:

> Establishing conspiracy as a permissible inference, like any empirical inquiry, is merely an exercise in inductive reasoning—inference based upon the cumulation of consistent data. It is true, as plaintiff points out, that the evidence should not be viewed as a whole when making this determination. Certainly each fact is meaningful primarily as part of a pattern, and the total pattern is the most important datum of all. But for the system to be workable the units of cumulation must begin at less ambitious and more manageable level than the "totality of the evidence" which plaintiff has so often urged to be the only proper measure of its case.

375 F.Supp. at 531-32 (footnote omitted). The Sixth Circuit affirmed the grant of a directed verdict, without specific discussion of "compartmentalization." 519 F.2d 119.

In *United States* v. *FMC Corp.*, 306 F.Supp. 1106 (E.D.Pa.1969), Judge Higginbotham analyzed the government's allegations and evidence in a civil conspiracy case under § 1 of the Sherman Act, finding after trial that some but not all of the alleged conspiratorial price increases were the result of an illegal conspiracy among competitors. Judge Higginbotham commented:

> The Government argued forcefully that the several incidents which it sought to establish as evidence of the conspiracy should not be viewed in isolation, but rather should be considered as "tiles in the mosaic of an over-all plan or conspiracy." And the Supreme Court has held that in cases involving alleged conspiracies in violation of the Sherman Act, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962). Nevertheless, because of the episodic nature of the incidents, separated in space and time; and the disparity of their respective elements, linked only by the cast of characters common to most of them; it is necessary to consider some of these incidents separately to define precisely the nature of the conspiracy.

306 F.Supp. at 1135.

Like Judge Higginbotham, in the *FMC* case, we deem it necessary to analyze plaintiffs' conspiracy allegations in order "to define precisely the nature of the conspiracy." Consonant with the observations quoted above by the court in *Overseas Motors*, it is impossible in this case to begin with the "totality of the evidence."

In addition to the precedents discussed above, our construction of *Continental Ore* is also supported by reason and common sense. To give the *Continental Ore* warning the talismanic quality which the plaintiffs propose would be to permit any antitrust plaintiff to foreclose critical analysis of his allegations, merely by intoning the magic words "unitary" conspiracy and "totality of the evidence." Lawsuits in the federal courts are decided by proof, not sorcery. We cannot allow plaintiffs to erect such a barrier to probing examination of their claims.

Since *Continental Ore* does not prevent us from analyzing the plaintiffs' conspiracy allegations, we proceed to consider another specialized issue of conspiracy law which confronts us on these motions: the so-called "slight evidence" rule.

3. *The "Slight Evidence" Rule*

Plaintiffs contend that under the law of the Third Circuit, once the existence of a conspiracy is established only "slight evidence" is required to connect any given defendant with it. This so-called "slight evidence" rule has been stated as follows: "Where the government has established the existence of a conspiracy . . ., 'slight evidence may be sufficient to connect a defendant with it.' " *United States* v. *Kates*, 508 F.2d 308, 310 (3d Cir. 1975), *quoting United States* v. *DeCavalcante*, 440 F.2d 1264, 1273 (3d Cir. 1971). An examination of the cases readily shows that, as followed in the Third Circuit, this princi-

ple is merely an application of the standard for appellate review of jury verdicts, and has no application to a district court determination of a summary judgment motion.

Once a jury has returned a guilty verdict on a conspiracy charge, the reviewing court's role is to determine whether there was sufficient evidence to sustain the conviction of conspriacy. The court will view the evidence in the light most favorable to the prosecution. *See, e.g., United States* v. *Allard*, 240 F.2d 840 (ed Cir.), *cert denied*, 353 U.S. 939, 77 S.Ct. 814, 1 L.Ed.2d 761 (1957). The Third Circuit recently clarified the meaning of the slight evidence rule in light of these principles:

> The reference to "slight evidence" . . . is no more than a shorthand expression of the rule that, after a guilty verdict by a jury or a finding of guilt by a trial court, an appellate tribunal may not substitute its inferences from the evidence for those drawn by the factfinder, if there was sufficient evidence to submit to the fact-finder in the first place.

United States v. *Cooper*, 567 F.2d 252, 253 (3d Cir. 1977). In fact, Judge Gibbons, writing for the court in *Cooper*, a criminal case, commented:

> Clearly, it would be reversible error to charge a jury that, once the government has shown the existence of a conspiracy, it may connect a particular defendant to it by "slight evidence," rather than by evidence proving the connection beyond a reasonable doubt.

Id. See also United States v. *Schoenhut*, 576 F.2d 1010, 1027 (3d Cir.), *cert. denied*, 439 U.S. 964, 99 S.Ct. 450, 58 L.Ed.2d 421 (1978); *United States* v. *Provenzano*, 620 F.2d 985, 999 (3d Cir.), *cert. denied*, ___ U.S. ___, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980). The Ninth Circuit has also attempted recently to clarify the slight evidence rule, *United States* v. *Dunn*, 564 F.2d 348, 356-67 (9th Cir. 1977), and the Fifth Circuit has repudiated the rule entirely, *United States* v. *Malatesta*, 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979).

Since the Third Circuit explained clearly and unambiguously in *Cooper, supra*, that the "slight evidence" rule is "no more than a shorthand expression" for the standards of appellate review of a jury verdict of guilt, which assumes sufficient probative evidence to go to the jury initially, that rule has no place here.[80] Accordingly, when we consider the evidence purportedly connecting particular defendants to the alleged conspiracy, we will do so under the pertinent evidentiary standards: whether there is a genuine issue of material fact, for purposes of ruling on the summary judgment motions, *see* Part IV, *supra;* and wheter that connection is established by the preponderance of the evidence, for purposes of our F.R.E. 104(a) determination on evidence *aliunde, see* Part VI.D.6, *infra.*

4. *The Requisites of Circumstantial Proof of Conspiracy by Inference from Consciously Parallel Business Behavior*

a. *Introduction*

Part of plaintiffs' purported proof that the defendants conspired with one another is evidence that the Japanese manufacturing defendants each charged significantly lower prices in the United States than in Japan for allegedly comparable products. *See* part VII.J, *infra.* Thus plaintiffs' conspiracy case is premised in part on evidence of parallel price discrimination between two separate national markets. The plaintiffs also rely on other evidence of parallel conduct, such as the granting of rebates from the invoice price by many of the defendants, as circumstantial evidence of conspiracy.

The defendants contend that this and other evidence of parallel conduct offered by plaintiffs does not suffice to create a

---

[80] During oral argument, plaintiffs relied on *United States* v. *Tiche*, 424 F.Supp. 996 (W.D. Pa.), *aff'd mem.*, 564 F.2d 90 (3d Cir. 1977), where the District Court, stating its findings after a bench trial, said that slight evidence may be sufficient to connect a defendant with a conspiracy, relying on *United States* v. *Kates, supra. Tiche* was decided prior to the Third Circuit opinion in *Cooper*.

genuine issue of material fact with respect to the existence of conspiracy under the leading cases of *First National Bank of Arizona* v. *Cities Services, Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) and *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975). The plaintiffs reply that the choice between inferences which might flow from a showing of parallel price discrimination is properly a matter for the trier of fact, and cannot be made by the court in ruling on summary judgment motions. The defendants rejoin that the leap from a showing of parallel price discrimination to the ultimate fact of conspiracy is speculation, not inference, and is not permissible as a matter of law.

b. *General Principles Concerning Inferences From Circumstantial Evidence on Summary Judgment Motions*

In order to withstand defendants' summary judgment motions, plaintiffs must come forward with "significant probative evidence," *Cities Service, supra*, that the defendants had a "conscious commitment to a common scheme." *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963). The circumstances under which evidence of parallel behavior is probative of conspiracy depend upon principles of general application governing the permissibility of factual inferences. If those principles preclude the trier of fact from inferring the ultimate fact of conspiracy from plaintiffs' evidence of parallel behavior, then plaintiffs' evidence is not probative of the conspiracy alleged in their complaint. If the evidence is not probative, then it cannot raise a genuine issue of material fact so as to defeat a Rule 56 summary judgment motion. In other words, in order to determine whether or not plaintiffs' circumstantial evidence is sufficient to create a genuine issue of material fact, we must determine whether or not the inference from the circumstantial evidence to the ultimate fact of conspiracy is permissible as a matter of law.

The Court of Appeals discussed the law of inferences in a recent case upholding a directed verdict for the defendant on a

Sherman Act § 1 antitrust claim. Although the circumstantial evidence which the plaintiff offered in that case was not evidence of parallel business behavior, the principles governing permissible inferences are of general application. The Court of Appeals stated:

> When a trial court grants a directed verdict in a circumstantial evidence case, the court makes a legal determination that the narrative or historical matters in evidence allow no permissible inference of the ultimate fact urged by the opposing party. It decides that no reasonable person could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture. To permit a jury to draw an inference of the ultimate fact under these circumstances is to substitute the experience of logical probability for what the courts describe as "mere speculation." *Galloway v. United States*, 319 U.S. [372] at 395 [63 S.Ct. 1077 at 1089, 87 L.Ed. 1458]; *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d [20] at 25.

Sweeney, supra, 637 F.2d at 116. In an earlier case, also affirming a directed verdict for Sherman Act § 1 defendants, the Third Circuit said:

> A jury is permitted to draw only those inferences of which the evidence is reasonably susceptible, and may not be permitted to resort to speculation. Therefore, we hold that the evidence was insufficient to support the claim that the distributors rejected superior bids of the plaintiff in furtherance of a common plan.

Viking Theatre Corp. v. Paramount Film Distributing Corp., 320 F.2d 285, 296 (3d Cir. 1963), *aff'd by an equally divided court*, 378 U.S. 123, 84 S.Ct. 1657, 12 L.Ed.2d 743 (1964).

Although these rulings were made in the context of appeals from directed verdicts, they were based upon general principles of the law of inferences, which apply equally to a motion for summary judgment, to a motion for a directed verdict, to a Rule 104(a) evidentiary determination, or to any other situation in which a party seeks to meet his evidentiary burden by means of an inference. "Mere speculation," in the form of an

inference which is not supported by logic, is not sufficient to withstand a motion for summary judgment.[81] In *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979), for example, the Ninth Circuit affirmed a grant of summary judgment, holding that "a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation."

Similarly, in *American Telephone & Telegraph Co. v. Delta Communications Corp.*, 590 F.2d 100, 101-02 (5th Cir.), *cert. denied*, 444 U.S. 926, 100 S.Ct. 265, 62 L.Ed.2d 182 (1979), the Fifth Circuit upheld the grant of summary judgment in an antitrust conspiracy case, stating:

> In passing on a motion for summary judgment, even where the underlying facts are undisputed, it is hornbook law that the court must indulge every *reasonable* inference from those facts in favor of the party opposing the motion. Insofar as any weighing of inferences from given facts is permissible, the task of the court is not to weigh these against each other but rather to cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on these which do. If a frog be found in the party punch bowl, the presence of a mischievous guest—but not the occurrence of spontaneous generation—may reasonably be inferred.

(emphasis in original). And in *Miller v. Schweickart*, 413 F.Supp. 1062 (S.D.N.Y. 1976), a securities case, in granting summary judgment Judge Weinfeld commented:

> It is true that the inference to be drawn from an established fact must be left to the fact finder. But a precondition is that "the inference, to qualify as a fact found, must be reasonable, and, in the context of the known facts, be one that springs readily and logically to mind and . . . not one or two or more inferences, both or all of which are about equally probable."

[81] The essential difference between summary judgment and a directed verdict is the unavailability of demeanor evidence at the summary judgment stage. *See* 6 Moore's Federal Practice ¶ 56.04[2]; Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U.Chi.L. Rev. 71, 79 (1977). The inferences which plaintiffs would propose to the trier of fact in this case have nothing to do with demeanor evidence.

Id. at 1066, *quoting NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466, 474 (2d Cir. 1976). *See also Eastern Engineering & Elevator Co. v. NLRB*, 637 F.2d 191, 199-200 (3d Cir. 1980); *Neely v. St. Paul Fire & Marine Insurance Co.*, 584 F.2d 341 (9th Cir. 1978); *Southern Distributing Co. v. Southdown, Inc.*, 574 F.2d 824, 826 (5th Cir. 1978); *Natrona Service Inc. v. Continental Oil Co.*, 435 F.Supp. 99, 106-07 (D.Wyo. 1977), *aff'd*, 598 F.2d 1294 (10th Cir. 1979). *See generally* Part V, *supra*.

Thus to withstand a summary judgment motion, any inference from circumstantial evidence must be made "on the basis of the hard evidence without resorting to guesswork or conjecture." *Sweeney, supra.* We turn to the application of this principle to the special context of inferring a conspiracy in violation of the Sherman Act § 1 from circumstantial evidence of parallel business behavior.

c. *Inferring Conspiracy From Parallel Conduct*

It is clear as a matter both of logic and of controlling precedent that evidence of consciously parallel conduct alone is not sufficient to support an inference of conspiracy. The reasons for this rule of inference were stated by Professor Donald Turner in a influencial law review article:

> The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts. Thus, conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent*, that the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way. . . .
>
> Even the fact that competitors have knowingly charged identical prices is a neutral fact in the absence of evidence

which would lead one to expect that the prices would have been different if truly independent decisons had been made. Identical prices may be consistent with independent competitive decisions. A large number of producers of a standardized commodity selling under stable market conditions might be expected to charge the same price, a price set not by agreement but by market conditions. None could charge more and make any sales, and there would be no point in charging less because, under competitive assumptions, each could sell at the established market price all that his costs made it profitable to sell.

Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv.L.Rev. 655, 658-59 (1962) (emphasis in original).

The requirement that interdependence of business behavior be shown before an inference of conspiracy from consciously parallel conduct is legally permissible is well established in the case law under the Sherman Act. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), the Supreme Court upheld the grant of summary judgment in favor of an antitrust defendant on the issue of whether the defendant was a member of the conspiracy alleged in the complaint. The case arose from a dispute over the marketing of Iranian oil following the nationalization of Iran's oilfields by the Mossadegh government in 1951. The original plaintiff, Waldron, obtained a contract to purchase some of the output of the nationalized oilfields, but allegedly was unable to market the oil. He alleged that the defendants other than Cities Service Co. ("Cities") had conspired to prevent him from selling any of the Iranian oil; and that Cities, which initially had conducted extensive negotiations with him, broke off dealing and joined the conspiracy as the result of receiving a contract for the purchase of Kuwaiti oil at a favorable price from other conspirators. Waldron sought to prove Cities' membership in the alleged conspiracy by circumstantial evidence of Cities' refusal to deal with him, after breaking off the initial negotiations, and of its receipt of the Kuwaiti oil contract. After extensive discovery, Cities moved for summary judgment; after additional extensive discovery, the motion was granted.

In the Supreme Court, the plaintiff abandoned his argument relating to the award of a contract for Kuwaiti oil to Cities, as undisputed evidence showed that that contract was unrelated to the alleged conspiracy. His case against Cities was thus premised on Cities' alleged refusal to deal with him, conduct which was alleged parallel with that of the other defendants. The Court found that parallel conduct insufficient to withstand Cities' motion for summary judgment. It distinguished a previous decision on conscious parallelism, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939):

> In *Interstate Circuit* a group of motion picture distributors, at the request of two large first-run exhibitors, simultaneously imposed identical restrictions on subsequent showing of the films they distributed . . . There was no direct evidence showing that the distributors agreed with one another to impose the identical restrictions, but it was shown that each distributor knew that all the other distributors had been approached with the same proposal and that the imposition of the restrictions would be feasible only if adhered to by all distributors. Finally, it was shown that the identical action taken had the effect of creating a likelihood of increased profits for each distributor. This Court held that on the foregoing facts a tacit agreement to restrain competition between the distributors could properly be inferred.

391 U.S. at 286-87, 88 S.Ct. at 1591-1592. This in *Interstate Circuit*, in addition to consciously parallel conduct, the plaintiffs had shown the essential elements of interdependence. First, they had shown that each of the alleged coconspirators knew that the restrictions "would be feasible *only if adhered to by all distributors*" (emphasis added). Second, they had shown that if all the distributors adhered to a common scheme, their adherence created "a likelihood of increased profits for each distributor." The *Cities Service* Court found these elements absent in the case against Cities:

> *Interstate Circuit* differs from the case at hand . . . in the inferences of motive that can reasonably be drawn from the facts. The reason that the absence of direct

evidence of agreement in Interstate Circuit was not fatal is that the distributors all had the same motive to enter into a tacit agreement. Adherence to such an agreement would enable them to increase their royalties by forcing a rise in admission prices without the danger of competitors enlarging their share of the subsequent-run market by refusing to impose similar restrictions. . . .

> Here Waldron is unable to point to any benefits to be obtained by Cities from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from Cities' "parallel refusal to deal" does not logically follow.

Id. at 287, 88 S.Ct. at 1592 (footnote omitted). Since the inference of conspiracy did not logically follow, the Supreme Court affirmed the grant of summary judgment for Cities.

Subsequent decisions have refined the test of interdependence. The leading case of the Third Circuit is *Venzie corp. v. United States Mineral Products*, 521 F.2d 1309, 1314 (3d Cir. 1975), which plainly controls our decision here. In *Venzie* the Court of Appeals, speaking through Chief Judge Seitz, affirmed a directed verdict for the defendants in a Sherman Act § 1 conspiracy case. The Court of Appeals ruled:

> [Plaintiffs'] evidence does not, however, include two elements generally considered critical in establishing conspiracy from evidence of parallel business behavior: (1) a showing of acts by defendants in contradiction of their own economic interests, *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839, 82 S.Ct. 867, 7 L.Ed.2d 843 (1962); and (2) satisfactory demonstration of a motivation to enter an agreement, *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 287, 88 S.Ct. 1575 [1592], 20 L.Ed.2d 569 (1968).
>
> The absence of action contrary to one's economic interests renders consciously parallel business behavior "meaningless, and in no way indicates agreement. . . ." Turner, [*supra*, 75 Harv.L.Rev. at 681].

521 F.2d at 1314.

Also important is *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978), in which the Court of Appeals, again speaking through Chief Judge Seitz, vacated and remanded the district court's grant of pre-discovery summary judgment for the defendants on a complaint which alleged "a course of interdependent consciously parallel action." The Court of Appeals determined that the lower court had treated the summary judgment motion as the functional equivalent of a Rule 12(b)(6) motion to dismiss for failure to state a claim, and reviewed the lower court's order on the standard applicable to a motion to dismiss. 561 F.2d at 444. The Court of Appeals determined that the complaint was sufficient to state a cause of action under § 1 of the Sherman Act, and stated the law concerning inferring a conspiracy from consciously parallel interdependent action as follows:

> The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational independent choice less attractive than that of concerted action. *Compare Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939), with *First National Bank v. Cities Service Co.*, 391 U.S. 253, 274-88, 88 S.Ct. 1575 [1585-1592], 20 L.Ed.2d 569 (1968). We recently articulated those circumstances in *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975):
>
> "(1) a showing of acts by defendants in contradiction of their own economic interests; and
>
> (2) satisfactory demonstration of a motivation to enter an agreement . . ."

561 F.2d at 446.[82] Under this formulation, if the inferences of rational independent choice and concerted action are equally

---

[82] Thus *Bogosian* states the general principle—that the circumstances under which the conduct occurred must make the inference of rational

drawable, the proof is insufficient. We shall apply this formulation, which is an exercise in logical analysis, in Part VII, *infra*.

More recently, in *Sweeney, supra*, the Third Circuit upheld the grant of a directed verdict in favor of a defendant charged with participation in a conspiracy in violation of § 1 of the Sherman Act. In that case, the defendant, Texaco, Inc., had terminated the plaintiff, Edward J. Sweeney & Sons, Inc., as a distributor of Texaco products. The plaintiff alleged that the termination was the result of Texaco's combination with competing Texaco retailers. Texaco claimed that the plaintiff's agreement was terminated because Texaco was incurring a $58,000 annual loss by supplying the plaintiff with its products. The Court of Appeals found that the $58,000 figure was undisputed, and held that no conspiracy could be inferred because Texaco's action was in Texaco's own independent self-interest. The court stated:

> Putting aside the testimony of Rodden, Doherty, Murray and the others on which appellants rely, appellants have failed to show that Texaco's actions contradicted the refiner's economic self-interest. Speaking through Chief Judge Seitz, our court has isolated "two elments generally considered critical in establishing conspiracy from evidence of parallel business behavior: (1) a showing of acts by defendants in contradiction of their own economic interests . . . and (2) satisfactory demonstration of a motivation to enter an agreement." *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975) (citations omitted). *Venzie* sets forth one means of establishing a conspiracy circumstantially. Clearly by lowering the hauling allowance, Texaco acted in its self interest, and was not proceeding contrary to its "own economic interests." The change saved it $58,000 per year on sales to Sweeney. This undisputed fact negates an inference of concerted action that might exist if both factors of *Venzie* were satisfied.

---

independent choice less attractive than that of concerted action—while *Venzie* refined that principle by specifying two particular circumstances that would generally be critical to a determination of conspiracy based upon parallel conduct.

637 F.2d at 114 (footnote omitted).[83] *See also Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205 (3d Cir. 1980); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 35 n.54 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978).

If the plaintiffs are unable to meet the *Venzie* test for circumstantial evidence of conspiracy, mere proof of parallel behavior added to evidence of meetings among the defendants will not suffice as proof of conspiracy. The defendants admit that they held meetings among themselves on various issues, ranging from discussions of price and demand in the domestic Japanese market, *see* Part VII.G, *infra*, to a common legal defense to the U.S. administrative proceedings under the 1921 Antidumping Act, *see* Part VII.L, *infra*. The plaintiffs have placed great weight on the existence of these admitted meetings among defendants, contending that the meetings offered the defendants an opportunity to engage in the low-price export conspiracy charged in their complaint. However, as we explained in Part VI.A.4, *supra*, proof of an "opportunity to conspire" is insufficient to give rise to an inference of conspiracy.

Although *Venzie* and *Sweeney* were decisions upholding the grant of directed verdicts, rather than summary judgment, and *Bogosian* merely announced the applicable rules of law, the principles of inference announced therein are fully applicable on a motion for summary judgment. First, as we have observed, principles governing the permissibility as a matter of law of inferences from circumstantial evidence apply at the summary judgment stage just as they do on motions for a directed verdict, or at or after trial. *See* p. 1171, *supra*. Furth-

---

[83] Judge Sloviter dissented in *Sweeney*, largely on the basis that in her view the plaintiff had elicited enough evidence of Texaco's acting in contradiction of its own independent economic interests to require the issue to be submitted to the jury. 637 F.2d at 128-29. She did not disagree with the majority's statement of the law on proof of interdependence, however, and even commented that evidence of actions in contradiction to the actor's indepenent self-interest is "the key to reconciliation of the [Supreme] Court's decisions in *Interstate Circuit* and *Theatre Enterprises*." *Id.* at 129.

ermore, the Supreme Court upheld the grant of summary judgment in *Cities Service* because of the failure of plaintiff's evidence there of parallel conduct to support an inference of conspiracy. In addition, many other courts have granted or upheld the grant of summary judgment on the basis of the plaintiffs' inability to support an inference of conspiracy by proof of parallel conduct. *E. g., Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980); *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975); *Gold Fuel Service, Inc. v. Esso Standard Oil Co.*, 306 F.2d 61 (3d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S.Ct. 506, 9 L.Ed.2d 500 (1965); *Southway Theatres, Inc. v. Buena Vista Distribution Co.*, 1980-2 Trade Cases ¶ 63,546 (N.D.Ga. 1980); *Weit v. Continental Illinois National Bank & Trust Co.*, 478 F.Supp. 285 (N.D.Ill. 1979); *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F.Supp. 1251 (S.D.N.Y. 1976). Thus we must apply the rules of antitrust inferences of *Venzie, Bogosian*, and *Sweeney* in our consideration of the instant summary judgment motions.

As we examine plaintiffs' evidence to determine whether or not plaintiffs have met the *Bogosian/Venzie* test for the inference of conspiracy from consciously parallel conduct, we will most often be applying the first part of the *Venzie* test: whether the defendants' parallel behavior is inconsistent with their own independent economic interests. Put differently, in ruling on the present motions for summary judgment, our inquiry will most often be whether the plaintiffs have adduced significant probative evidence sufficient to create a genuine issue of material fact as to this element of their proof. If the plaintiffs have not made such a showing, then the inference of conspiracy which they propose from what they assert to be consciously parallel behavior is not permissible as a matter of law, and their evidence of parallel conduct provides no support for their opposition to these summary judgment motions. We will, from time to time, also address the question in terms of the more fundamental *Bogosian* formulation—whether the circumstances make the inference of rational independent choice

less attractive than that of concerted action, applying the same "showing of a genuine issue" standard.

To recapitulate, in applying the *Bogosian/Venzie* test to the evidence alleged by plaintiffs to be probative of conspiracy through consciously parallel interdependent action, we shall utilize one of the following formulations:

(1) whether the circumstances under which the behavior occurred "make the inference of rational independent choice less attractive than that of concerted action," *Bogosian*, 561 F.2d at 446;

(2) whether the inferences of rational independent choice and concerted action are equally drawable, in which case the *Bogosian* test has not been met;

(3) whether the conduct is contrary to defendants' economic self-interests and whether a motivation to enter an anticompetitive agreement has been shown. *Venzie, supra*.

We note that the *Bogosian/Venzie* test applies to situations in which plaintiff is attempting to prove collusion through evidence of consciously parallel business behavior. When we review evidence other than that which is alleged to show parallel behavior the broader general principles of the law of inferences will apply, and we shall draw all reasonable nonspeculative inferences in favor of the plaintiffs.[84]

[84] The same principles will control our determination under F.R.E. 104(a) as to whether the plaintiffs have made a sufficient showing of conspiracy to permit their coconspirator hearsay statements to be admissible against alleged coconspirators under F.R.E. 801(d)(2)(E). If the plaintiffs have not met the *Bogosian/Venzie* test by the relevant quantum of evidence *aliunde*, then the principles of inference which we have explained will bar us from accepting evidence of parallel conduct as proof of conspiracy.

5. *Vicarious Liability of Coconspirators: The* Pinkerton *Doctrine and Robinson-Patman Act and Clayton Act § 7 Violations*

Zenith has sought to establish the liability of all the members of the purported conspiracy for Robinson-Patman Act and Clayton Act § 7 violations committed by one or more of the members of the conspiracy under the doctrine of vicarious liability of coconspirators which it finds in *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Neither the Robinson-Patman Act nor § 7 of the Clayton Act refers to conspiracy, as does section 1 of the Sherman Act, and plaintiffs concede, as they must, that there is no separate antitrust violation for conspiracy to violate the Robinson-Patman Act or § 7 of the Clayton Act as such.

Pinkerton was a criminal case in which the Supreme Court held that a conspirator could be punished not only for the offense of conspiracy itself, but also for substantive offenses committed by his coconspirator in furtherance of their common conspiracy. Zenith admits that this principle has never been applied in a civil case, but argues forcefully that it should be so applied, and in this case. Zenith also relies upon a pre-*Pinkerton* case, *Sidney Morris & Co. v. National Association of Stationers*, 40 F.2d 620 (7th Cir. 1930), a civil treble-damage action under § 2 of the Clayton Act (the forerunner of the Robinson-Patman Act) which, in its submission, applied a rule of vicarious coconspirator liability.

The defendants, on the other hand, maintain that *Pinkerton* is inapplicable to civil cases in general and to civil antitrust cases such as this one in particular. Their position is best expressed in one of the memoranda filed by the Matsushita defendants,[85] which concludes that *Pinkerton* is inapplicable in

[85] "The Matsushita Defendants' Supplemental Memorandum on Vicarious Liability, Submitted in Support of Their Motions for Summary Judgment on Zenith's Section 7 and Robinson-Patman Act Claims," dated July 3, 1980. The arguments contained in the brief are endorsed and adopted by the other defendants.

a civil context on historical, conceptual, and policy grounds, and that only where the coconspirators wilfully participate in the conspiracy with knowledge of their coconspirators' acts can vicarious liability be imposed in a civil case.[86] The memorandum rejects *Sidney Morris* as being wrongly decided or aberrational and contrasts that decision with *Palmer News, Inc. v. ARA Services, Inc.*, 476 F.Supp. 1176 (D.Kan. 1979), in which the court refused to hold conconspirators vicariously liable for acquisitions violative of § 7 of the Clayton Act. The memorandum suggests that, in light of the long history and sophisticated level of antitrust jurisprudence, the almost total absence of cases in which vicarious liability or aiding and abetting principles have been applied demonstrates their inapplicability in actions under Sections 2(a) or 7.

The defendants also advance a statutory construction argument. First, they say that neither the language of the Robinson-Patman Act nor § 7 of the Clayton Act nor their legislative history even hint that Congress intended to extend liability to persons other than the primary wrongdoers identified in each section—sellers who unlawfully discriminate in price and companies which unlawfully acquire others. They argue that if Congress had intended to have aiders and abetters and conspirators drawn into the net of treble damage liability under those laws, it could have easily found the words to express that intent, as it did in Sections 1 and 2 of the Sherman Act. The Matsushita defendants find further support for their argument that liability under § 7 of the Clayton Act and the Robinson-Patman Act should not be extended to persons other than the primary wrongdoers in what they describe as the "well established rule" that the antitrust laws "are to be

[86] The memorandum distinguishes *Winkler-Koch Engineering Co. v. Universal Products Co.*, 79 F.Supp. 1013 (S.D.N.Y. 1947), which purportedly announced the principle that "coconspirators are vicariously responsible for acts committed in furtherance of the joint venture," on the ground that it actually applied an evidentiary rule but confused it with one determinative of substantive liability.

strictly construed and not to be enlarged by construction." *Image and Sound Service Corp. v. Altec Service Corp.*, 148 F.Supp. 237, 239 (D. Mass. 1956). Defendants also invoke the historical fact that actions for treble damages were unknown at common law and the principle that a "[p]laintiff has no right to sue for treble damages . . . unless a federal statute has created that right."[87] While such matters may add force to their anti-vicarious liability arguments, the particular argument which they construct on this point appears to be flawed.[88]

Finally, the memorandum challenges the fabric of the present plaintiffs' conspiracy claims in the *Pinkerton* setting, asserting that it is unreasonable to consider the conspiracy alleged by plaintiffs as the equivalent of an agreement among defendants to participate in acquisitions violative of § 7 of the Clayton Act or to engage in specific acts of price discrimination violative of the Robinson-Patman Act. They posit a hypothetical which, in their submission, demonstrates the "absurdity" of Zenith's position on vicarious liability:

> For example, under Zenith's theory, Sears, as an alleged participant in the general conspiracy, would be vicariously liable for allegedly discriminatory sales which favored one of its direct competitors, such as Montgomery Ward or J.C. Penney. To take another example, under Zenith's theory, Toshiba, a supplier to Sears, would be vicariously liable for Sanyo's acquisition of the television business of Warwick, another supplier to Sears.

[87] *Nashville Milk Co.* v. *Carnation Co.*, 238 F.2d 86, 88 (7th Cir. 1956), *aff'd*, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340 (1958).

[88] Defendants premise this argument on their interpretation of the holding of *Nashville Milk*, *see* n. 87, *supra*, that in view of the drastic nature of the treble damages remedy and Congressional silence, *no private right of action* lies against those responsible even as primary violators of Section 3 of the Clayton Act. In defendants' submission, to infer such a right to proceed against those alleged to be *secondarily liable* for violations of other provisions of the same statute would violate the "most basic principles of statutory construction and subvert the overall scheme." The problem with this argument is that in *Nashville Milk*, the court actually held that there is no private right of action under § 3 of the Robinson-Patman (not Clayton) Act, 15 U.S.C. § 13a. That holding followed from the court's determination that § 3 of the Robinson-Patman Act, unlike § 1, did not amend the Clayton Act and therfore was not among the "antitrust laws" within the meaning of § 4 of the Clayton Act which private parties have standing to enforce.

The foregoing arguments are well-considered and forceful. On the other hand, however it may have been ignored in recent years, and despite its never having been applied in a civil context, *Pinkerton* is a Supreme Court decision which has not been overruled. Under these circumstances, and because there is an alternative ground for dismissal of the plaintiffs' Clayton Act § 7 and Robinson-Patman Act claims, *see* Parts X and XI, *infra*, it is best that the question of the applicability of the *Pinkerton* doctrine in a civil antitrust context await another case and another day. We have extended the opinion to include this discussion of the vicarious liability issue so that the Court of Appeals will have the matter clearly set out before it without the necessity of rummaging through the huge record should it choose to reach an issue which we avoid.

6. *Requisites for Admissibility of Coconspirator Declarations*

The determination whether the plaintiffs have adduced sufficient evidence to raise a genuine issue of material fact with respect to the various defendants requires that we consider *all* the evidence, including any coconspirator statements which might be admissible under F.R.E. 801(d)(2)(E). As we have noted above, our pretrial evidentiary or *in limine* hearings were also intended as a vehicle for the making of a preliminary determination, pursuant to F.R.E. 104(a), of the admissibility of coconspirator statements.[89] That procedure accords with our view, that of a number of cases, and that of Professor Saltzburg that 104(a) is the appropriate device for making the preliminary determination of the existence, *vel non*, of independent evidence of a conspiracy required by the cases, described

[89] In the Japanese Materials Evidentiary Opinion, 505 F.Supp. 1190 at 1213, we reserved the determination of the admissibility of coconspirator hearsay statements.

infra. *See generally* S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* at 43-45 (2d ed. 1977), and cases cited therein.[90] We not address the legal principles applicable to that admissibility determination.

Rule 801(d)(2)(E)[91] codifies the traditional rule, which admits into evidence statements of one coconspirator against another coconspirator as long as those statements were made during the course of and in furtherance of the conspiracy. There are two controversial questions in this area. The first, generated by the proviso of F.R.E. 104(a) that in making its determination the court is not bound by the Rules of Evidence (except with respect to privileges), is whether the coconspirator (hearsay) statements may, themselves, be used to establish the existence of the conspiracy. The second is whether the standard of proof required in making the preliminary determination is a "prima facie" or a "preponderance" standard. While there is a conflict in the circuits on these points, the Third Circuit's position is clear.

Notwithstanding the facial appeal of the proviso to Rule 104(a), the Third Circuit holds firmly to the view that the admissibility of coconspirator statements against the nondec-

[90] *See also* Japanese Materials Evidentiary Opinion at 1229-1230, where we addressed the question whether the admissibility of hearsay under the hearsay exceptions is considered under Rule 104(a) or 104(b). We concluded that Rule 104(b) does not apply as it, by its terms, applies "when the relevancy of evidence depends on the fulfillment of a condition of fact." Hearsay exceptions do not generally raise questions of relevancy conditioned on fact. Accordingly, we determine the admissibility of evidence under the hearsay exceptions, including coconspirator hearsay declarations, under F.R.E. 104(a).

[91] Rule 801(d)(2)(E) provides in relevant part:

(d) *Statements which are not hearsay*. A statement is not hearsay if . . .

(2) *Admission by party opponent*. The statement is offered against a party and is . . .

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

larant depends upon the determination by the trial judge whether it has been proved, by a clear preponderance of the evidence *independent of the hearsay statement*, that a joint undertaking existed at the time of the statement or action. This position was first embraced in the case of *United States v. Bey*, 437 F.2d 188, 191 (3d Cir. 1971), and has been reiterated in a line of cases including: *United States v. Trotter*, 529 F.2d 806 (3d Cir. 1976); *United States v. Trowery*, 542 F.2d 623 (3d Cir. 1976), *cert. denied*, 429, U.S. 1104, 97 S.Ct. 1132, 51 L.Ed.2d 555 (1977); and *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980).[92] Thus, unless plaintiffs can show by independent evidence (evidence *aliunde*), that the conspiracy they have pleaded exists and that the declarants and the defendant against whom the statement is offered are members of that conspiracy, the hearsay statements of alleged coconspirators are inadmissible. As we shall see in Part VII.R., *infra*, this standard has not been met.

The second controversial question is whether the "prima facie" or "preponderance" standard is the proper standard of proof to be required of the proponent of coconspirator declarations. Under the prima facie test, the judge takes the evidence in the light most favorable to the offering party. As Professor Saltzburg explains, *Federal Rule of Evidence Manual* at 465, the preponderance standard differs from the prima facie test in that the preponderance test requires the judge to actually find facts, *i.e.*, to judge the credibility of witnesses and to make a finding based on a fair assessment of the evidence. In Professor Saltzburg's words: "in other words, before the test is satisfied, the Judge decides not whether some jury might believe the independent evidence, but whether he believes it." Although none of the courts adopting the preponderance test have expressly embraced the Santzburg exemplar, the credibility

[92] A number of circuits concur with the Third Circuit's position and a number of others do not. For a comprehensive discussion of this area of the law, *see* Saltzburg & Redden, *supra*, 462-69, 1980 Cum.Supp. at 200-04.

judgment would appear to be an essential part of the factfinder's role, that role to be exercised under F.R.E. 104(a). At all events, whatever its contours, the Third Circuit has plainly adopted the preponderance test in the line of cases from *Bey* to *Continental Group*, cited *supra*. For example, in *United States v. Trowery, supra*, the court stated:

> To determine whether the evidence is competent against the nondeclarant, the trial judge determines whether it has been proved, *by a preponderance of the evidence*, that a joint undertaking existed at the time of the statement or action. (emphasis added).

542 F.2d at 627.[93]

In accordance with the foregoing discussion, in making the preliminary determination in Part VII.R of the admissibility of conconspirator declarations, we shall make factual findings as to whether plaintiffs have established the existence of the alleged "unitary" conspiracy and the membership therein of the declarant and each individual defendant against whom the statement is sought to be introduced by a preponderance of evidence independent of the coconspirators' statements sought to be introduced.

---

[93] For a full discussion of this question, including citation of cases following the preponderance test, *see* Saltzburg and Redden at 462-69.

There is an interesting problem posed by the preponderance test. It is clear that a judge can make legal sufficiency rulings under various federal rules which result in the removal of matters from the consideration of the jury. However, where the judge assumes the role of fact-finder at the preliminary stage and makes rulings predicated in part on credibility judgments (using the same standard which a jury would subsequently use), it is arguable that a judicial determination, based partly on credibility judgments, that evidence which could be sufficient to meet a prima facie standard did not meet the preponderance test, might violate the Seventh Amendment rights of the proponent of the coconspirator statement which is thus excluded (possibly resulting in the demise of his conspiracy case). Fortunately we need not decide this difficult issue, for we have found that the plaintiffs have presented no genuine issue of material fact, thus dictating the 104(a) result and obviating the problem. While we shall make an independent decision on the F.R.E 104(a) determination, it does not turn on credibility matters.

Having concluded our review of the applicable law, we now turn to the evidence of record.

VII. *Plaintiffs' Sherman Act § 1 And Wilson Tariff Act Conspiracy Case As to Television Receivers—Evidentiary Review and Discussion of Legal Sufficiency*

A. *Introduction*

This segment of the opinion analyzes the materials which constitute the sinews of plaintiffs' Sherman Act § 1 and Wilson Tariff Act conspiracy case with respect to television receivers. We will commence this evidentiary review with a discussion of plaintiffs' allegations about: (1) the technological development of consumer electronic products; (2) the industrial organization of Japanese electronics firms on the foundation of borrowed technology; (3) the "closed Japanese market"; and (4) "the combined economic power of the defendants and their cartel." The facts in these areas, supplied largely through the admissible portions of plaintiffs' expert reports, constitute background or "climate" material for the plaintiffs' subsequent presentation.

Our first major substantive discussion will be a description of plaintiffs' evidence respecting the Japanese manufacturers' export control arrangements, including their check price agreements and the associated JMEA Rules. We will then turn to a description of the activities of certain groups and associations in Japan. In the course of that discussion we will address both the home market and export aspects of the alleged "unitary" conspiracy, *i.e.*, the alleged high price home market "warchesting" aspect and the alleged predatory low price export aspect thereof. The review will include a description of the evidence of the activities of certain trade associations and of certain "sub rosa" groups to which a number of defendants belonged, as well as consideration of a number of what plaintiffs style "connection" and "intent" documents. We will also consider what inferences may be drawn from this "Japan-side" evidence.

We will then turn to plaintiffs' allegations about below cost sales and about international price discrimination between the United States and Japanese markets, together with a discussion of what, if any, inferences may be drawn therefrom. This is followed by our review of another major component of plaintiffs' case—their allegations about the defendants' "predatory export rebate system for the collusive concealment of dumping" and the inferences to be drawn therefrom. Next we consider plaintiffs' allegations that an inference of conspiracy can be drawn from the alleged depletion and destruction of the U.S. CEP industry, followed by a discussion of the significance, *vel non*, of plaintiffs' allegations about certain acquisitions of various U.S. CEP manufacturers and manufacturing facilities by defendants. Additionally, we will consider plaintiffs' allegations about "defendants' systematic price discrimination in the U.S.," and we will deal extensively with the evidence of the participation of each individual defendant in the alleged conspiracy. In order to determine the admissibility of coconspirator declarations under F.R.E. 801(d)(2)(E), we shall then make a preliminary determination of the sufficiency of plaintiffs' conspiracy evidence pursuant to F.R.E. 104(a). We will end our review of plaintiffs' Sherman § 1 and Wilson Tariff Act Case regarding television receivers in Part VII.S with a summary of our conclusions with respect thereto.

The evidentiary review which we have previewed will be in the nature of a summary of all categories of plaintiffs' important evidence, linked to an analysis of the evidence and a discussion of its legal sufficiency for summary judgment purposes as measured against the standards set forth in Parts V and VI, *supra*. A significant portion of this discussion will focus specifically on the question whether the Third Circuit standards for proof of conspiracy by circumstantial evidence have been met.

During the course of our evidentiary review we shall, as is required on a motion for summary judgment, consider the evidence and all reasonable inferences to be drawn therefrom

in the light most favorable to the plaintiffs.[94] Except as is expressly indicated, nothing set forth as a fact in the evidentiary review is disputed of record. While plantiff may *contend* that the true state of affairs is otherwise there are no *facts* to the contrary in the voluminous record, except as we have stated them.

As we explained in the Preliminary Statement, this review emanates from our tedious in-chambers review of the FPS and its supporting, or supposedly supporting, documents,[95] along with the voluminous briefs of the parties. Our insertion of the word "supposedly" is a function of three factors. First, numerous documents do not support the conclusory propositions for which they are cited in support of damning conclusory statements regarding conspiratorial activities were in the document depository only in Japanese. This is the case not only with numerous documents cited in the FPS, but even with documents submitted to us in the latest full-dress memorandum filed by the plaintiffs, their post-summary judgment argument memorandum, and with still later submissions in the nature of letter memoranda. Third, a number of other documents cited by plaintiffs as important could not even be found in the depository. These include matters which were commented on extensively by defendants' counsel in the final summary judgment argument.[96]

---

[94] This approach is, of course, subject to our discussion in Part VI.D.4 relating to inferring conspiracy from parallel conduct.

[95] This evidentiary review will deal almost exclusively with documents, because the significant aspects of plaintiffs' case are based almost exclusively upon documentary evidence.

[96] On two occasions during the final summary judgment argument, Joel Harris, one of Matsushita's counsel, had a team of lawyers working in the depository late into the night in an attempt to locate documents which the plaintiffs had invoked the day before as being important to their case, only to find that they were either not in the depository or were untranslated from the Japanese.

We cannot consider in this evidentiary review documents that plaintiffs have not thought important enough to translate or to place in the depository. Nor have we considered the countless documents that are plainly irrelevant or cumulative. Repeating what we said in the Preliminary Statement, we can address herein only a fraction of the documents we have reviewed, covering the others by general reference, and choose to focus herein upon those documents called to our attention by counsel in their presentations and memoranda. We turn now to our review of the evidence on which plaintiffs rely to defeat summary judgment.

B. *The Technological Development of Consumer Electronic Products and the Industrial Organization of Japanese Electronics Firms on the Foundation of Borrowed Technology*

The plaintiffs have devoted some 232 pages of their FPS to mini-exegesis of the technological development of consumer electronic products and to a description of how the Japanese electronic industry was built on the basis of borrowed—primarily American—technology. Although these materials may seem peripheral to the reader, we do not begin here arbitrarily, for this is where plaintiffs initiate their case.

Plaintiffs commence with a list of the prominent scientists and inventors who contributed to the development of television; all are American or European.[97] Although both the National Broadcasting Co. and the Columbia Broadcasting System operated experimental television stations as early as 1931, the British Broadcasting Co. was the leader in the commercialization of television. Plaintiffs explain that after 1946 most major technological developments in the television industry involved semiconductors, and provide a list of major inventions in that industry. All but one (originating with Sony) are by American or European firms. By the mid-1960's, ac-

[97] Major treatises on the history of the television industry mention no specific Japanese scientific contributions to early television development.

cording to plaintiffs' FPS, the U.S. was the world leader in television production, with worldwide technological superiority in the production of electronic components. Moreover, from 1963 to 1978, the vast majority of improvements in television receiver technology were made by U.S. companies, including a number of Zenith. Plaintiffs provide similar background for the radio and other CEP industries.[98]

Plaintiffs then go on to explain that by 1953 RCA had licensed over sixty Japanese manufacturers in the various fields, primarily in the television receiver field, and from that base extended its licensing arrangements and technical assistance so widely as virtually to give birth to the Japanese CEP industry. Plaintiffs proceed to demonstrate that the Japanese CEP industry rests almost entirely upon the foundation of patent licenses from RCA, Westinghouse, GE, Western Electric, and other American firms, and from a number of European firms including N.V. Philips. The FPS documents the vast royalties paid by Japanese manufacturers to American firms under patent licensing agreements which are still in effect. Finally, plaintiffs represent that in recent years the patent licensing agreements between the Japanese manufacturers and foreign patent licensors have been jointly negotiated under the aegis of the Foreign Patent License Committee of the EIAJ.

This is all very interesting, but hardly of value to the case.[99] Defendants do not dispute that their technology is American in origin, not do they dispute that they manufacture under licens-

[98] We are treated in this segment to such interesting historical tidbits as the following: (1) magnetic recording was first accomplished in 1899 by a Danish engineer named Vladimir Poulsen, whose invention, the telegraphone, won a Grand Prix at the Paris Exposition in 1900; (2) in 1935 the German firm of Telefunken made the first modern tape recorder; (3) RCA was incorporated by GE in 1919 as its subsidiary operating in the radio field; and (4) by 1930 RCA had the exclusive rights to manufacture and sell under approximately 4,000 patents in the radio field.

[99] *E.g.*, plaintiffs have also offered a series of press clippings which demonstrate the chronology of the introduction of personal size television receivers in the United States market from various sources.

ing agreements with American (and European) firms. But those facts have no bearing upon the predatory low-price export conspiracy which plaintiffs have alleged. Plaintiffs have not pleaded a conspiracy to injure American patent holders through collusive patent license negotiations. The technological evidence is purely background, and does not tend to establish any ingredient in the "unitary" conspiracy.

C. *Closed Japanese Market*

An important ingredient contributing to plaintiffs' theory of defendants' alleged conspiracy is the role played by Japanese trade barriers, which, in plaintiffs' submission, permitted the Japanese defendants to avoid competition in their home market. In plaintiffs' submission, this home market, effectively closed to competition by foreign imports and investment, provided the climate wherein defendants could successfully fix high prices, thereby facilitating their low-price entry into the U.S. market by providing the necessary financial cushion.

Plaintiffs' evidence of the closed Japanese market is primarily contained in sections of their experts' reports which we have found to be admissible under the "or otherwise" clause of F.R.E. 702, which permits an export to "give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts."[100] Advisory Committee Note to Rule 702. Plaintiffs' theory is explained in "Economic Analysis of Evidence Relating to Japanese Electronic Products Antitrust Litigation" by Economic Consulting Services, Inc. (the Nehmer Report) as follows:

> A tightly "closed" Japanese consumer electronics market would indeed be essential to the success of Defendants' scheme in at least several important ways. First, by keeping foreign suppliers out of the high-priced Japanese market, the price-maximizing policies of the cartel in the domestic market could be maintained more easily. Second, the absence of foreign competition would make it easier for the members of the cartel to coerce Japanese

[100] *See* Expert Testimony Opinion at 505 F.Supp. 1313 at 1337, 1363, 1364-1366, 1371-1372, 1378.

> distributors and retailers by threatening to restrict their sources of supply. Finally, the absence of foreign competition meant that the enforcement of the cartel's policies among the cartel's members would be simplified, and that the financial benefits of monopoly profits in Japan and the rewards of their anti-competitive activities abroad would be shared among fewer cartel members. In short, the fact that the Japanese market was effectively closed to foreign competition throughout the 1957-1977 period acted to "segment" the higher-priced Japanese market from the lower-priced and open U.S. market, thereby making the execution of discriminatory pricing policies, as well as other aspects of the cartel's anti-competitive behavior, possible, while excluding U.S. competition from the higher-priced Japanese market.

Nehmer Report at IV-1 & 2.

The Nehmer, DePodwin, and Yamamura Reports, and to a somewhat lesser extent the Haley Report, all set forth narrative descriptions of Japanese barriers to foreign imports and investment. Among them are such governmentally-imposed or supervised financial barriers as high tariff rates,[101] discriminatory ocean freight rates,[102] the Japanese commodity tax,[103] import deposits,[104] the "Japanese Standard Method of Settlement,"[105] and strict limitations on foreign investment in

[101] According to the Nehmer Report, Japanese tariffs, unlike those of the U.S., include freight and insurance in dutiable value.

[102] We are informed that discriminatory shipping rates result in freight costs *to* Japan roughly twice those *from* Japan.

[103] The Japanese commodity tax is calculated as a percent of the c.i.f. (cost plus insurance plus freight) price, plus tariff charges.

[104] During the latter half of the 1960's, the Japanese government required an import deposit in the amount of 5%. The rate dropped to 1% for the final months of its imposition. No interest was paid on the deposit unless the deposit was made in cash. Thus potential importers were required to commit capital for the privilege of doing business in Japan.

[105] This policy requires that imports be paid for within four months, while domestic competitors are permitted to sell on a deferred-payment basis. While exceptions may be made, such exceptions are entirely within MITI's discretion.

Japan,[106] which, in Nehmer's submission, act together to impose an onerous financial burden on foreign competitors seeking to sell in Japan.[107]

In addition to these financial barriers, the reports detail a number of "subtle, non-financial means that can be highly effective in severely restricting foreign competition." Nehmer Report at IV-7. First, and probably most important, is the Japanese government's practice of providing "administrative guidance" over business activities. While such informal guidance does not have the force of law, it does tend to have an important influence on private business behavior. Other non-financial barriers include an elaborate system of quantitative restrictions, which in earlier years operated together with a foreign exchange licensing program; safety and design standards which implicate cumbersome inspection and testing procedures; barriers to the importation of samples; and the Japanese government's procurement practice, which has been to solicit bids only from domestic firms. In addition to these governmental regulatory practices, the structure of the

[106] Until 1967, foreign investment was virtually prohibited. Thereafter, until 1976, foreign ownership could not exceed 25% of the total equity issued by an existing Japanese corporation, and no single foreign investor could acquire more than 10% of total equity. While 100% foreign ownership of both existing and new Japanese companies is now permitted in theory, the red tape and paperwork are frequently insurmountable obstacles, and approval is discretionary. Moreover, no foreign manufacturer may establish more than ten wholly-controlled retail outlets.

[107] The combined result of these measures is that a U.S. exporter of color television receivers must bear charges in the amount of approximately 30% of the f. o. b. U.S. price; the corresponding figure for a Japanese manufacturer exporting to the U.S. is only approximately 10%. After analyzing the history of Japanese tariff and commodity tax rates for other CEP's, Nehmer concludes that for most years the result is a "compounded rate of financial burden which is substantially in excess of 20 percent." He notes in addition that "a tariff of over 20 percent ad valorem is a serious obstacle to trade when added to the natural protection created by distance, difficulties of communications and marketing and foreign languages and customs," *quoting* G. Patterson, Deputy Director General of the G.A.T.T., *Current GATT Work on Trade Barriers*, in Vol. I, *Compendium of Papers Submitted to the Commission on International Trade and Investment Policy* 27 (1971).

Japanese market adds another layer of difficulty to U.S. firms attempting to enter the Japanese market.

As described in detail in the Yamamura Report, the Japanese economy is dominated by company groups, called *keiretsu*, which are groups of companies in various industries, perhaps best described as "cliques" of associated companies. The historical roots of *keiretsu* are to be found in the prewar *zaibatsu*, which were family organizations that controlled particular industries, with strong central control through a holding commpany. These conglomerates were called upon during World War II to assist in the war effort. As a result, after the defeat of Japan, the leaders of the Allied occupation blamed much of Japan's militarism on these industrial conglomerates, and were determined to eradicate them from the Japanese business system to prevent future combinations of economic or military strength. Accordingly, during the period of occupation under General MacArthur, and in full consultation with the United States Department of Justice, the Mitsui Holding Company, the Sumitomo Holding Company, the Yasuda Holding Company, the Mitsubishi Holding Company, and 28 other holding companies were sold to the general public and the linkages were dissolved. In their place, the lesser groups emerged, with links dependent upon mutual interest and convenience, though based in part upon the traditional family linkages.[108] Unlike the *zaibatsu*, the *keiretsu* has no central control; holding companies remain illegal.

[108] Some of the companies continued to use the pre-dissolution names, such as "Mitsui," "Sumitomo," "Mitsubishi," and others.

There are two main species of *keiretsu:* horizontal[109] and vertical (or distribution network)[110] *keiretsu*. Professor Yamamura goes on to describe the international significance of *keiretsu*. He suggests that to the extent that the *keiretsu's* market power can limit domestic competition, the situation is similar to a cartelized market. The firms act together to prevent foreign entry into the Japanese market, constituting, in Yamamura's terms, an "invisible trade barrier."[111]

The first priority following World War II was rapid industrial growth. Accordingly, the government's monetary

---

[109] Within the category of horizontal *keiretsu* there are two primary types, characterized by the institution at the center. A *kinyu keiretsu*, or financially linked group, is a fairly weakly joined group which revolves around a bank and which includes a trading company. Member companies generally obtain their financing through the member bank and sell their products through the member trading company. While members need not deal solely with one another, they tend at least to refuse to deal with competitors of member companies.

The second, more strongly-linked type of horizontal *keiretsu* is a *sangyo keiretsu*, or industrially-linked group, with a major manufacturing company at its core. In this type of group the central company is usually the main or only buyer of the products of the others, thus exerting considerable control. In many cases, the central company of a *sangyo keiretsu* is itself a member of a *kinyu keiretsu*, and reaps the benefits of that association on behalf of all its satellite companies.

Cohesiveness of these groups is maintained through a variety of mechanisms. One of the most visible such mechanisms is, in Yamamura's submission, the formation of presidents' clubs, which meet on a regular basis to discuss matters of mutual interest. According to Yamamura, solidarity is also reinforced through mutual shareholding among the members and through interlocking directorships.

[110] Vertical *keiretsus* are essentially domestic marketing systems, in which a product manufacturer totally controls its distribution network. Retail outlets are generally associated with a single manufacturer. Territorial restrictions, by which retailers may purchase only from designated wholesalers, are common. *See generally* Haley Report.

[111] For example, a *keiretsu* bank would not finance an entry into the market by a competitor of one of its associated companies; a trading company will not help import products of competitors; and a foreign company will be unable to develop a distribution network. In short, *keiretsu* constitute a substantial barrier to foreign entry into the Japanese market.

policy was designed to promote rapid growth of the largest firms. The antitrust laws, enacted by the occupation forces, were weakened and were only weakly enforced. Moreover, certain cartel activities were exempted, and a large number of "authorized cartels" arose. In the submission of the experts, these policies, linked with the close governmental cooperation described above, fostered the growth of *keiretsu* and created a "climate" which encourages "cartel capitalism" in the Japanese market.

We have been brief in our discussion of the Japanese market because defendants virtually concede that much of the information presented by plaintiffs' experts is true. They argue, however, that the facts we have set forth are totally irrelevant to the existence of a conspiracy to export to the U.S. at predatorily low prices. They argue further that Professor Yamamura's description of the Japanese market is an attempt to describe the Japanese "propensity to conspire," and as such that it is impermissible character evidence under F.R.E. 404(a). Plaintiffs, on the other hand, argue that they are showing a climate in which collusive behavior is commonly accepted, and that this evidence therefore bears upon opportunity, motive, and intent.

While conceding that plaintiffs have adduced evidence of a "climate," we accept defendants' position. No amount of evidence about *keiretsu* activities of Japanese companies—or even about these specific defendants, who were for the most part not aligned in the same *keiretsu*—can suffice to create an inference that these particular defendants combined to take over the U.S. market in consumer electronic products. The only inference a jury could draw from the experts' dissertations on trade barriers is that the Japanese domestic market is tightly closed to foreign trade and investment. But a climate which might nurture or even condone collusive behavior is simply not probative of any actual conspiracy.

D. *Plaintiffs' Expert Reports*

We described plaintiffs' expert reports in detail in our Expert Testimony Opinion, and in capsule form in Part IV, *supra;* we need not repeat that description herein. The critical opinions regarding the existence of a conspiracy were held inadmissible in evidence in that opinion, leaving in only explanatory materials as to the closed nature of the Japanese market, the technological development of the consumer electronic products industry, and economic principles and methodology. These matters we held to be admissible, when purged of their occasional lapses into inflammatory rhetoric, under the "or otherwise" clause of Federal Rule of Evidence 702, which permits an expert to "give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts." Advisory Committee Note to F.R.E. 702. In addition, we reserved ruling on one comparison of prices in the domestic and export markets, presented in the DePodwin Report at V-32 to 36. *See* Expert Testimony Opinion, 505 F.Supp. 1313 at 1347-1348.

We have already discussed in Part VII.B, *supra*, the technological development of the CEP industry and the organization of Japanese firms on the foundation of borrowed technology, and in Part VII.C, *supra* the nature of the Japanese market. In light of our discussion of plaintiffs' evidence of international price discrimination, Part VII.K, *infra*, we need not further consider the admissibility of the reserved calculation. The only admissible materials in the expert reports which we have not discussed are those sections outlining economic principles and methodology. Such matters plainly do not raise a factual issue sufficient to defeat defendants' summary judgment motions.

E. *Plaintiffs' Allegations About the Combined Economic Power of the Defendants and their Cartel*

Plaintiffs devote a segment of their FPS to detailing the "combined economic power of the defendants and their cartel." Attaching data taken from the annual reports of MEI, Melco,

Hitachi, Sanyo, Sharp, Sony, and Toshiba, plaintiffs first allege that:

> "The seven Japanese defendants are among the world's largest corporations. During fiscal year 1973-1974, for example, the seven defendants had aggregate sales of \$20.8 billion and aggregate net income of \$.7 billion. In the fiscal year 1966-1967, the seven Japanese defendants had sales of \$4.9 billion and net income of \$.2 billion. Over the seven year period, therefore, the defendants enjoyed an increase in sales of 324 percent and an increase in net income of 250 percent."

FPS at 3139.

Citing MC's annual report, plaintiffs state that MC is the world's largest trading company, with sales ranging from \$17.3 billion in 1971 to \$44.0 billion in 1978, and net income growing from \$17.3 million in 1971 to \$100 million in 1978. They also state that MC employs more than 19,000 people, has a worldwide network of 260 offices, handles some 10,000 commodities, and so forth. *Id.* at 3147-50.

Then, without supporting documentation, the plaintiffs allege that the financial strength of the Japanese "cartel" arises from the close affiliations of the defendants with companies and banks in their "respective groups" and from the participation in the cartel of "several other financially strong companies," including Japan Victor, General Corporation, Nippon Columbia, Ltd., and Nippon Electric Company, Ltd. They explain:

> "In 1978, for example, eight selected companies in the Mitsubishi Group which consists of over 40 companies, had aggregate sales of \$21.9 billion and net income of \$199.7 million. . . . Moreover, the Mitsubishi Group owned two banks . . . whose combined assets of \$96.7 billion in 1978 placed them as the world's largest banking group."

FPS at 3157. Apparently intoxicated with these figures, the plaintiffs point out that "the groups which control the defendant companies" had sales of at least \$58.9 billion in 1977-1978, and at least \$38 billion in 1974-1975; that these groups employed at least 654,668 workers in 1977-1978, etc. They then

contrast Zenith and NUE as being considerably smaller in terms of sales, net income and employment than the "groups which controlled" the defendants. *Id.* at 3157-58.

While this approach is symptomatic—or perhaps symbolic—of plaintiffs' approach in this litigation, we will not labor the point. It is clear beyond peradventure that plaintiffs' allegations about the combined economic power of the defendants and their cartel is "bootstrapped" and is in any event utterly of no probative value in drawing an inference of the conspiracy alleged by plaintiffs.

F. *The Manufacturers' Agreements and the JMEA Rules; Operation of the Minimum Price Agreements and the "Five Company Rule"*

1. *General Background; Operation of the Minimum Price Provisions*

From 1963 until 1973, the seven principal Japanese manufacturers of television receivers that are defendants in this litigation, along with a large number of non-party Japanese manufacturing companies, were signatories to formal written agreements which established minimum prices for television receivers sold for export to the United States.[112] In addition, many defendants were members of the Japan Machinery Exporters' Association (JMEA), an exporters' trade association which, during the same period, required its members to register the names of all customers who purchased television receivers for the U.S. market and, after 1967, limited the number of customers so registered to five.[113] The plaintiffs characterize these

[112] These manufacturers are Hitachi, Matsushita, Melco, Sanyo, Sharp (formerly Hayakawa), Sony, and Toshiba. Similar Arrangements existed during various periods with respect to radio receivers and tape equipment. These arrangements are discussed in Part VIII, *infra*, relating to non-TV products.

[113] We will discuss in Part VII.G.4, *infra*, the record with respect to the meetings and activities of the JMEA and its committees, and also its role in the alleged conspiracy. Our discussion here is limited to the JMEA export control rules.

arrangements as "formal written cartel agreements," involving both price-fixing and customer allocation.

As we have noted in Part II, *supra*, at various times plaintiffs have asserted that these agreements formed the "heart" of the alleged conspiracy.[114] The defendants, on the other hand, contend that these arrangements were mandated by the Japanese government Ministry of International Trade and Industry (MITI) in response to actual or anticipated pressure from U.S. industry and government to limit the effects of Japanese television exports on the U.S. television industry, and that the defendants are immunized from antitrust scrutiny by the act of state and sovereign compulsion doctrines and principles of international comity.

The written agreements in question bear the title "Agreements on Manufacturers' Domestic Transactions Relating to Exportation of Television Sets," and we refer to them herein as the "Manufacturers' Agreements." There were seventeen different agreements, covering consecutive time periods which varied in length from one month to two years. Each of the agreements was accompanied by a written "Rationale" setting forth reasons for the agreement.[115] Although there were minor variations in the provisions of the agreements, none of those variations is significant for the issues before us. A copy of the full text of the first Manufacturers' Agreement, covering the period from October 1963 to March 1964, and the accompanying Rationale, is attached to this opinion as Appendix A. While the first agreement applied only to black-and-white television

[114] And, as we have also noted in Part II, at other times plaintiffs have contended that the "heart" of the conspiracy was an alleged agreement to *violate* the minimum-price agreements by granting secret rebates. *See* Part VII.L, *infra*.

[115] We will consider the Rationales to the Manufacturers' Agreements and JMEA Rules in our discussion of plaintiffs' "intent" evidence, Part VII.I, *infra*. Our discussion here is concerned only with the operative provisions of the Agreements and Rules.

receivers, all subsequent agreements applied to color television receivers as well, and the attached agreement is fairly representative of the others.

The Agreements applied on their face only to television receivers sold by the manufacturers for export to the United States. Article III of the Agreements created an entity called the "Television Export Council," consisting of all the parties to the Agreements. The Agreements contained other administrative provisions relating to the eligibility of parties to enter into the agreements, the procedure for joining the Television Export Council, and the procedure for withdrawing from the agreements.

The Manufacturers' Agreements set minimum prices below which the signatories were not permitted to sell. The operative provision, in Article 8 of the Agreements, states:

> The parties to this agreement shall not offer for sale, make a contract for sale or deliver to export businessmen goods at prices *lower than* the prices specified in attached Schedule 2.

(emphasis added).[116] Thus, the agreements left the signatories free to sell *at or above* the minimum prices set therein. In addition to minimum sales prices, the agreements also imposed other controls on exports. Manufacturers were: (1) required to register in advance with the Television Export Council the names of all customers to whom they wished to sell goods and prohibited from trading with unregistered customers; (2) required to register with the Television Export Council the brand names which were to be affixed to goods sought to be exported; (3) prohibited from selling or delivering television receivers which did not conform to specified quality standards;

[116] The first agreement, a copy of which is attached as Appendix A, contained a slightly different Article 8, which merely empowered the Television Export Council to set minimum export prices with the approval of MITI, for goods specified in the attached Schedule 2. Subsequent agreements listed, in the attached Schedule 2, the minimum prices thus set.

(4) required to submit to the Television Export Council an "Application for Confirmation of Shipment" with respect to each sale; and (5) subjected to fines for violations of any provision of the agreements.

During the same years that the Manufacturers' Agreements were in force, 1963 to 1973, the JMEA adopted rules which, in the plaintiffs' submission, "parallel and dovetail with the Manufacturers' Agreements." FPS at 5191. While the Manufacturers' Agreements operated through the governance of sales by manufacturers to exporters, the JMEA rules applied directly to sales of television receivers by exporters in Japan to United States customers and importers. A copy of the JMEA rules for the period corresponding to the first Manufacturers' Agreement, along with the accompanying Rationale, is attached to this opinion as Appendix B.[117]

Like the Manufacturers' Agreements, the JMEA Rules created an entity to administer its provisions. The administrative organ set up by the JMEA Rules was called the "Television Export Examination Committee" and consisted of ten members appointed by the chairman of the JMEA Board of Trustees. With respect to prices, the JMEA Rules did not set forth specific minimum export prices, but required that export prices for televisions of the categories subject to the minimum price provisions of the Manufacturers' Agreements be higher than the prices established under those Agreements. Thus, the JMEA Rules echoed the minimum-price provisions of the Manufacturers' Agreements. In addition, the Rules required that export prices on *all* television sets, not just the categories

[117] As with the Manufacturers' Agreements, there are slight variations in the JMEA Rules from year to year. For example, the first version of the Rules, attached hereto as Appendix B, applies only to black-and-white television receivers, while all subsequent versions apply to color television receivers as well. The Rules adopted December 18, 1966, and all subsequent versions, apply to exports to Canada as well as to the U.S. Except as indicated in the text, we find these variations insignificant for the issues before us.

subject to those minimum provisions, be reported to the JMEA.

We need not labor the impact of these minimum price provisions on the case at this juncture, for we have explained in detail in Part VI.B, *supra* that plaintiffs cannot have been injured by the minimum price agreements, and that they therefore lack standing to attack them. We incorporate that discussion by reference here and conclude on the basis thereof that the agreements and accompanying rules are of no significance in the case and cannot create a genuine issue of material fact.

2. *Operation and Significance of the "Five Company Rule"*

In terms of distribution, the JMEA Rules contain customer and brand name registration provisions similar to those contained in the Manufacturers' Agreements.[118] In addition, from 1967 on, the Rules limited the number of export customers that could, as a rule, be registered each year by individual JMEA members. This restriction was accomplished by means of the "Gosha Waku" or "Five-Company Rule," which limited the total number of export customers to five companies in the United States for each exporter:

> Article 6
>
> The members of the Association, when they are going to export applicable goods to an applicable area, shall register in advance the export customer with the Association in conformity to attached Form (1), and shall also notify the Association of the trademark (expressed by means of letters, symbols or a combination of both, and hereinafter referred to as 'trademark') to be used for the applicable goods in conformity to attached Form (1).
>
> 2. Application for registration pursuant to the provisions of the above paragraph must be such that the export transaction referred to in the application satisfies each of the following conditions:
>
> (1) An export contract has been concluded or a long-term, continuous trading relationship has been maintained; and, as a principle, the number of such customers shall not be more than 5 companies for the First Zone. . . .

[118] The plaintiffs contend that JMEA prohibited two members from selling to the same U.S. customer, citing one of the "Guidelines for Registration" attached to the 1973 Rules. *See* FPS at 5221. However, plaintiffs have identified no evidence in the record to indicate that this guideline existed *prior* to January 1, 1973, or that it was *ever* enforced. In fact, even according to plaintiffs' expert Dr. DePodwin's analysis of the record, several of the defendants *did* share the same customers, and registered those customers with the JMEA, during a number of years including 1973. DePodwin Report at V-54.

The terms of the so-called Five Company Rule embodied in the Manufacturers' Agreements and the JMEA regulations do not limit any defendant to selling only to a particular customer or customers. Nor do they allocate particular customers to particular manufacturers, or prevent a particular manufacturer from changing the registration of a particular customer if the need should arise. Thus, the agreements themselves do not provide *direct* evidence or any basis for inferring a customer allocation agreement. Indeed, plaintiffs have in effect admitted that a number of defendants competed for the business of the same U.S. customer and themselves demonstrated that individual registered customers changed from time to time during the time period applicable to this litigation.

According to plaintiffs' FPS and the report of their expert, Horace J. DePodwin, at different points in time, certain American customers were dealing with several Japanese suppliers. Thus, for example, J. C. Penney Corp. purchased CEP merchandise from Hitachi, Toshiba, and Matsushita; W. T. Grant purchased from Matsushita and Melco; Montgomery Ward purchased from Sharp and Matsushita; General Electric purchased from Hitachi and Sanyo; Midland (Western Auto) purchased from Melco, Sharp, and Sanyo; and Sears purchased from Toshiba and Sanyo. *See* Exhibit F to Plaintiffs' FPS and

the DePodwin Report, Tables V-10 and V-11 at pp. V-50 through V-53.[119]

Plaintiffs have compiled a list of each of defendants' customers who were registered pursuant to the Five Company Rule in Exhibit F to plaintiffs' FPS. While this list is not a complete list of all companies with which defendants did business in the United States—it does not include customers who purchased goods manufactured by defendants in countries other than Japan, nor does it include customers who purchased merchandise from defendants' United States sales subsidiaries—the exhibit demonstrates the fact that no defendant limited its sales to any five customers and that the Five Company Rule was not a "customer allocation." In fact, at one time, Sanyo had thirteen customers.

Of equal significance is the fact that nothing in the Five Company Rule prohibited the members of the JMEA from registering their United States subsidiaries as export customers, and nothing in the Rule prohibited those subsidiaries from reselling products in the United States, free from the restriction of the Five Company Rule. In fact, most of the Japanese manufacturing defendants followed this pattern by listing their U.S. subsidiaries as export customers with the JMEA. PTO 289 at 231-36 (August 21, 1980); plaintiffs' FPS at 7631-7759 and 10741-47. Dr. DePodwin's own summary of the export validation forms filed by the defendants to comply with the JMEA Rules shows that each of them listed its U.S. subsidiary as an export customer during all or nearly all of the years for which information is available. DePodwin Report, Table V-10 at V-52. *See also* FPS at 5234-35. In plaintiffs' own submission, each of these American sales subsidiaries sold

[119] Customers were registered by defendants pursuant to the Five Company Rule by filing a "Form 2" with the TV Export Council. In the words of William H. Roberts, Esq., one of the lead counsel for the plaintiffs, defendants produced literally "barrels of them" (PTO 291 at 134) to plaintiffs during discovery.

products to hundreds of customers in the U.S. FPS at 7631-7759 and 10741-47.[120] In view of the foregoing, the impact of the Five Company Rule was entirely illusory.

However, even if the Five Company Rule were not illusory in character, it would be unavailing to the plaintiffs, suffering the same fate as the minimum price agreements. That is because, as we have explained in Part VI.B, *supra*, an agreement to allocate customers runs precisely contrary to a "low price export conspiracy," for such an agreement would limit competition and have the tendency to keep prices up, not push prices down. That result could not possibly cause injury to plaintiffs.[120A] Plaintiffs thus have failed to show how a customer allocation could have injured them and, therefore, how they have standing to press this claim.

3. *The Agreements as Evidence of Conspiracy*

Notwithstanding plaintiffs' lack of standing to attack the Manufacturers' Agreements, they can still proffer those agreements as evidence of climate and opportunity for collusive activity by the defendants. Indeed, plaintiffs depict the negotiations surrounding the Manufacturers' Agreements as quintessential evidence of defendants' opportunity and intention to conspire, in the shadow of which all of defendants' activities take on a conspiratorial hue.

We explained in Part VI.A.4, *supra* why opportunity to conspire does not give rise to an inference of actual conspiratorial behavior on the part of particular defendants. To the extent that plaintiffs argue that one can infer an agreement to fix prices at less than the check price level via concerted

[120] Additionally, a number of the signatories to the Manufacturers' Agreements (Sony Corp. was the only exception) listed a trading company, such as C. Itoh and Co., Ltd., as one of their customers. As plaintiffs' FPS clearly establishes, each of these trading companies in turn sold to hundreds of customers in the United States market.

[120A] *See also* discussion at 1213 *infra*.

rebate activity or an agreement to take over the U.S. CEP market by charging depressed prices from the fact that another agreement—the export control arrangements—existed among some of these defendants, that effort must also fail. That is because evidence of one alleged conspiracy is not a basis for drawing an inference of the existence of some other conspiracy.

In *Golf City, Inc.* v. *Wilson Sporting Goods Co.*, 555 F.2d 426 (5th Cir. 1977), the plaintiff obtained a verdict under Section 1 of the Sherman Act by proving the uniform practice of restricting the sale of pro-line equipment to pro shops. In addition, the plaintiff proved that officials of the Professional Golfers Association had joined with representatives of the manufacturers in an effort to prevent "leakage," which refers to the practice of some professional golfers of buying pro-line equipment for their own shops and then reselling it to retailers such as the plaintiff. On appeal, defendants attacked the trial court's findings of fact on the grounds that they did not make clear the basis for the court's finding of liability and apparently confused the question of the conspiracy to prevent leakage with the question of a possible conspiracy to restrict direct sales. The Fifth Circuit reversed and remanded for the entry of more precise findings of fact, rejecting any "intuitive link" between the anti-leakage conspiracy and a conspiracy to restrict direct sales, stating:

> Clearly there is a link between the *fact* of antileakage and the *fact* of pro only sales policies. The two share the object of restricting to pro shops the sale of proline golf equipment. We do not understand, however, the nature of the link between antileakage and the question of whether the pro only sales policies were born or maintained in *conspiracy. If the inference is based only on the notion that persons who engaged in one conspiracy probably engaged in another, then the inference is improper.* . . . We have trouble understanding why antileakage efforts would not be just as compatible with the scenario urged by appellants that the pro only sales policies were formulated unilaterally and were prompted by the utility of the policies as a form of non-price competition.

We find *Golf City* to be well-reasoned, and adopt it in this context. Plaintiffs' use of the export control arrangements as evidence of a low-price export conspiracy is unavailing.

4. *The Role of MITI*

It is not disputed that the Manufacturers' Agreements and the JMEA rules were formulated with significant participation by the Ministry of International Trade and Industry ("MITI"), a cabinet-level ministry of the Japanese government. The defendants urge that the MITI involvement in the arrangements was so substantial as to render them immune from attack in United States courts by reason of the doctrines of act of state and sovereign compulsion, and principles of international comity. The plaintiffs, while conceding a MITI presence and an active MITI role, as they must under the facts, dispute the substantiality of MITI's role and vigorously assert that these defenses are inapplicable as a matter of law.

It is plain that application of the doctrines of act of state and sovereign compulsion, as well as principles of international comity, would require a detailed analysis of the factual patterns of the various cases which have implicated those doctrines, cited in note 123, *infra*. It is equally plain that a decision on these issues would have enormous implications for U.S. trade policy. Therefore, since our injury and standing analysis makes it unnecessary to reach these issues, we prefer not to do so. Our approach does not eradicate the enormous amount of time and briefing devoted to the issue nor can we gainsay that if defendants are correct in their contentions many of the points that we have in fact reached are mooted. In order that the Court of Appeals might have an adequate record should they decide to address these issues on appeal, it is appropriate that we summarize the record with respect to MITI's role. In fact, an understanding of the defendants' contentions in this area is essential to an understanding of the case.

The keystone of the defendants' position in this area is a written statement which was transmitted to this court by

MITI through diplomatic channels ("the MITI statement").[121] The statement sets forth the role and responsibilities of MITI under Japanese law, explaining its authority under Japanese

[121] The MITI statement was transmitted to the court with a cover letter dated June 9, 1974, from Phillip R. Trimble of the U.S. Department of State. The statement had earlier been transferred to the Department of State by the Embassy of Japan along with a diplomatic note dated April 25, 1975, requesting that the Department of State transfer the statement to this court. Although the original MITI statement was unsigned and unsealed, a formal seal for the statement and verifying affidavits were subsequently supplied.

For several years, It was unclear whether the MITI statement represented the views of the Japanese government as a foreign sovereign, or only the views of the Ministry of International Trade and Industry—a distinction which may be of some significance for the act of state, sovereign compulsion, and comity defenses. The dispute between the parties on this point was resolved by a letter to us dated July 11, 1980 from Yoshio Okawara, the Ambassador Extraordinary and Plenipotentiary of Japan, which stated that 'MITI was and is empowered and authorized to act for the Government of Japan in making the statement as attached to the Note Verbale dated April 25, 1975 which was delivered to the Department of State of the United States by the Embassy of Japan."

Plaintiffs moved to strike Ambassador Okwara's letter on the grounds that it was sent directly to us through the U.S. mail, instead of being forwarded through diplomatic channels. They argued that the court may not give any weight to a communication from a foreign government unless it is transmitted by the U.S. Department of State, *citing, e.g., The Navemar*, 303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667 (1938); *Civil Aeronautics Board* v. *Alitalia-Linee Aeree Italiane*, 328 F.Supp. 759 (E.D.N.Y. 1971); *United States* v. *Anchor Line, Ltd.*, 232 F.Supp. 379 (S.D.N.Y. 1964). Plaintiffs also suggested that the letter should be excluded under F.R.E. 403.

We denied plaintiffs' motion to strike Ambassador Okawara's letter, PTO 298 (Oct. 20, 1980), because it is no longer the policy or practice of the U.S. government that statements or positions of foreign governments regarding pending litigation be submitted through the Department of State. Rather, the current policy is for foreign governments to submit their views directly to the court where the litigation is pending. This practice was changed in 1978 in response to a suggestion of the Clerk of the United States Supreme Court. At the present time, statements of foreign governments regarding litigation pending in the United States Supreme Court or the United States Courts of Appeals are to be made by means of a brief *amicus curiae*. *See* 73 Am.J. Int'l L. 124 (1979). With respect to federal trial courts, the Depart-

law to direct Japanese manufacturers and exporters to enter into agreements and adopt trade association regulations like those we have described above, in order to implement the foreign trade policy of the Japanese government.

The MITI statement then turns to the genesis of the particular agreements and rules involved in this litigation:

> With respect to the export of television sets to the United States, in 1962 MITI accurately recognized, in view of the importance of televisions as one of Japan's export products, the need for assuring their orderly exportation to avoid the possibility of trade conflicts.
>
> Thus, MITI directed Japanese television manufacturers including the present Japanese defendants to enter into an agreement under Article 5-3 of the Export and

ment of State has announced that it does not, in general, expect to transmit diplomatic notes to such courts either, but may do so on a case-by-case basis. 73 Am.J. Int'l L. 678 (1979). We can discern no reasons for requiring diplomatic transmittal of Ambassador Okawara's letter in this case. In order to promote consistent practice as between courts on the appellate and trial levels, we think that, in general, the views of foreign governments should be communicated directly to the district court where the litigation is pending. Since there is no equivalent of an amicus brief in the Federal Rules of Civil Procedure, and since the Japanese government's statement is only two double-spaced pages in length, we think it entirely appropriate for that statement to be communicated in a letter to the court. To require the government of Japan to intervene in the litigation under F.R.Civ.P. 24, as plaintiffs suggest, would be pointless and wasteful of the court's and the litigant's resources when, as here, the statement which the Japanese government wishes to communicate is simple and short. To the extent that the decisions cited by the plaintiffs contain statements which can be interpreted to support their position on the admissibility of Ambassador Okawara's letter, we view those statements as merely descriptive of then contemporary practice, which has since been changed.

Furthermore, it should be noted that even prior to 1978, the federal courts apparently did occasionally consider the statements of foreign governments when presented directly to the courts by letter. *See Puente* v. *Spanish National State*, 116 F.2d 43 (2d Cir. 1940); *United States* v. *Melekh*, 190 F.Supp. 67 (S.D.N.Y. 1960). Finally, we find plaintiffs' Rule 403 argument to be patently without merit.

Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States, and further, directed the exporters to establish a new regulation to be observed by the members of the export association with respect to filing of export prices and other related matters, pursuant to the association's functions under Article 11, Subparagraph 2 of the same law regarding the same exports. MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected. Such direction and supervision concerning minimum prices at which televisions could be sold for exportation to the United States and other matters were exercised continuously from 1963 until February 28, 1973 when such exporting arrangements were terminated.

Had the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy.

Therefore, when MITI decided the above-mentioned policy with respect to such sales and directed the television manufacturers and exporters to conclude, under the Export and Import Trade Law, such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction.

The evidence in this record is uncontroverted that the MITI role included the attendance of a MITI representative at meetings of the JMEA; participation by MITI in the drafting of the Manufacturers' Agreements, including the establishment of the check-price level; MITI supervision of the agreements, in the form of various reporting requirements; and MITI approval power in the form of licensing, over manufacturers' exports. MITI's overriding purpose was to promote "orderly marketing" through these means.

The defendants contend that the MITI statement should be afforded conclusive effect as the statement of a foreign sovereign, and submit that the statement conclusively establishes the defenses of act of state, sovereign compulsion, and comity. The plaintiffs challenge the conclusivity of the statement,[122] and argue further that even if it were afforded conclusive effect, it would not be sufficient to establish these defenses.[123]

---

[122] On the conclusivity point, defendants cite, *inter alia*, *United States* v. *Pink*, 315 U.S. 203, 218-21, 62 S.Ct. 552, 559-561, 86 L.Ed. 796 (1942); *Banco de Espana* v. *Federal Reserve Bank of New York*, 114 F.2d 438, 443-44 (2d Cir. 1940); *The Claveresk*, 264 F. 276 (2d Cir. 1920); *Agency of Canadian Car & Foundry Co.* v. *American Can Co.*, 258 F. 363 (2d Cir. 1919); *D'Angelo* v. *Petroleos Mexicanos*, 422 F.Supp. 1280, 1283-85 (D.Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977); *United States* v. *Melekh*, 190 F.Supp. 67, 87 (S.D.N.Y. 1960). Plaintiffs dispute defendants' reading of these cases, contending that the cases set forth certain minimum standards which a statement must meet in order to be efficacious, such as that it be made by a person or agency with the power to interpret the foreign law involved, that there be an affidavit by an Ambassador, or that the statement be by the highest and sole authority empowered to issue official legal opinions. None of these are met, in plaintiffs' submission, in the case of the MITI note. *See also In Re Muir*, 254 U.S. 522, 41 S.Ct. 185, 65 L.Ed. 383 (1921); *Sullivan* v. *State of Sao Paulo*, 122 F.2d 355 (2d Cir. 1941); *The Rogdai*, 278 F. 294 (N.D.Cal. 1920); *Lamont* v. *Travelers Insurance Co.*, 281 N.Y. 362, 24 N.E.2d 81 (1939).

[123] The act of state doctrine provides that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897). Thus, a U.S. court cannot entertain any action that calls into question the validity of conduct or policies of a foreign government acting within its sovereignty. The degree of foreign government entanglement which must be present to invoke the act of state doctrine varies with the circumstances of individual cases. *See, e.g., Alfred Dunhill of London, Inc.* v. *Repubiic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 38 S.Ct. 312, 62 L.Ed. 733 (1918); *Underhill* v. *Hernandez*, *supra*; *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984, 98

In addition to contending that the MITI statement is insufficient to establish any of the defenses for which it is offered, the plaintiffs also challenge the accuracy of the statement. Their factual position is based primarily on the testimony of their expert witness, Prof. John O. Haley, PTO 264 (June 24, 1980), and his earlier affidavit. According to Professor Haley and the plaintiffs, MITI lacks the authority under Japanese law to compel Japanese companies to enter into the kind of arrangements described *supra*, and instead can only make non-binding recommendations. Plaintiffs point, in particular, to Article 7 of the Manufacturers' Agreements, which permits any party to the agreement to withdraw from it upon notice to the Television Export Council (a provision that has been dub-

S.Ct. 608, 54 L.Ed.2d 477 (1977); *Bokkelen & Rohr S.A.* v. *Grumman Aerospace Corp.*, 432 F.Supp. 329 (E.D.N.Y. 1977); *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D.Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). Plaintiffs cite a number of cases in which courts have determined that the doctrine should not be applied. *See, e.g., Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Industrial Investment Development Corp.* v. *Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903, 100 S.Ct. 1078, 63 L.Ed.2d 318 (1980); *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597 (9th Cir. 1976); *United States* v. *The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases ¶ 70,600 (S.D.N.Y. 1963). It is the application of these cases to the factual pattern before us that the parties dispute.

The sovereign compulsion defense rests upon similar reasoning. Although the actions of a private party are at issue rather than actions of the sovereign itself, as in the act of state doctrine, the defense is applicable when those private actions were compelled by the sovereign. *See Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F.Supp. 1291 (D.Del. 1970). Again, the parties' dispute centers upon application of the relevant cases to the facts before us, with plaintiffs citing, *inter alia*, *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 47 S.Ct 592, 71 L.Ed. 1042 (1927); and *Watchmakers of Switzerland*, *supra*.

Finally, defendants assert that even if they fail to persuade the court that plaintiffs' claims are precluded by the act of state or sovereign compulsion doctrines, principles of international comity nonetheless require dismissal. *See, e.g., Mannington Mills, supra*, 595 F.2d at 1297-98; *Timberlane, supra*, 549 F.2d at 613.

bed in this litigation the "opt-out clause") and to pertinent provisions of Japanese law which, in their view, are to the same effect. They also note that the Japanese statute which authorizes agreements among manufacturers and exporters speaks in terms of MITI approval of agreements entered into by the companies themselves, rather than in terms of MITI ordering the companies to enter into agreements, and that the language of the Agreements themselves is consistent with this statutory scheme.

In sum, plaintiffs contend that MITI's role in the formulation of the export control arrangements amounted, at most, to informal encouragement and subsequent approval of activities initiated by the defendants themselves. They submit that none of the defendants were under any compulsion to engage in the export trade at all, and that they could have avoided any governmental compulsion simply by declining to export their products to the United States. Defendants, relying *inter alia* on the cases cited in n.123, *supra*, rejoin that plaintiffs' arguments are not sufficient to overcome these defenses.

Since we do not reach the act of state, sovereign compulsion, or comity defenses, we have no occasion to make findings on these disputed points, nor to determine whether or not a genuine issue of material fact exists as to them so as to preclude summary judgment on the defenses.[124] We trust, however, that

[124] We also do not reach defendants' contention that the MITI-related export control arrangements do not, given their setting, violate the U.S. antitrust laws. Price-fixing and customer-allocation agreements are, in general, per se violations of § 1 of the Sherman Act. Defendants submit, however, that the specific context of the arrangements involved in this case, i.e., the international trade background and the Japanese government involvement, creates significant differences from the factual patterns of the cases which announced the per se rules. Defendants thus contend that even if the Manufacturers' Agreements and JMEA Rules are not immunized from antitrust attack by reason of the doctrines and principles discussed in the text, those arrangements should not be assessed against a per se standard, but considered under the rule of reason, under which, defendants argue, the arrangements should be found reasonable and therefore lawful because of their concomitant political and economic benefits to the U.S.

the foregoing discussion has served to introduce the points, without which the mosaic of this case would be incomplete, and thus to inform the deliberations of the Court of Appeals.

G. *Activities of Certain Groups and Associations in Japan*

1. *Introduction; General Background*

Plaintiffs' case as it relates to activities in Japan has its primary roots in the membership of the Japanese manufacturing defendants in a large number of conventional trade associations (and in sub-committees thereof) and in a number of additional trade groups operating sub rosa. Plaintiffs have identified these groups in the 500-page Appendix A to their FPS, entitled "Plaintiffs' Compilation of Japanese Trade Associations and Other Groups." In this appendix, plaintiffs also identify the individuals who attended the meetings of the various groups, the company employing that individual, and the source of information as to membership. Appendix B, consisting of four volumes entitled "Calendar of Conspiratorial Meetings," sets forth the dates of these meetings.[128] As the title of the Appendix suggests, it is a fair statement that, in plaintiffs' submission, no meeting ever occurred among the executives of the defendants which was not "conspiratorial."

We will address four basic groups or congeries of groups. The most important to plaintiffs' case is a host of informal sub rosa groups (the Okura, Palace, and Tenth Day Groups, *et alia*), whose existence was revealed by the JFTC investigation in the "Six Company Case" and whose membership was composed of executives of the Japanese manufacturing defendants. The purpose of these groups, in plaintiffs' submission,

[128] The four volumes represent the following time periods:

April 21, 1961 to August 7, 1968;

Aug. 9, 1969 to Aug. 30, 1971;

Sept. 1, 1971 to March 26, 1974; and

March 27, 1974 to Feb. 10, 1979.

was darkly conspiratorial. The second and largest category consists of the Electronic Industries' Association of Japan (EIAJ), a trade association, and its multitudinous committees and sub-committees. The third category contains the JMEA and its various committees, which were involved in the export control scheme implemented in conjunction with MITI. Finally, we will address the Home Electric Appliance Market Stabilization Council and a supposedly related group, the Four Associations Conference. These groups are alleged to have been involved in a Japanese home market price fixing conspiracy in the late 1950's.

We have organized this segment of the opinion according to these four categories of groups, further dividing the sub rosa groups according to whether the activities under discussion relate to the home market or export aspects of the "unitary" conspiracy. We are not entirely happy with this mode of organization because there is considerable overlap in the activities of the various groups, especially with respect to certain kinds of data dissemination. Nonetheless, we believe that the record before us can be described more fully and with greater clarity by organizing our discussion around the four categories of groups and associations than by utilizing an issue or subject matter approach with annotations to the relevant groups sprinkled amidst a cross-sectional discussion. However, to avoid redundancy in the information exchange area, we make an exception to this format with respect to data dissemination concerning price, production, shipment, and inventory, and joint forecasts of demand. We shall discuss all of plaintiffs' evidence in this area at the time that we discuss this type of data exchange by the sub rosa groups.

The Japanese manufacturing defendants do not dispute either the existence of or their membership in any of these groups, and assert that the fact of membership alone is not evidence of the conspiracy which plaintiffs have pleaded. That proposition is, as we have seen in Part VI.A.4, *supra*, quite

correct, and to the extent that plaintiffs have offered evidence of no more than mere membership, their case in this area must fall. Recognizing this fact, plaintiffs have attempted to supply evidence about the activities of the various groups through documents seized by the JFTC in the "Six Company Case" and by other documents produced in discovery. As we have observed, plaintiffs have been unable to procure direct evidence of conspiracy, and have therefore been relegated to establishing it by circumstantial means. Hence, the documents are of critical importance.[126]

It is the documents that have been the principal object of our attention over the past months. As will be seen, however, they are not necessarily pellucid or self-explanatory. As will also be seen, because plaintiffs have adhered to a litigation strategy of refusing to take depositions of persons who might clarify these often cryptic or opaque documents, *see* discussion at pp. 1200-1202 *infra*, we have generally been left to interpret the documents in a vacuum. Although we shall, as we must, give the plaintiffs the benefit of all favorable inferences in analyzing the documents, they may have to suffer the consequences of their litigation strategy.

2. *The Sub Rosa "Conspiratorial" Meetings of Executives Revealed by The Six Company Case*

(a) *Introduction; General Background*

The groups and associations most important to plaintiffs' case are those whose existence was revealed by the seizure of certain documents from the offices of the Japanese manufacturing defendants during the course of the investigation in the

[126] We repeat that we have not considered those documents that have already been excluded from evidence (except where specially noted as being assumed admissible on an arguendo basis), those that are not translated or missing from the depository, or those that are not remotely germane. *See* n. 46, *supra*.

Six Company Case brought by the JFTC in 1966.[127] The documents included diaries or notebooks of officials of the Japanese companies and also certain internal company memoranda, all of which revealed the existence of regular sub rosa meetings of

[127] *See generally* Public Records Opinion 505 F.Supp. 1125 at 1173-1176 (describing Japanese Antimonopoly Law and JFTC procedures). The "Six Company Case," Case No. 6 of 1966, was brought against six respondents, all of which are defendants in this case: Sanyo Electric Co., Ltd., Tokyo Shibaura Electric Co., Ltd. (now known outside Japan as Toshiba Corporation); Hayakawa Electric Co., Ltd. (now known as Sharp Corporation); Hitachi, Ltd.; Matsushita Electric Industrial Co., Ltd. ("MEI"); and Mitsubishi Electric Corporation ("MELCO" or "Melco"). The seizure mentioned in the text occurred in November 1966, during the course of "raids" carried out in conjunction with the JFTC investigation which are conceded by the parties to have been legal under Japanese law. On December 14, 1966 the JFTC charged the six respondents with violations of the Japanese Antimonopoly Law by issuing a document called a "Recommendation," which bears the legend "No. 17 of 1966." The six companies were charged with holding meetings known as the Tenth-Day Group and the Palace Group, at which they agreed on retail list prices, retail and wholesale profit margins, and rebates in connection with the sale of television receivers in the domestic Japanese market. The JFTC held a total of 39 hearings in the case between January 31, 1967 and June 7, 1969. On June 9, 1970, the hearing examiners issued a "Draft of Decision" in which they found that the respondents had engaged in the violations charged, but that the violations ceased in 1967. The JFTC did not adopt this Draft of Decision, however. On July 27, 1978, the JFTC entered an Order to Terminate, dismissing the case, which stated:

> Whereas, examining the draft of decision on the basis of the case records as well as the statements of objection, etc., although it may be noted that the respondents had discussed together the retail cash list prices and wholesalers' and retailers' margin rates of color television sets and black-and-white television sets, this Commission has not been able to reach a conclusion up to the present because of the factual and legal problems involved in this case.
>
> Moreover, as the acts which are the subject matter of the hearing proceedings ended in January of 1967, thus already showing a lapse of more than ten years, the factual background cannot be expected to be further clarified even if the hearing proceedings were reopened at this time while, in addition, from the point of view of maintaining order in competition, the practical benefit of continuing the hearing proceedings has now been lost. Moreover, any further prolonging of the disposition of this case is also considered to be undesirable from the point of view of legal stability.

executives of the various companies. It is plaintiffs' submission that during the course of these meetings the defendants jointly discussed and entered into agreements upon price levels for television receivers to be sold in Japan, as well as to be exported to the United States, and that the executives agreed upon production and allocation of production as well as other matters, all in furtherance of a conspiracy to fix high prices in Japan to finance or "war-chest" a predatory export raid designed to destroy the United States CEP industry. The catalogue of allegedly conspiratorial groups is as follows.

Plaintiffs describe the *Okura* Group as a regular monthly meeting of the highest executives of the Japanese CEP manufacturing defendants at the Okura Hotel in Tokyo. They are said to have met from as early as 1964 through at least September 1974. The *Palace Group* is said to have met at the Palace Hotel in Tokyo from 1964 until at least September 1974. The *Palace Group* was composed of senior managing directors, who are high-level executives just below the chief executive level. The *Palace Preparatory Group* is said to have been an assemblage of persons whose job it was to digest the matters discussed at meetings of the Tenth Day Group, *see infra*, and to segregate those matters relating to the price-fixing activities of the Tenth Day Group and those issues not decided by the Tenth Day Group and to prepare an agenda of the more important unresolved matters to be taken up by the *Palace Group*.

The *Tenth Day Group*, said to have been so named because its first meeting occurred on September 10, 1964, was attended by mid-level corporate managers involved in the day-to-day operation of the various divisions of the Japanese CEP manufacturers. In plaintiffs' submission, the Tenth Day Group was the real hum of the price-fixing conspiracy. More specifically, plaintiffs assert that at Tenth Day Group meetings, defendants' representatives secretly discussed and agreed upon: (1) the minimum price level for monochrome and color television receivers manufactured and sold by them in Japan; (2) the profit margins (in percentages) to be realized by retail dealers on sales of defendants' television receivers; (3) the profit margins to be realized by wholesalers on the sale of defendants' television receivers; (4) (indirectly) the manufacturers' shipment prices on television receivers manufactured and sold in Japan; (5) the relationship between the prices of television receivers manufacturered by them and sold in Japan and the prices of television receivers manufactured by them and sold in the United States; and (6) prospective shipment and production figures. With respect to this last point, plaintiffs submit that defendants exchanged a variety of internal corporate information regarding immediate past records of production and shipment, exchanged corporate estimates of future demand for television receivers to be sold in Japan and to be exported, and also "voted" on projected production. Although the defendants have asserted that the Tenth Day Group was dissolved in 1966, plaintiffs contend that it continued until at least 1973.

The *TS Group* is said to have been a conspiratorial group which was attended by several smaller Japanese CEP manufacturers as well as by the larger manufacturers. It is said to have engaged in discussion of and agreement on the prices of television receivers to be sold in Japan, including installation fees and service charges, the nature of warranties to be furnished, the common advertising approach to be taken to certain products, etc. Although the TS Group was originally related to TV service, the character of the meetings is said ultimately to have changed so that the group talked about the same issues as the Tenth Day Group and used essentially the same procedures.

The *Twentieth Day* (or Hibiya) *Group* is said to have been formed at least as early as 1960 as a "secret forum for discussion of, and agreement upon, the export prices of television receivers." Plaintiffs allege that among the matters considered by the defendants at the Twentieth Day Group meetings were the prices of TV receivers exported to the United States. The plaintiffs also submit that through the Tenth Day and the Twentieth Day Groups, the "cartel" coordinated the relationship between TV export prices and domestic TV prices. The Twentieth Day Group is said to have met at least through November 1972.

The last group claimed by the plaintiffs to have been involved in secret conspiratorial activity is the *MD Group*, which plaintiffs say was a forum for secretly exchanging the most sensitive intra-corporate material, such as actual and projected production, shipment, and inventory figures. The MD Group members are also said to have voted on each company's projected production, providing a vehicle, in plaintiffs' submission, for adjusting production in conjunction with one another.[128]

In the appendices to the FPS which we have described, the plaintiffs have elaborately set forth the membership and the dates of meetings of each of these groups. In the FPS, plaintiffs have stressed the overlapping membership of the groups and have pointed to the commonality of membership of these groups and the various EIAJ committees, and also of the JMEA and its committees, whose members were signatories to what plaintiffs contend were export cartel agreements.

Beyond such background matters as membership and dates of meetings, the plaintiffs have devoted hundreds upon hundreds of pages of their FPS to a putative description of the activities of these sub rosa groups. As is so often the case, plaintiffs' FPS contains conclusory statements about what the evidence shows without support in the evidence itself. In the case of evidence of the activities of the various "conspiratorial groups," the evidence is derived almost entirely from the JFTC record in the Six Company Case and various answers by the defendants to "Interrogatories Relating to Japanese Trade Associations and Other Groups."

The answers to interrogatories concede that the various groups existed as alleged and that representatives of the various defendants attended meetings of the groups. The defendants also concede multiple group membership and that the

[128] A large number of other groups, some with colorful names such as The Big Dipper Group, are also alleged by plaintiffs to have existed sub rosa in furtherance of defendants' unitary conspiracy. Because plaintiffs have neither seriously advanced nor documented their role, we shall not discuss them in any detail.

same individual often attended meetings of a number of different groups. However, that is where the agreement between the parties ends. The defendants submit that the plaintiffs' conclusions as to what went on in the various group meetings is totally at odds with the facts. They also submit that plaintiffs have taken great liberties with the documents which they have referenced in the FPS by asserting that they support plaintiffs' conclusory allegations of conspiratorial activity. That this latter contention is correct is clear beyond cavil.

Many of the documents here at issue are those dealt with at length in the Japanese Materials Evidentiary Opinion, which we have summarized in Part IV, *supra*, and which we have incorporated by reference herein. In that opinion, we excluded virtually all of the materials which can be claimed to constitute direct evidence of plaintiffs' broad conspiratorial allegations, including their "smoking guns," on the grounds that they were unauthenticated or were hearsay and not within any of the exceptions to the hearsay rules. It is important to note that the documents upon which the plaintiffs have most heavily relied—those that are the most critical to their case—were excluded not on some technical ground, but because they were found to be untrustworthy.

The most significant of those documents, the diaries and internal memoranda, all appear to have been written solely for the author, with the notations written in a kind of shorthand code which the writer presumably could understand but which, except for occasional excerpts, is unintelligible to others. We explained in the Japanese Materials Evidentiary Opinion:

> As defendants correctly note, they [the diaries] are a "hodge podge" of notes in which the author has not explained with any degree of clarity what he meant, to what he was referring, or even where he was when he wrote it. While plaintiffs have clarified a few of the references in the diaries by cross reference to JFTC testimony or protocols, only an infinitesimal part has been thus explained. One would have to engage in the rankest of speculation to make sense out of the vast bulk of the diaries.
>
> One cannot tell with any certainty where entries begin and end. There are many time gaps in the notebooks or

> diaries, and only a portion of the "conspiratorial meetings" otherwise demonstrated to have taken place are recorded in them. There are all kinds of arrows and innumerable symbols and notations and references which are unintelligible to the translators, who report those references as "illegible." Many of them are written in a code which only a cryptographer could solve.
>
> There is both intrinsic and extrinsic evidence that many of the diary entries reflect occurrences at meetings which the diarists did not attend, but rather about which they were informed by others. The diaries plainly contain numerous instances of second and third level hearsay. Because of the manner in which the diaries are kept, however, it is not possible to sort out which entries are based upon the diarist's personal knowledge and which are based upon hearsay. There is no evidence of regular or continuous habit on the part of any of the diarists in making their notebook entries or checking them systematically.

505 F.Supp. 1190 at 1212. These observations are documented at length in that opinion.

Our exclusion of these documents was in large part a function of the failure of the plaintiffs to lay any foundation for them by the testimony of someone who could explain what they meant. Notwithstanding that fact, what the plaintiffs have done (or at least have attempted to do) in the FPS is to interpret the documents according to their own view of the case, that interpretation being the nexus between the raw excerpts from the document, or what we call the "bits and pieces," and the conclusory statement in the FPS. Plaintiffs cannot, of course, advance their interpretations on the basis of documents we have excluded as the result of pretrial evidentiary hearings (except to the extent that they succeed in challenging our rulings on appeal). However, a number of documents similar in character to those excluded in the Japanese Materials Evidentiary Opinion but not submitted for consideration during the evidentiary hearings must be taken up herein because they appear at important points in the FPS.[129] Since these

[129] We refer, *inter alia*, to the MD Group documents and to a number of the "rebate scheme" documents.

documents too are unexplained by any witness, it is necessary that we rescribe what we said in the Japanese Materials Evidentiary Opinion on the subject of plaintiffs' litigation strategy.

Taking the diaries as an example of that litigation strategy, it is obvious that there are indeed persons who could eliminate the difficulty we have described and decipher any code-like references: the diarists themselves. In their absence, someone present at the meetings whose proceedings are supposedly recorded, or someone contemporaneously familiar with the contents of the diary or memo and the diarist's recording practices could serve. However, the plaintiffs, despite their role as proponents of the documents, hence bearers of the burden to qualify them, have not proffered the testimony in any form of any such person. Moreover, they have made it clear that they have no intention of doing so, before or at trial.[130] Rather, they have attempted to qualify the documents circumstantially and to offer selected (though extensive) excerpts therefrom.

The litigation strategy we have described is not merely our supposition. Edwin P. Rome, Esquire, plaintiffs' lead counsel, has confirmed the strategy time and again. For example, he noted during the course of the evidentiary hearings:

> I assume personally, Your Honor, whatever onus there may be about the fact that we chose quite deliberately, and I state it of record, we chose quite deliberately not to undertake to depose persons in a foreign language when we had documents that in our view documented and explicated a conspiracy to violate American law.

PTO 268 at 143-44 (June 27, 1980). There are numerous similar statements by Mr. Rome in the voluminous record.[131] This

[130] This intention is confirmed by their failure to list any such witness in the preclusive FPS.

[131] We note that plaintiffs' strategy does not reflect sloth or any lack of experience on the part of plaintiffs' counsel. Mr. Rome is one of the ablest antitrust lawyers in the United States. A brilliant and eloquent advocate, he

litigation strategy was maintained in the face of repeated warning from the defendants that they intended to challenge the admissibility of the diaries, memoranda, protocols, and testimony.[132]

Indeed, we challenged plaintiffs on several occasions, questioning why, having proceeded with this case for close to a decade and having inspected literally millions of documents, they had failed to take depositions to lay foundation for the admissibility of the seriously challenged JFTC materials. We also sharply questioned plaintiffs as to why, given the magnitude of their claims and the existence of so much fodder for examination, they had failed to take depositions, for substantive purposes, of a single Japanese executive who attended any of the allegedly conspiratorial meetings at the core of plaintiffs' case. We noted that we found it difficult to conceive of counsel pursuing that strategy in a case with purely U.S. roots, and that it was ordinary fare in complex cases for counsel to take

---

tried some of the pioneering antitrust cases in the movie industry and has asembled a stellar litigation team, led by William H. Roberts, whose efforts have been prodigious, as well as of the highest quality.

[132] This warning came not only during the course of our numerous pretrial conferences, but as early as Melco's motion for summary judgment, filed in March 1978, well before the close of discovery. In that motion, Melco spent many pages detailing the kinds of evidentiary foundational deficiencies we dealt with in the first two opinions in the pretrial evidentiary "trilogy." Yet the plaintiffs, all the while insisting they were ready for trial, declined to take depositions of those who might shed light upon the documents. For example, at the pretrial conference of June 14, 1978, six months before the close of plaintiffs' discovery period, plaintiffs' counsel stated to the court:

> MR. McELROY: We said a long time ago, and Ed Rome has repeated throughout, that the plaintiffs in this case are ready to go to trial upon reasonable advance notice. We believe that discovery in the case to date is sufficient for us to get to a jury and to get a verdict. Likewise, we believe that, and it follows, that we believe we have enough discovery, we have enough evidence to defeat a motion for summary judgment. We don't need further discovery in order to respond to [Melco's counsel] Mr. Reath's motion.

PTO 107 at 21.

depositions to qualify documents,[133] as well as for substantive purposes. Mr. Rome consistently responded that it was his considered decision not to do so.

That foundational and substantive depositions of Japanese executives were feasible is demonstrated by the repeated and uncontroverted representations of Japanese manufacturing defendants' counsel that, with the exception of Mr. Yajima who died in 1968, all of the diarists and all persons whose names were focused upon during the evidentiary hearings are alive and well in Japan, still employed by their companies,[134] and that they have been available for depositions throughout this litigation.[135]

Defendants' explanation for plaintiffs' litigation strategy is not gentle. It is stated in the "Memorandum of Certain Defendants in Support of their Position that Materials from the JFTC Proceeding Are Not Admissible in Evidence" (pp. 3-4) as follows:

> Indeed, it seems clear that it was precisely because the Japanese materials do not constitute records of the only two matters that could make them properly probative in

---

[133] Defendants have taken them in this very case. For another example, see the pretrial order governing non-party discovery in the Uranium Antitrust Litigation, which makes specific reference to "depositions . . . taken solely for the limited purpose of . . . authenticating documents produced by such non-party." Joint Pretrial Order No. 8 at 2-3, In Re: *Uranium Antitrust Litigation*, M.D.L. 342 (N.D. Ill. Nov. 13, 1979) (Marshall, J.).

[134] These representations have been made in response to our request that counsel attempt to verify continued employment *vel non*.

[135] That depositions were feasible is further illustrated by the fact that plaintiffs did take depositions of some Japanese executives in connection with the motions relative to personal jurisdiction and venue. Although plaintiffs have occasionally complained about the cost and cumbersomeness (due to translation problems) of taking depositions in Japan in the Japanese language, they have abandoned any reliance upon such problems as their rationale for their failure to take depositions. They concede, as they must, that given the magnitude of the litigation they have instituted and maintained, cost factors provide no excuse.

> this case, that plaintiffs chose not to follow the normal route of taking depositions to lay a proper foundation for their introduction. Plaintiffs knew that such depositions would not be helpful to their case and that, at the end of such discovery, while they might have come up with admissible evidence regarding discussions of "bottom prices" by six companies for two years (1965-1966), they would not come up with any admissible evidence of the creation of a U.S. export invasion fund or of a United States predatory price agreement. They, therefore, seized upon the ploy of attempting to introduce the materials without proper foundations—and without any opportunity by the other side to cross examine—and arguing to the jury that all kinds of wild inferences can be drawn from a handful of cryptic and basically incomprehensible "export references" found in materials which were obviously not written to record export activities. Since plaintiffs' direct case will last for some months, the jury will be hopelessly prejudiced by such tactics before the first of the defendants could even be heard.
>
> In furtherance of this approach, plaintiffs adopted the tactic of piling into the FPS hundreds of thousands of materials and spuriously arguing that they are all evidence of conspiracy, so that they could create the argument that it would be extremely burdensome for them to lay foundations in the normal way, even though their PPTM and summary judgment briefs show that they are, in fact, relying on a relatively small number of such Japanese materials.

While we do not endorse defendants' rhetoric, we do note that we find more than a kernel of truth in defendants' evaluation of plaintiffs' litigation strategy. As we have suggested, their observations apply not just to the materials from the Six Company Case, but to many other materials in the case as well.

Notwithstanding our exclusion of the diaries and memoranda, there was certain evidence from the JFTC proceedings which we did admit and which must be considered in connection with our evaluation of the activities of the Tenth Day Group and the other "conspiratorial" groups. We refer specifically to the JFTC testimony, which we held admissible, with the exception of export references, against the defendants in

the Six Company Case,[136] and to the protocols given to the JFTC investigators which we found admissible against the employer of the executive giving the protocol. Moreover, as we have noted above, plaintiffs have now placed reliance upon a number of other documents which they did not find important enough to proffer during the pretrial evidentiary hearings, but with which we shall have to reckon. Against this background, we turn to a discussion of plaintiffs' evidence as to the "secret conspiratorial meetings."

Any such discussion must take into consideration the two facets of plaintiffs' claims: the home market and the export market aspects of the "unitary" conspiracy.[137] Although the vast bulk of the JFTC materials relates to the home market, there are smatterings of export references which the plaintiffs contend are evidence of an export conspiracy. Because the references are all mixed in together, we do not find it useful to analyze the evidence separately as to each "conspiratorial" group. Rather, we shall look at what the record as a whole shows, first about the home market aspect of the "unitary" conspiracy and then about the export aspect thereof. The bulk of the relevant references is from the Six Company Case record, although we include within the compass of our discussion any other documents that plaintiffs have relied upon in this area of the case.

(b) *Evidence of the Home Market Aspect of the "Unitary" Conspiracy; the Plaintiffs' "War-Chesting" Claims*

We have canvassed the evidence and sought to extract therefrom the version most favorable to plaintiffs of what

---

[136] We did admit export references with respect to the testimony of two witnesses, *see* pp. 1209-1210 *infra*.

[137] Our separate analysis of the home market and export aspects is not an attempt to fragment the conspiracy, but rather a matter of convenience and a vehicle for clarity.

occurred at the meetings of the numerous groups and associations identified by the defendants in their answers to interrogatories and the relationship of those meetings to the Japanese domestic CEP market. What we have gleaned, largely from the JFTC protocols and testimony but also from other admissible evidence of record, may be summarized as follows.[138]

The Tenth Day Group and the other groups metamorphosed from social gatherings to hard core business gatherings involving exchange of information some time near the end of 1964 or in early 1965. The domestic TV market was then oversaturated, and there was tremendous retail price-cutting competition. The period fromm 1960 to 1965 had seen a steady decline in the price of monochrome TV, so that there was already a relatively low price threshold, and the manufacturers were concerned about the possibility that the retail market might collapse. Accordingly, they entered into serious discussions at the Tenth Day Group about a variety of business matters. It is apparent that their primary concern was prediction of demand so as to avoid over-production, oversaturation, and further price decline.[139] However, there was also discussion at the Tenth Day Group meetings of so-called "bottom prices" and of wholesale, retail, and rebate margins.

The evidence all points to the conclusion that the "bottom price" was the lowest price that any manufacturer would charge. It is indisputable, however, that under the practice as

[138] In accordance with our rulings in the Japanese Materials Evidentiary Opinion, the testimony is admissible only against the defendants in the Six Company Case and the protocols are admissible only against the employer of the maker of the protocol. Although, given the large number of other defendants in the case, this markedly constricts the impact of plaintiffs' evidence, in view of the ultimate result, we need not parse out the "cut" of this evidence against the various defendants.

[139] During this initial period, color TV was not as big a factor as monochrome. However, color TV was becoming popular and the demand was increasing, though prices were still very high.

it existed, any manufacturer could quote as a bottom price as low a price as it wished, but that once that bottom was determined, it was the general understanding of the manufacturers that no one would sell below that bottom for some (undetermined) period of time. Mr. Yajima of Toshiba defined bottom price as the "target" price, or the price where the price level ought to be within a foreseeable period, such as six months. The evidence is strong that there was no agreement on bottom price and that ultimately everyone was free to proceed with whatever bottom price he wished;[140] however, for purposes of the motion for summary judgment, we assume that there was such an agreement.

It is important to note that the "bottom" price was not the actual retail selling price, but rather the suggested retail (or so-called "cash normal") price. Yajima, for example, testified that the conferees were not overly concerned about the bottom price. He noted that a higher bottom price did not necessarily end up being a higher actual selling price, and that there was no relationship between the bottom price and the actual selling price. He said that "they each represent a separate element." Yajima also identified various countermeasure funds, as well as a variety of rebates paid by Toshiba, directly or indirectly to the retailers. He added that fixing only the bottom price and the profit margin rates did not automatically determine the price of TV sets marketed by Toshiba Shoji (Toshiba's marketing subsidiary).[141]

[140] Mr. Yajima, for example, testified that there was no approval or disapproval solicited as to the bottom price.

[141] Yajima's testimony and protocols were corroborated by Hitachi's Mr. Adachi, who was emphatic as to the extreme swings in the rebates and as to the existence of sales, expansion, and other funds of a similar nature. In his submission, the price the Japanese retailer sold at was up to him and was also affected by the so-called rebate. There is a dispute among the protocol-givers and JFTC hearing witnesses as to whether rebates were ever disclosed, some saying that they were and others that they were kept like state secrets. For purposes of the summary judgment motions, we must assume they were disclosed.

Yajima testified before the JFTC that he would report to his superior, Mr. Kamakura, the bottom price and demand forecast figures disclosed at the Tenth Day Group meeting. Having discussed these matters at the meeting, Yajima said that he could "more or less guess each company's moves." He testified that he could "speculate on the basis of his hunches" what the companies were up to. There was no disagreement, however, on one point—that cost of production, company manufacturing and marketing policies, and product line details were *never* disclosed by one company to another. Yajima, for instance, testified that up-to-date plans of the companies were *not* discussed at the Tenth Day Group meetings, and that topics so specific in nature were not discussed at all because that might reveal proprietary secrets of each company. Adachi also made clear that the companies did not discuss their profit margins. This uncontradicted testimony in and of itself seriously rends the garment of plaintiffs' conspiracy-cartel theory.[142]

The best that plaintiffs can draw from the Tenth Day Group meetings then is that each company would disclose its projected "bottom" price as well as its projected wholesale and retail margin, and perhaps its rebate figure. Theoretically it was necessary to have agreement on the margins, since otherwise the suggested "bottom" or "cash normal" price would be inefficacious. However, insofar as margins are concerned, the only evidence is that there was considerable pressure to *increase* the margins, and that the companies during the relevant period agreed to increase the margins, particularly the retail margins, so as to protect the retailers from collapse. This, of course, would have the effect of *decreasing* the manufacturer's

[142] Perhaps the most interesting JFTC testimony about the various meetings was that from several witnesses who stated that when the defendant companies made disclosure of economic data at the meetings, they lied to one another. For instance, Adachi claimed that "when it comes to price, profit margin, and rebate," the manufacturers would not tell the truth and disclose exact figures. One attendee described attendance at the meetings as a "reconnaissance mission." We do not, however, consider the testimony about mendacity because it is disputed.

profit, the opposite of what plaintiffs posit in support of their theory of high profits in Japan to war-chest a predatory export raid on the United States market. Concomitantly, any agreement to limit production would also impede that supposed predatory export raid.

Moreover, and this may be a subtle distinction, but it is an important one, undisputed on the record, it is plain that the thrust of whatever price discussions there were was not to keep prices high, but rather to keep them from going all the way down. Thus, the minimum price which was being set was not a high price, but was rather as low a price as the manufacturers could bear without letting their retail market collapse, i.e., a price consistent with protecting retail margins. As one witness stated, they were talking about targets for the maximum price *cut*.

Yajima's testimony is important in this regard. He relates a Tenth Day Group meeting at which Kamakura, Yajima's Toshiba superior, proposed the "daring" figure of 175,000 yen as the bottom price of certain table-top models. Yajima testified that it was simply impossible to market the new line at a price below 180,000 yen, indeed 182,000 yen was the absolute limit. Had they introduced the product at 175,000 yen, they would have undoubtedly gone into the "red." However, it appeared ultimately that Kamakura had merely been trying to "smoke everybody else out," and Toshiba finally withdrew the 175,000 yen price and settled at 180,000 yen. The point is that the bottom price, according to plaintiffs' "star" witness, was in no sense a high price calculated to war-chest a predatory export raid.

At another point Yajima noted that circumstances did not allow Toshiba to market monochrome TV sets at prices as low as the bottom price. Moreover, according to plaintiffs' evidence, some manufacturers would complain at the meetings that they could not break even at a particular bottom price. The point—again—is that the so-called bottom prices were not high prices, but rather were relatively low prices, inconsistent with

the plaintiffs' war-chesting theory. Indeed, according to the record, throughout the relevant period, bottom prices went down, not up!

There is also strong evidence, which we accept for F.R.E. § 104(a), though not for summary judgment, purposes, that there was considerable pressure for price *cuts*, not only to popularize color TV, but also to compete for business, so long as the cuts did not become ruinous. One figure which plaintiffs say was often mentioned in the sub rosa meetings and which is frequently referred to in the protocols and JFTC testimony—10,000 yen per inch—was incontrovertibly a function of the common desire to lower, not increase, prices toward the end of popularizing color TV.[143]

At all events, it is plain that there is not the slightest evidence in this record of "war-chesting" activity, i.e., of extracting high profits from the Japanese consumer to fund a predatory export raid on the U.S. CEP market.[144] Rather, the evidence is only of efforts to stabilize prices so as to keep them from going too low. The evidence also is only that the wholesale and retail margins which were discussed at the meetings increased. To repeat, all of this would have the effect of reducing the returns of the manufacturers, contrary to the war-chesting theory. Moreover, in terms of company profits, there is nothing in the JFTC record—or elsewhere in the record—which would establish that defendants made excessive profits in the sale of CEP's in the Japanese market which would constitute a "war-chest" to fund an export low price conspiracy.

[143] Adachi testified, for example, that the 10,000 yen per inch cost was not a profit figure, but rather an effort to popularize color TV, with the expectation that the cost of manufacturing color TV would drop substantially in the future.

[144] The plaintiffs have at no time even suggested that there is any direct or specific evidence of an agreement to this effect.

In terms of profits, we note the following colloquy which we had with Mr. Rome, lead counsel for the plaintiffs, during the final summary judgment argument:

> The Court: Do you have any evidence of excessive or exorbitant profits that constituted the war chest, Mr. Rome, on the part of Matsushita, Sanyo, Sharp, or any of them?
>
> Mr. Rome: Your Honor, to the extent you inquire about excessive or exorbitant profits, that in my respectful submission isn't required to be shown if there is a difference, if it can be shown that there is a profit being made, a higher price being charged than that which is being charged in the export market.
>
> That provides a financial curb on—
>
> The Court: Maybe they paid it all out in dividends. I mean, I don't know what they did.
>
> Mr. Rome: Maybe they did, your Honor.

PTO 292 at 129-30.[145]

We also note in this regard the substance of two documents offered by plaintiffs. The first is DSS 61, the JFTC testimony

[145] Plaintiffs' post-argument summary judgment brief fails to supply any of the missing evidence about which we were inquiring, and, indeed, the brief actually disavows any ability, or need, to establish the existence of a "war chest." Moreover, it admits that the alleged "subsidy" might have come from any of the defendants' "very profitable enterprises" (p. 249). In the same segment of the brief, however, plaintiffs still maintain that:

> "It is logical to assume that the monopoly profits the Japanese manufacturers earn from their price-fixed closed home market provide the source for the subsidization.
>
> * * *
>
> In plaintiffs' submission, the most logical and reasonable source for such subsidization is the margins defendants enjoy for the consumer electronic products they manufacture and sell in the closed Japanese market." (247, 249).

We cannot help but observe that what is "logical and reasonable to assume" is, in the absence of evidence, but speculation by counsel. Speculation, however, cannot serve as a substitute for evidence.

of Mr. Tsu Fujio of MEI, in which it is stated that profits in the Japanese CEP industry were very low. The second is a lecture entitled "Commemorative Lecture at the Appreciation Sale for the Attainment of 6 Million National [MEI's Japanese brand name] TV Sets: The Road to Co-Existence and Co-Prosperity," by K. Matsushita, delivered January 1, 1966. The document makes the following comments:

> . . . profit has become very small indeed. It has dropped to half of former levels. . . . Although business had been increasing year after year, more or less, profit is decreasing because competition has gradually become severe. In addition, because of general adversity in business there is a stronger impression that profit is decreasing. . . [T]otal quantity of production exceeds actual demand by far. This is one of the major reasons why profit plummets in these already unfavorable conditions. Another reason for decrease in profits seems to be coupled with [sic] excessive competition among manufacturers, agents, and sales stores, respectively. . . .

This picture, of recession, plummeting profits, and cutthroat competition contradicts plaintiffs' argument that the Japanese market was characterized by high, monopolistic profits and the absence of competition.[146]

In plaintiffs' submission, the architect of the conspiratorial activity in Japan about which they complain was K. Matsushita, the founder and chairman of MEI. Plaintiffs assert that Mr. Matsushita had prevailed upon the other Japanese manufacturing defendants to avoid competition and to cooperate in order to avoid over-production and destructive price cutting which might lead to the collapse of the retail market. Plaintiffs rely on a number of public statements of Mr. Matsushita in addition to the lecture which we have just quoted. One of the

---

[146] This statement was made at a time when, according to plaintiffs' own submission, the home market aspect of the conspiracy was at the very least in midstream. The JFTC raids took place in November 1966. Accordingly, it cannot be said that subsequent joint conduct significantly altered the profit picture.

documents they cite is an "essay" entitled "Toward the Year of Restored Business by Overcoming the Slump," also delivered in January 1966. The "slump" refers to the then current condition in the Japanese market, not to exports. This document is cited at p. 7812 of the FPS as evidence that K. Matsushita "explained to the consumer electronics products industry in Japan that competition among rival companies must not be permitted." The essay states:

> one of the causes for sluggish business during the past two years was our (mutual) excessive competition. We competed with each other in terms of expanding equipment caused the business slump. Therefore, we must not have excessive competition for plants and facilities even if we do enter a period of prosperity. But, in the future, expansion that produces the effect of competition among rival companies must not be permitted. In a Japanese wrestling match, victory or defeat is important. But we do not compete for victory in business.

Plaintiffs have repeated Mr. Matsushita's statements again and again as evidence of the home market aspect of the conspiracy. It would be astounding if such public statements could be the foundation of a conspiracy claim. However, even assuming that these statements were acted upon by the Japanese manufacturing defendants, their very formulation does not suggest a conspiracy to gouge the Japanese consumer by charging high prices either to "war-chest" a predatory export raid in the U.S. CEP market, or for any other purpose. Rather, the formulation of the statement is more redolent of efforts to avoid domestic market collapse.

This first portion of our summary of the evidence concerning meetings of the sub rosa groups makes plain that we have found no evidence of a high price high profit conspiracy to war-chest a predatory export raid on the U.S. CEP market. We turn to the evidence of data dissemination to see if that can alter the picture. Before reviewing that evidence in detail, we are constrained to comment upon a problem we confront in dealing with plaintiffs' data dissemination claims that is far more vexing than one of mere organization—the manner in

which the data dissemination claims are advanced. Plaintiffs' representations in the FPS tend to be broad and conclusory, to the effect that certain types of data were exchanged among the conferees at certain meetings. However, when the source for the representation is consulted, it generally does not support the conclusory statement. While in some instances that is because the source, while appearing to be a statistical compilation of production, shipment, and inventory figures, is entirely in Japanese, usually it is for a more pervasive reason.

More often than not, the source for a conclusory statement is a "minute" of a committee meeting (often that of the MD Group or an EIAJ Committee) which contains only a one line agenda item suggesting that some aspect of data dissemination was on the agenda or was discussed, but supplying no detail of the conversations or of the dramatis personae involved.[147] For example, a typical EIAJ meeting minute (MIH 012781) says: "Data: . . . (4) The 1973 Production/Export Statistics." What can we make of this? To what country were the exports discussed shipped? Obviously, there are many unanswered questions. We cannot draw an inference of conspiratorial activity from a bald statement that some subject may have been discussed without knowing the details of the discussion, the persons who discussed it, or what, if anything, was done as a result. Even where the documents are statistical in nature, a conspiracy cannot be inferred in a vacuum, without knowing how and by whom the statistics were prepared, what the figures represent, to whom they were distributed, and how, if at all, they were used.

The data dissemination area provides the most graphic example of the folly of plaintiff's litigation strategy. It may well be that substantive depositions might not, Perry Mason-like,

[147] This, by the way, is a supreme irony. Although plaintiffs, in their FPS, ground much of their case upon such "minutes," they complain in their Supplemental Post-Argument Memorandum in Opposition to Defendants' Motions for Summary Judgment, filed September 22, 1980, that the MD Group had not produced adequate documentation. *See* n. 262, *infra*.

have ferreted out evidence of conspiratorial agreements on price. But they surely would have produced explanations of thousands of documents upon which plaintiffs rely but as to whose significance we can only guess.[148] So often, in dealing with the FPS, we feel like we are trying to nail jelly to the wall, as it were.

Notwithstanding these observations, we shall posit, in connection with our consideration of the summary judgment motions, that a broad range of information was exchanged among representatives of the Japanese companies. The nature of the exchange is what is critical, and we shall flush out what can best be said for plaintiffs' position in the discussion to follow. As will be seen, there is far more "evidence" of home market data exchange than of exchange of export information. The majority of the cognizable data exchange took place under the aegis of the several subcommittees of the EIAJ and of the MD Group. MITI (and therefore also the JMEA) was also heavily involved, because it sought and obtained a great volume of statistical data from its Japanese manufacturers. We will here summarize the evidence of domestic data exchange as it appears from the EIAJ and sub rosa group documents. In the next segment, we shall do likewise with respect to the dissemination of export-related data.

It appears that domestic data dissemination occurred on two levels: dissemination by the EIAJ of aggregate statistics based upon information supplied by its members, and dissemination of individual company statistics. There is evidence that the EIAJ disseminated aggregate statistics about past production, sales, shipment, and inventories by region,[149] and also

[148] Although we are at the pretrial stage, plaintiffs have made it clear that they will call no witnesses from Japan to explain the documents. They have said so in colloquy and have failed to list any such witnesses in their preclusive FPS.

[149] We note that many of the documents whose general nature we have adumbrated emanate from the EIAJ's several statistics committees, which distribute lists of aggregate statistics. A number of documents from those

that individual company statistics of this variety found their way into the files of other companies.[150] There is evidence that demand forcasts were aggregated and distributed. Finally, although it is sketchy and elusive, there is some evidence of "voting" on production. It is important to note that in none of the charts and statistics disseminated through the EIAJ committees or the MD Group is there any evidence of exchange of identifiable price data.

The foregoing information is gleaned primarily from documents not submitted as DSS's during the pretrial evidentiary hearings. The documents at issue are similar in character to many of the documents excluded in the Japanese Materials Evidentiary Opinion. They have neither been qualified under the exceptions to the hearsay rule, despite omnibus challenge by defendants, nor explained. We note again that: (1) we have no idea from these documents who said what to whom or which company representatives were present and/or voted on any of the proposals; (2) there has been no deposition taken of anyone present at such meetings, so we do not know the extent of detail exchanged or the extent of dissemination; and (3) we do not know whether any of the proposals were implemented. Although the documents are therefore merely suggestive of the kind of information exchange we have described, without providing any specific information, plaintiffs attempt to interpret these documents to suit themselves. Notwithstanding these factors, we assume admissibility.

Although the foregoing discussion strongly suggests that some kind of data dissemination program existed, the plain-

---

committees relate to statistical methodology, including such matters as the type of data to be submitted, deadlines for submitting information, ultimate computerization of statistics, and non-disclosure to outsiders.

[150] We glean this from documents which we have traced from our reading of the FPS. Most of the statistical documents are in Japanese, but there are some master translations of statistical documents which are at least suggestive of the point made in the text; hence, we posit it for purposes of summary judgment.

tiffs' information exchange claims are not cohesively presented; rather, they are a blunderbuss, amounting to random documentation, referenced helter skelter in the FPS. Moreover, these claims are not supported by evidence which creates a genuine issue of material fact.

As we have explained in Part VI.A.5, *supra*, the exchange of aggregate production and inventory statistics is insufficient alone to give rise to an inference of an agreement violative of Sherman § 1 under *Maple Flooring*. As we explained in Part VI.A.6, *supra*, to the extent that there is also evidence of the exchange of technical data and of product standardization, that kind of information exchange will not, except under usual circumstances not present here, give rise to an inference of conspiracy. On the other hand, it may be that the data dissemination in Japan was ancillary to some kind of an agreement to adjust domestic production and avoid oversaturation of the market, although—and this is another major flaw in plaintiffs' case—the dates of the activity are most unclear. However, even assuming that the defendants were disclosing or signaling their individual production plans, and further assuming that the "vote" was tantamount to some kind of production limitation, there still is insufficient evidence to support an inference of the home market aspect of the "unitary" conspiracy.

First, there is no evidence of who did what at various meetings or whether any of the supposed plans were implemented. Second, data exchange does not constitute a per se violation, and even exchange of individual production, sales, shipment, and inventory data cannot sustain a conspiratorial inference in the absence of some evidence that the information was used in aid of collusive pricing activity, or of some purpose or effect to stifle competition in the manner charged by plaintiffs, *see* Part VI. A.5, *supra*. There is no such evidence. Finally, even assuming that plaintiffs had adduced evidence of some kind of production limitation, that would not be evidence of a "unitary" conspiracy claim for the reasons that follow.

Although a limitation on production would be consistent with a scheme to keep Japanese domestic prices high, and

would further be consistent with plaintiffs' claim tht K. Matsushita had persuaded his confreres to "stabilize" the Japanese market against ruinous competition which was driving prices down and threatening the retail distribution system, it is inconsistent with plaintiffs' theory of conspiracy. In analytical terms, the conspiracy could fund a predatory export raid only if accompanied by high prices and high profits in the domestic market. However, as we have seen, *see* pages 1204-1206, *supra*, and 1213-1214, *infra*, the plaintiffs have offered no evidence of high prices and seem no longer even to contend that there was high profitability on domestic CEPs. At all events, the claim is inconsistent with the record, which contains no evidence of a high price conspiracy or of high profits, but which does reflect a policy of increasing the margins of the wholesalers and retailers to protect the distribution system at the expense of high profitability. Accordingly, plaintiffs' domestic information exchange claim is unavailing.[151]

Plaintiffs have thus adduced no significant probative evidence from activites of the sub rosa industry groups or from the data dissemination activities of any of the allegedly "conspiratorial" organizations to support the domestic high price "war-chesting" aspect of their "unitary" conspriacy theory.[151A]

[151] Our discussion in this segment takes into account all of the documents which plaintiffs cited on pp. 28-30 of their Supplemental Post-Argument Memorandum in Opposition to Defendants' Motions for Summary Judgment. In that document, filed September 22, 1980, plaintiffs made submissions of documents they had not thought important enough to include as DSSs during the pretrial evidentiary hearings. More precisely, what plaintiffs did was to give us a list of additional document numbers with the representation that those documents reflected additional conspiratorial meetings of the defendants and their coconspirators at the TS Group, Tenth Day Group, Twentieth Day Group, Palace Group, Palace Preparatory Group, MD Group, and Okura Group. Upon visiting the document depository to retrieve these documents, we found that a number of them were not in the depository, and that all those that were there were untranslated into English, with the exception of a number of pages from one of the Yajima diaries which had already been excluded in our Japanese Materials Evidentiary Opinion. One other document was translated into English but said nothing intelligible, much less probative.

(c) *Evidence of the Export Aspect of the "Unitary" Conspiracy*

We have canvassed the evidence and sought to determine therefrom whether there is any evidence that an export conspiracy was conceived or implemented at the meetings of the numerous groups and associations identified by the defendants in their answers to interrogatories.[152] For the reasons that follow, we find no admissible evidence in the JFTC materials or in any other materials which refers or relates to the setting or coordination of export prices, the exchange of export price

[151A] We have not dwelt upon the TS Group in the foregoing discussion. For the most part, that group is an analogue of the Tenth Day Group, and most of the references to its activities are in diaries excluded in the Japanese Materials Evidentiary Opinion. There are some TS Group data dissemination references cited in the FPS which are similar to MD Group references, but they suffer from the same flaws. The activities of the TS Group were confined to the Japanese domestic market, and those activities do not support plaintiffs' high price war-chesting theory for the same reasons explained above.

[152] The canvass covered the following materials: the parties' briefs; their oral argument in connection with the motions for summary judgment; the portions of the FPS dealing with plaintiffs' allegations about the groups and associations in Japan alleged to be involved with export activity or about export activity in any context; the supporting documents cited in the FPS; and plaintiffs' Feb. 12, 1980 submission, with its five-page cover letter, of a list of "export references" contained in the JFTC materials. The Feb. 12, 1980 submission, signed by Arnold Kalman, one of plaintiffs' counsel, was in response to our directive at the January 16, 1980 pretrial conference (PTO 222 at 230-32) that plaintiffs identify the portions of the JFTC record which tended to show that defendants agreed to coordinate their pricing of television receivers for export to the U.S. We understand the submission to include *all* export references, for that was our order. We note that plaintiffs time and again throughout this litigation, when asked to submit a complete list of something, have submitted it with a disclaimer that the list is "representative," implying that there are other documents in the requested category somewhere in the voluminous record. Indeed, they did so in their February 12, 1980 cover letter, but, in view of our previous directive to them, we deem this attempted disclaimer unacceptable and unavailing.

information relative to the claimed conspiracy, the impermissible dissemination of other export-related economic data, or any other aspect of the "export" component of the "unitary" conspiracy claimed by plaintiffs. This result follows inevitably from the fact that virtually all of the documents in the JFTC materials that are of major significance to plaintiffs' "export" case were excluded in the Japanese Materials Evidentiary Opinion. Because this aspect of their case is so critical to plaintiffs, however, we have elected to canvass the entire record, analyzing the signficiant portions of the excluded materials to determine whether the result would change our evidentiary rulings. We also consider some additional documents referenced in the FPS. As will be seen, the result would be no different.

We begin with the JFTC protocols and testimony. None of the protocols contain any export references. We ruled inadmissible all of the export references in the JFTC testimony with the exception of those in the testimony of Mr. Nishi, Senior Managing Director of Hitachi. *See* Japanese Materials Evidentiary Opinion at 1293-1294. However, these references are of no help to plaintiffs' case.[153] We turn then to the mainstay of plaintiffs' case—the documents.

The plaintiffs' February 12, 1980 submission, *see* note 152, *supra*, purports to be a compendium of export-related documents. This compendium lists 310 separate page references from the 6,317 pages in the JFTC record. However, a review of these 310 pages reveals that only a small number of them, amounting to approximately 30 separate references, actually contain language which could be argued to be an "export reference." The remaining pages do not refer to export even peripherally. Moreover, virtually all of the arguable export references relate to exports in general and not specifically to exports to the United States, and thus they are of no probative value.

[153] Mr. Nishi's export references are so amorphous that they are not even worth mentioning. Mr. Fujio's testimony supports defendants' position.

In their final summary judgment briefs, defendants analyzed all of the export references. Upon review, we find their analysis (appropriately referenced to the documents themselves) to be accurate, and we draw upon it here. Fourteen of the cited references contain nothing more than estimates of future domestic and export demand or shipments, with no separate breakdown for the U.S.[154] We note again that such information exchange, common in trade association activity, is at best for plaintiffs of the *Maple Flooring* genre and cannot give rise to liability. One reference is a statement by Mr. Yajima that he was neither responsible for nor knowledgeable about Toshiba's export operations;[155] and three are statements by Mr. Kamakura of Toshiba, upon whose testimony plaintiffs also rely, that he too had no knowledge concerning Toshiba's export operations.[156] A number are passing and innocuous references to exports in general: MJ 2653, 2655, 2656 (excerpt from testimony of Mr. Nishi of Hitachi that the TV industry is an "export industry" and "specialty item of Japanese industry"); TJ 4610 (excerpt from Yajima Diary concerning an internal Toshiba meeting: "export . . . more export . . . there is a limit domestically. . . ." "Strengthening of export"); TJ 4656 (excerpt from Yajima Diary concerning Tenth Day Group meeting: Hitachi "will domestically distribute TV's for export"—a mysterious statement indeed); HJ 50033 (excerpt from diary of Mr. Yamada of Hitachi: "19" CTV: will exhibit at U.S.A. show, but the prospect of actual sales unsure"); HJ 50085 (excerpt from diary of Mr. Yamamoto of Hitachi concerning discussion at the Color TV Committee: "EIA re U.S. market analysis presented by RCA"); TJ 4439-4442 (excerpt from testimony of Mr. Fujio of MEI concerning technical capa-

[154] Some of these citations are excerpts from the Yajima Diary; others are excerpts from the diary of Mr. Yamada of Hitachi. As we noted in the Japanese Materials Evidentiary Opinion, Mr. Yamada's is the most cryptic and unintelligible of the diaries.

[155] MJ 2100.

[156] MJ 2081, 2083, 2090-91.

bilities and capital structure of Japanese companies as compared with U.S.CEP companies); MJ 2927 (statement of respondents' counsel that Mr. Fujio of Matsushita had testified regarding the growth of exports in the home appliance industry).

Numerous pages of the JFTC record contain the word "export" followed by certain small quantity figures (usually in the range of a few hundred, occasionally in the thousands). These statements are usually from the Yajima diaries and contain no explanation as to what the figures represent. We do not know whether the entries are internal company notes of a meeting with co-workers or quantities passed on to Yajima by someone else within or without Toshiba, nor do we know to what they refer.

We have paid special attention to the allegations in the FPS and elsewhere about the Okura Group, the Twentieth Day Group, and the MD Group, all of which supposedly dealt with export matters. We have, however, found nothing probative. Despite their centrality to plaintiffs' case, the FPS entries relating to the Okura Group are limited to membership and attendance data, which are not disputed, and to other material which has either been excluded (e.g., materials from Yajima's or some other diary), or which has been demonstrated to be of no value (*see* discussion of "intent" documents, Part VII.I, *infra*). Most of the references to the Twentieth Day Group were contained in materials excluded in the Japanese Materials Evidentiary Opinion. No substantive reference of any significance survives.

We have carefully reviewed a host of documents submitted by plaintiffs with respect to the MD Group, even though they did not submit these documents for consideration at our *in limine* hearing.[157] The tenor of the MD Group documents was

[157] We cannot assume admissibility of these MD Group documents, for they suffer from the same flaws as many of the documents excluded in the Japanese Materials Evidentiary Opinion. Whether the MD Group "minutes"

discussed in the preceding segment of this opinion. Those documents mostly refer to intended or expected *domestic* shipments, and not to export shipments as represented by the plaintiffs. Even if some of them list export statistics, these statistics represent only aggregates; no individual breakdown by company is included. As was the case with the domestic materials discussed *supra*, these purportedly export-related documents give us no idea what was said or done at any of these meetings or whether the plans or policies discussed in the "minutes" were ever implemented, much less who was responsible for doing so. To the extent that there may have been some kind of "voting" on export shipments of stereos and TVs, we can only speculate as to the nature and results of such voting.[158]

The only portion of the 6,317 pages of the JFTC record which could arguably be called an export *price reference* is a five line note from the Yajima Diary which reads as follows: "Hayakawa—export price—olympic—16 inch—$160—contract 20,000 sets—41% of those for domestic." We can only

are in chart form or otherwise, they are just as unexplained as those already excluded, and are not shown to meet the requirements of F.R.E. 803(6) or any other hearsay exceptions; nor are they the admissions of any party.

[158] We have also looked at all the documents not excluded by the Japanese Materials Evidentiary Opinion relating to the other "conspiratorial groups"—the Tenth Day Group, the Palace Group, the Palace Preparatory Group, the TS Group, etc.—and can find no translated export references probative of plaintiffs' case. None of these documents support plaintiffs' conclusory allegations of conspiracy, even if they were admissible. *See, e.g.*, the recently asserted document MA 033669 relative to the "Shachokai" (Presidents' Meeting); that document, like so many others, is cryptic and meaningless on its face, and plaintiffs have proffered no explanatory testimony. F.R.E. 403 analysis is an alternate approach to the materials considered in the Japanese Materials Evidentiary Opinion. Were we to have erred in our Article VIII and IX rulings, Rule 403 would be an independent basis to exclude most of the excluded documents on the ground that any (minimal)probative value the documents had would be grossly outweighed by the unfair prejudice of admitting them, the waste of time in explaining them, and the danger of misleading the jury.

speculate on the meaning of this cryptic statement. There is no indication of its source or of where Mr. Yajima heard it, and it possesses no indicia of reliability. We explained at length in our Japanese Materials Evidentiary Opinion that the Yajima diaries are inadmissible on multiple grounds. *See* Part IV, *supra*. As we have noted, plaintiffs have made no effort to adduce testimony, by deposition or otherwise, to explain any of the cryptic references in the diaries and memoranda.

What the foregoing description represents is the plaintiffs' litigation strategy, discussed at pages 1200-1202, *supra*, in action. The principal manner in which plaintiffs have constructed their export conspiracy theory is to draw upon bits and pieces and fragments of sentences and paragraphs in the various diaries and memoranda and, proceeding from the premise that there had to be a conspiracy, fit in the "bits and pieces" to suit their purposes. What plaintiffs have in actuality been engaged in is not logical inference but speculation for, upon scrutiny, the "export references" are illusory.

The data dissemination record with respect to exports is qualitatively different from that with respect to the domestic market. Other than certain average past price information promulgated by the EIAJ, there is no evidence of price information exchange. There is evidence of demand forecasts for exports, but there is no evidence of any substance of "voting" on expected exports. Neither is there any evidence of exchange of production shipment, and inventory data except for aggregates. Moreover, the aggregate figures do not even provide discrete data as to the U.S.[159] But assuming that they were otherwise probative, plaintiffs still could not establish the "unitary" conspiracy to destroy the U.S. CEP industry via such worldwide figures.[159A]

We concluded in Part VI.A.5 that cases which have found Sherman Act § 1 violations as a result of data dissemination have either involved an exchange of detailed, individually identifiable, actual price data, a concentrated industry, and a purpose or effect to restrain competition, or some other evidence of an actual agreement to restrain competition. Exchange of aggregate data and most non-price data, such as market conditions, trends, and forecasts, has generally been permitted, at least in the absence of some evidence of an agreement to use the information to fix prices, adjust production, or allocate market shares. Under these standards, plaintiffs' export-related data dissemination case fails the summary judgment test.

[159] For example, plaintiffs offer the documents of the Consumer Overseas Survey Committee (EIAJ). These "minutes" are afflicted with the same admissibility problems as are exposed in the Japanese Materials Evidentiary Opinion. However, assuming admissibility, they suggest only that the EIAJ was attempting to forecast total exports of CEPs, without any breakdown by country or by individual company. It is interesting to note in this regard that the Electronic Industries Association of the U.S. publishes annual sales forecasts for the forthcoming years which are derived from surveys of the major U.S. manufacturers, including Zenith. These are published in *Consumer Electronics*, a weekly trade publication.

Another facet of the EIAJ documents which bears special mention is the fact that the export-related topic alleged to have been most frequently discussed at the EIAJ meetings was that of the various MITI-related export control arrangements affecting exports to the United States and elsewhere. These discussions apparently involved the establishment of the arrangements, compliance with them, their termination, their revision, and the manner in which they operated. Although plaintiffs in some instances suggest by broad conclusory references in their FPS that "agreements" were entered into at EIAJ meetings, examination of documents reveals that the alleged agreements were in fact the MITI-related export control arrangements, which we have explained are of no value to plaintiffs' case. There are also references to statistics to be supplied to MITI which collected and disseminated them in pursuance of its duties. MITI was thus like government organizations in virtually all other nations, publishing details on (export) statistics.

[159A] Our discussion to this point has dealt with data dissemination via the sub rosa groups and the EIAJ. The plaintiffs have also offered JMEA meeting agendas which imply that "export statistics and trends" were discussed at JMEA meetings. However, insofar as it can be gleaned from the record, the JMEA discussions related to aggregate non-price statistics only. There is no evidence of disclosure via the JMEA of individual companies' production, sales, shipment, or inventory data.

Even were we to assume that the record contains cognizable evidence of exchange of individual past production, sales, shipment, and present inventory statistics in the export context, such evidence would not help plaintiffs' case either. We explained in Part VI.A.5, *supra*, why this kind of data exchange does not tend to show a Sherman Act violation, at least, as here, in the absence of evidence of an anticompetitive purpose or effect. At all events, the kind of information exchanged in the export context is more in the *Maple Flooring* than the *Container Corp.* mode.

Another problem with the data dissemination point is of equal significance: plaintiffs have shown no evidence of a logical nexus between the information exchange and the alleged conspiracy. First, even though there is no admissible evidence of "voting" on export shipments, it would not help plaintiffs' case if there were. While an agreement to adjust production levels might, under some circumstances, be helpful in keeping prices high, such an agreement is not consistent with the main thrust of plaintiffs' export conspiracy theory, for it is illogical to assume that a group of companies that sought to flood the American market with CEPs at artifically low prices would agree to limit production.

Moreover, as explained in Part VI.A.5, *supra*, information exchange is not per se illegal, and is only found to be unreasonable when it is conducted as part of or in furtherance of some anti-competitive scheme. While the anti-competitive agreement can be inferred from the data dissemination in some circumstances, in the circumstances of this case the conspiracy posited by plaintiffs cannot, as a matter of logic, be inferred from the types of data exchange activities purportedly described in these documents. The U.S. CEP market is an open, competitive market; the defendant companies, as new entrants into that market, had no power to affect either output or prices in that market. Thus information as to past shipments, present inventory, or forecasted demand would not be useful to alleged participants in a conspiracy to export at low prices to the U.S. market.

Plaintiffs, of course, proceed from the premise that the defendants had allocated the U.S. market via the Five Company Rule and that they were acting in concert in the U.S. market as a "monolith," competing only against the U.S. CEP manufacturers. In plaintiffs' submission, those activities would protect manufacturers pursuing a low price policy from ruination, or at least from substantial losses. However, there is no evidence to support these premises. There is no evidence of market allocation, *see* Part VII.F.2, *supra*, and no evidence that the defendants acted in concert with respect to exports (or that they administered or policed their supposed arrangement, see p. 1240, *infra*).[160] Moreover, there is no evidence that the defendants were able accurately to predict U.S. demand. Even if there were such evidence, the notion that this information would so strengthen the coconspirators as to enable them to effect their low price conspiracy is illogical given the uncontradicted information in the record about U.S. market conditions: Zenith and RCA had close to 50% of the market, there was competition among a large number of manufacturers, etc. To put it charitably, the analytical possibilities of a nexus between plaintiffs' evidence and the concerted predatory pricing conspiracy theorized by plaintiffs range from non-existent to gossamer, especially given the onus of a rule of reason test.

In sum, the scenario portrayed by plaintiffs, even assuming that there were evidence to support it, cannot be a viable part of their "unitary" conspiracy theory in the absence of evidence, direct or cimcumstantial, of concerted pricing activity, and there is no such evidence. But even assuming that plaintiffs had admissible evidence which might permit an inference that there was an export production limitation, that would not be sufficient under the facts of this case to permit an inference of concerted pricing activity, since for the reasons stated above,

---

[160] Although not a basis for our decision on the summary judgment motions, the evidence explained in Part VII.L, *infra*, demonstrates that there was in fact competition among the Japanese manufacturing defendants and that they did not act monolithically.

such an inference would be illogical here. The short of its that our canvass of the record of documents generated in Japan shows no evidence, direct or circumstantial, on which plaintiffs' claim of a predatory export conspiracy can be founded.

(d) *The Six Company Case—Conclusion*

Our conclusions about the significance of the Six Company Case materials are not a function of the JFTC's July 27, 1978 termination order, which stated that the commission had not been able to reach a conclusion. Neither are they a function of the fact that in the Six Company Case the JFTC did not itself allege a "high price" conspiracy. Instead, they are a function of our independent review of the documents produced as a result of the Six Company Case and proffered here by plaintiffs. These documents do not show a massive worldwide thirty-year conspiracy to fix prices of Japanese CEPs at home and abroad. Actual prices and actual rebates and discounts were not discussed at the meetings relied upon by plaintiffs. During the period of the alleged conspiracy, the "bottom" or suggested list prices allegedly discussed dropped, while the wholesale and retail margins which were discussed rose, all of which would have had the effect of reducing the returns to the manufacturers, contrary to the "war-chest" theory. Moreover, the data dissemination evidence is essentially non-probative.

There is simply nothing in the JFTC proceedings which supports the claim of a high price "war-chesting" conspiracy in Japan. The following colloquy is instructive in this regard:

> THE COURT: .... Do they [the protocols] demonstrate in terms of specifics, that the level at which they fixed the prices was artificially high?
>
> MS. LARKIN: [Counsel for plaintiff] They demonstrate that they were setting a price without specifically addressing whether it was a high price or low price, but that it was an artificially created price decided among them, and the level of it being a high price conspiracy is something which we would prove by other documentation.
>
> THE COURT: What other documentation?

> MS. LARKIN: Well, the model price comparisons for one."[161]

Whether or not Ms. Larkin's statement represents an abandonment of the "high price" conspiracy claim, it is clear that there is no evidence of such a conspiracy in the JFTC record.[162]

Finally, the JFTC record does not show an export conspiracy. Indeed, export prices and export terms of sale were not discussed at the meetings relied upon by plaintiffs, and according to the only viable evidence on the point, in the JFTC protocols and testimony, most of the attendees were not involved in export business and had no knowledge of export matters.

Notwithstanding plaintiffs' broad conclusory allegations about the role of the Okura Group, the Twentieth Day Group, and the MD Group as vehicles for the export aspect of the alleged conspiracy, our careful canvass of the record has revealed no admissible evidence which refers to or relates to setting export prices, improperly exchanging export price information, or any other evidence of a low price export conspiracy. And evidence about the data dissemination of non-price matters is non-probative. The record of the Six Company Case taken all together thus does not supply any evidence which will help plaintiffs create a genuine issue of material fact on plaintiffs' television receiver conspiracy claims.[163]

For reasons of convenience, we have subsumed within the foregoing discussion of the materials from the Six Company

---

[161] As will be seen *infra*, the model price comparisons do not supply the missing link.

[162] We need not address plaintiffs' contention that the mere fixing of *any* price in Japan is enough to create a genuine issue of material fact on plaintiffs' conspiracy claims. Such an argument would fail of its own weight.

[163] In evidentiary terms, it might even be said that the Six Company Case record is irrelevant. That analysis would proceed on two levels. First, in terms of F.R.E. 401, the Six Company Case documents do not make the existence of any fact which is of consequence to determination of the action

Case certain matters dehors the record of that case, especially the EIAJ documents relating to certain types of data dissemination. That fact has not altered our focus or changed the result. We turn now to plaintiffs' case as it is built upon the other EIAJ documents.

3. *The EIAJ*

The Electronic Industries Association of Japan ("EIAJ") is a trade association to which a number of defendants have belonged since at least 1952.[164] The EIAJ operates through a large number of committees which deal with virtually every aspect of the manufacture, distribution, and exportation of CEP's (and certain other electronic products). The plaintiffs, in Appendix A to their FPS, identify some 86 committees of the EIAJ. As we have noted, in that Appendix they also identify the individual members of the various committees, naming the company employing that individual as well as the source of the information as to membership. This description alone consumes some 294 pages. The vast majority of the "conspiratorial meetings" listed in the Calendar of Conspiratorial Meetings which constitutes Appendix B to the FPS are EIAJ committee meetings. Plaintiffs' description of the activities or alleged activities of the EIAJ and its various committees is spread over some 550 pages of the FPS.

In both their PPTM and their FPS plaintiffs have set forth a list of the names of "some of the principal, pertinent committees of the EIAJ," which "convey a sense of the variety of the matters which received joint attention by defendants during their EIAJ committee meetings." PPTM at 105. They lay the heaviest stress on the so-called export committees: the TV

more probable than it would be without the evidence. Secondly, in F.R.E. 403 terms, assuming initial relevancy, the (minimal) probative value of such evidence would be substantially outweighed by the danger of unfair prejudice from the jury hearing about the meetings in Japan, confusion of the issues, etc.

[164] The following defendants are members of the EIAJ: Hitachi, MEI, MEC, Melco, Sanyo, Sharp, Sony, and Toshiba.

Export Committee, the Radio Export Committee, the Tape Recorder Export Committee, the Transistor Radio Export Stabilization Committee, the Electron Tube Export Committee, and the Parts and Components Export Committee. The entire list, as presented in plaintiffs' PPTM, is set out in the margin.[165]

[165] Plaintiffs' list consists of the following committees:

Advertising Committee of EIAJ
Audio Technical Committee of EIAJ
Color TV Fair Trade Council of EIAJ
Committee of PR to USA of EIAJ
Committee of TV Export to US of EIAJ
Commodity Tax Considering Committee of EIAJ
Consumer Domestic Investigation or Research Committee
Consumer Electronic Products Joint Technical Committee
Consumer Equipment Section Meeting
Consumer Overseas Research Committee
Consumer Products Patent Committee of EIAJ
Domestic Safety Committee
Electric Products Design Committee
Electron Tube Export Council
Electronics Compilatory Committee
Four Channel Stereo Research Committee
Electronic Industries Association of Japan—General Meetings
International Safety Committee
Standing Board of Directors
Operation Committee of Research & Statistics Committee
Patent Committee (Steering Committee)
Radio Business Committee
Radio Export Committee
Radio Technical Committee
Safety Investigation Committee of EIAJ
Safety Research Committee
Safety Special Committee
Solid Lighting Device Technical Committee
Statistics Committee
Steering Committee of Statistics & Investigation Committee
Stereo Business Committee

Plaintiffs thus have gone to enormous length to document the existence of the various committees of the EIAJ and the membership of those commitees, despite the fact that defendants concede those points. What is really at issue is the nature of the activities of the EIAJ; we turn to plaintiffs' evidence in that area.[165A]

Stereo Technical Committee
Stereo Technology Committee
Stereo Advertising Committee
Tape Recorder Business Committee
Tape Recorder Export Committee
Tape Recorder Technical Committee
TV Business Committee
TV Export Committee
TV Technical Committee
Technical Promoting Committee
Transistor Radio Export Stabilization Committee
Electron Tube Business Committee
Hybrid I.C. Business Committee
Semiconductor Business Committee
Electrolytic Condenser Committee
Electron Tube Inspection Method Subdivision
Electron Tube Semiconductor Patent Committee
Electronic Devices Technical Joint Committee
IC Test Method Subdivision
Magnetic Head Committee
Picture Tube Technical Committee
Picture Tube Technology Committee
Semiconductor External Shape Committee
Semiconductor Technical Committee
Semiconductor IC Technical Committee
Semiconductor Reliability Sub-Division

Plaintiffs allege *every* group to be a part of the conspiracy; nary a one escapes their condemnation.

[165A] We have discussed the bulk of the EIAJ-related data dissemination materials in the preceding subpart of this opinion.

The plaintiffs contend that the EIAJ committees served as fora for discussion of and agreement upon export and domestic prices of CEP's and for consultation and agreement upon "virtually every other phase of the manufacture, sale and exportation of consumer electronic products." PPTM at 105. The plaintiffs further allege that the formation of the JMEA and the EIAJ facilitated the achievement of the objectives of the defendants' conspiracy by providing two important vehicles for communication among the Japanese manufacturers and their affiliates. Moreover, according to plaintiffs, one of the first steps taken by the EIAJ was the elimination of competition among defendants by the creation of the so-called Market Stabilization Council, which we will discuss in Part VII. G.5.

Plaintiffs first seek to draw an inference of conspiracy by the mere demonstration of the names of the various committees, their membership lists, and the dates of their meetings. As we have seen in Part VI.A.4, *supra*, such an inference is improper, for mere opportunity to conspire is not probative of actual conspiratorial activity. Moreover, no inference can be drawn from plaintiffs' surmise, based apparently on the name, as to any given committee's purpose. The enormous amount of effort which plaintiffs have spent in listing the names of the various committees, identifying particular committees as part of the EIAJ, and explaining who attended the meetings of each committee, and when it met, all of which creates no inference of conspiracy, itself suggests the weaknesses of plaintiffs' claims.

Plaintiffs next seek sustenance in the General Rules of the EIAJ, which set forth a series of general purposes, subsidiary objectives, authorized programs. According to the General Rules, the EIAJ's purpose is to bring about the prosperity of the manufacturers throughout the mutual cooperation of the members, and one of its subsidiary objectives is to expedite the overall growth of the electronics industry. Among the programs expressly established in the General Rules is one for the collection of statistics and data and "affiliation and cooperation with other industrial associations related to the electronics industry and other related organizations." (Article IV). How-

ever, these objectives and activities (and those set out in the margin)[166] are insufficient to create an inference of conspiratorial activity. First,they are too general; conspiracies are made of more specific stuff. Second, and more important, all of these matters come within the purview of what we have explained in Part VI.A.5, *supra*, as the kind of trade association, data dissemination, and product standardization activities which do not offend the Sherman Act.

The crowning touch to plaintiffs' presentation concerning the EIAJ is their discussion of agenda items allegedly discussed at EIAJ meetings.[167] The Matsushita defendants, in one of their final summary judgment memoranda, offered the following sample of agenda items which we find to be fairly representative of what appears in the FPS and the documents:

(1) Market conditions and trends in the United States and other countries;

(2) Public relations and lobbying efforts within the United States ;

(3) Compliance with various U.S. regulations concerning such matters as the designation of country of origin on imported products and product safety;

[166] Plaintiffs also argue from the fact that the expressly authorized activities of the EIAJ include: (1) "conducting research on production of, trade in, and consumption of electronic equipment and components, collecting, preparing and providing information and data thereon"; (2) "conducting research on business and technological know-how for the electronic industries, collecting, preparing and providing information and data thereon"; (3) "helping to prepare and standardize specifications on electronic equipment and components"; and (4) "conducting research for balanced expansion of external trade in electronic equipment and components and disseminating the results thereof." (Article IV of Revised Articles of Association, EIAJ Translation).

[167] We are herein assuming admissibility of the EIAJ-related documents, although we are constrained to note that the only EIAJ-related documents which plaintiffs thought to be of sufficient importance to present during the *in limine* hearings, DSS's 1027, 1028 and 1029, were held to be inadmissible. *See* Japanese Materials Evidentiary Opinion at 1301-1309.

(4) Various investigations and proceedings instituted in the United States and Canada against Japanese CEP manufacturers calling for the imposition of import restrictions, including anti-dumping proceedings, the countervailing duty investigation, the "escape clause" investigation, and the U.S. International Trade Commission § 337 proceeding initiated by Sylvania;

(5) The effect of Unites States import surcharges;

(6) Concern about protectionist sentiment in the United States and the threat of import restrictions in the U.S. market;

(7) Export Statistics;

(8) After-sales service in the United States;

(9) Standards for testing the performance of televisions for export to the United States;

(10) Televisions donated to India;

(11) Requests for pricing information from MITI;

(12) Restraints on exports to Western Europe;

(13) The effect on television exports to the United States of the Japanese government's decision to float the yen.

In order to give a complete picture of the agenda items reflected in the FPS, we comment specially on four categories. First, the agendas place a heavy emphasis on technical matters, particularly those relative to product standardization and product safety. Secondly, we note a significant number of agenda items reflecting joint efforts to deal with the Japanese commodity tax law. Third, we note repeated agenda consideration of simplification of export procedures. Fourth, there is frequent reference to exportation problems with countries around the world, such as West Germany, the Benelux countries, and Canada.

Our discussion in Part VI.A.5 (Data Dissemination), (and in the preceding segments of this Part VII) and Parts VI.A.6 (Product Standardization and Technical Research Exchange)

and VI. A.8 (Joint Activities in Promoting Public Relations and Joint Legal Action in Response to Common Problems), *supra*, makes clear that these agenda matters, without additional evidence of the kind plaintiffs failed to adduce, e.g., evidence of price fixing or exchange of identifiable actual price data, or of an actual agreement (or a purpose or effect) to restrain competition, are not, alone or together, or coupled with all the other evidence in the case, a basis for inferring an antitrust conspiracy in violation of the Sherman Act.

We have reviewed all of the plaintiffs' translated material relating to the EIAJ and its various committees in an effort to determine the existence of support for the broad conclusory statements in the FPS alleging that the EIAJ engaged in conspiratorial activities. Consistent with our earlier declarations, we shall not burden the record by recounting all such matters, limiting ourselves to the more important groups of documents. However, it is essential that we state our conclusion from this review; we can find nothing in any of these materials (primarily documents) to implicate defendants (or any one of them) in the unitary conspiracy asserted by the plaintiffs, or in any aspect thereof.

One of the EIAJ Committees which must be accorded special mention is the so-called Television Business Committee. Although plaintiffs apparently did not feel the Television Business Committee sufficiently important to submit any of its documents during the course of our *in limine* hearing, plaintiffs' apparent heavy reliance thereupon as reflected by their post-summary judgment argument submission of a large volume of TV Business Committee "minutes" prompts this special comment.[168]

[168] We will assume admissibility of the Television Business Committee documents notwithstanding that the plaintiffs have not, even in the face of defendants' non-frivolous challenge to the admissibility of their documents: (1) sought to authenticate them; (2) sought to establish foundation for them which might qualify them as exceptions to the hearsay rule, *see* Japanese Materials Evidentiary Opinion, or (3) introduced any evidence which will explain the naked documents. Additionally, we note, the documents are laden with inernal hearsay.

None of the "minutes" reflect the involvement of the Committee with export matters. Indeed, in the 61 meetings, there are only six passing references to exports which are of no significance whatever and do not point in any way to an export conspiracy.[169] Of primary concern to this Committee, as reflected by the "minutes," were commodity taxes, safety, consumer protection problems, government regulations,[170] transmission interference, stimulation of demand for television in Japan, and educational television. This is amply illustrated by the frequency with which certain topics were discussed. For example, commodity tax matters were discussed at 26 meetings, and safety matters were discussed at 22 meetings. The

[169] The references are as follows:

(1) In what appears to be a draft of an appeal to the Ministry of Finance to lower taxes on stereo products, the argument is made that taxes should be lowered because stereos are the export product of the future.

(2) The Committee lists export promotion and enhancement of international cooperation as a project to emphasize in 1969;

(3) In response to a request by MITI, the Committee prepared and submitted certain unknown materials concerning export and domestic color television prices to MITI;

(4) In discussing the standardization of terms used to describe screen size it was agreed that export as well as domestic models would be taken into account;

(5) A presentation was made based on materials prepared by MITI and the EIAJ concerning an issue involving domestic and export prices that was raised in the Japanese Diet;

(6) Discussion of a pamphlet which argues that taxes on television, radio and stereos should be *lower* because it would promote exports by making them more competitive.

[170] These discussions included the so-called "double pricing" problem. Although plaintiffs intimate that this double price is related to their claims of rebate/double pricing schemes, *see* Part VII.L, *infra*, it is clear that the two have no connection. The "double pricing" that concerned the Television Business Committee was a consumer protection problem in the domestic market resulting from a disparity between list price and actual sales price of merchandise on a retail level. The Committee apparently was concerned with this matter because it was being investigated by the Japanese government.

short of it is that the Television Business Committee was solely a domestic committee and that no export conspiracy was created at its meetings. Moreover, as we have seen, the product safety and government relations concerns plainly do not create an inference of Sherman Act violation, *see* Parts VI.A.6 and 8, *supra*.

The Minutes also show an intense involvement by MITI in the activites of the Committee. MITI representatives were in attendance at numerous Committee meetings. Moreover, a review of the minutes reveals that even when MITI officials were not physically present, much of the Committee's time and energy was spent discussing requests made by MITI or preparing materials to submit to MITI. For example, at the October 15, 1973 meeting (D 15109-11), the following items were apparently discussed:

> Pre-heat presentation to MITI
>
> Issues concerning advertising and labeling of home electric appliances
>
> Report on MITI's proposed guidelines and the attitude of Tokyo's sanitation department on the question of large-size waste disposal
>
> MITI's request for materials relating to model changes
>
> Report on a meeting with consumers sponsored by MITI
>
> MITI's expected announcement of new administrative guidance regarding retailers pressing for new purchases rather than procuring replacement parts.

We fail to see how such evidence helps plaintiffs' claims.[171]

Three additional groups, related to the EIAJ, must also bear special mention: the Japan Light Machinery Information Center (because the plaintiffs made so much of it in the final round of briefs), the Color TV Manufacturers' Fair Trade Council,

[171] It may also be contended that accomodation to MITI might be one ingredient militating against liability under a rule of reason test. *See* n. 124, *supra*.

and Konshin Kai (because these latter two are the subject of a post-summary judgment argument sally and apparently thought by plaintiffs somehow to resurrect their case).

Although it might be considered an activity in the U.S. rather than in Japan, because the Japan Light Machinery Information Center allegedly is an arm of the EIAJ, we shall deal with it here. Plaintiffs state in their FPS:

> "The defendants created and funded, through the EIAJ, the Japan Light Machinery Information Center in New York. . . .
>
> The JLMIC acted as liaison between the United States' subsidiaries of the defendants. The JLMIC also facilitated the communications between the EIAJ and JMEA in Japan and the U.S. subsidiaries. In fact, the JLMIC has been referred to as the "EIAJ-N.Y."

FPS at 4851.[172]

Plaintiffs allege in thier FPS that the JLMIC received information concerning JMEA Agreements (FPS at 4862); forwarded information to the JMEA regarding market penetration, current events and marketing (FPS at 4856-4858); relayed information concerning import statistics and estimates of future demand (FPS at 4855); discussed the possibility of import restrictions (FPS at 4867); and promoted Japanese products in the United States (FPS at 4854).

The bulk of the documents cited in support of these claims are copies of the JMEA *Association News* which cover a multitude of topics, dealing with a multitude of products (e.g., cameras, clinical thermometers, optical equipment) and with dealings of Japanese firms in the four corners of the globe.

[172] The plaintiffs have neglected to point out in their arguments and briefs what appears from our reading of the actual documents (i.e., the JMEA Newsletters)—that there are Light Machinery Information Centers in London and Bangkok, as well as in New York. We assume the plaintiffs believe that these offices support conspiratorial activity in England and Thailand as well.

Accounts of activities of the New York Light Machinery Center generally concern that Center's reports on proceedings in the United States which were being transmitted back to Japan. For example, document MA296, on JLMIC stationery, simply tells EIAJ members about testimony given at hearings of the Tariff Commission. Other typical entries, set out in the margin, taken from documents relied upon in the FPS, demonstrate that plaintiffs' conclusory statements ascribing a role in the "unitary" conspiracy to JMLIC activities are not borne out by the documents.[173] At best, these matters reflect harmless (and ostensibly pro-competitive) data dissemination. *See* Part VI.A.5, *supra*.

The documents cited were not proffered as DSS's during the pretrial evidentiary hearings and are, as of this writing, unau-

---

[173] Sample entries relate to:

(1) dry cell battery and TV problems in regard to the Fair Package Labelling Law of the U.S.A.;

(2) the distribution of "Machinery Japan 1967";

(3) distribution of catalogues, etc. for the International Automobile Show;

(4) the FCC's proposal concerning walkie-talkies;

(5) the influence of the increase in marine freight;

(6) preparations for the reception for the group which is investigating telescopes in North American markets;

(7) information from 13 newspaper articles;

(8) trends of the Olivetti Corp;

(9) the receipt of surveyors for consumer electronic machinery and appliances;

(10) the declining number of orders received by U.S. factories;

(11) order acceptance of the U.S. machine tool manufacturers in December;

(12) the decline in profits of the Ford Corporation;

(13) the number of lines for advertisements in U.S. general newspapers;

(14) outlook for RCA's pocket-size TVs;

(15) the sales decrease of the Chrysler Corp.
Similar entries are found regarding the other Light Machinery Information Centers in London and Bangkok.

thenticated hearsay documents. However, we assume admissibility and note that defendants do not deny that: (1) the JLMIC was created by the EIAJ for the purpose of promoting the export of products manufactured in Japan into the United States; (2) the JLMIC would furnish to the EIAJ statistical data for consumer electronics imports and estimates for future demand of CEP imports; (3) that the JLMIC forwarded other information as to the progress of the dumping proceedings back to Japan. But, to repeat, these actions do not give rise to an inference of Sherman § 1 liability.

The conclusory statements in the FPS that the innocuous documents which we have mentioned are evidence that the JLMIC coordinated a "cover-up" of activities among the Japanese manufacturers for the record are also not supported.[174] Because of their litigation strategy, *see* pp. 1200-1202, *supra*, plaintiffs have not taken the deposition of anyone connected with the JLMIC to shed light on the documents related to the JLMIC's activities, nor will they, since the FPS lists no such witnesses. Thus, we are relegated to the documents, which do not advance plaintiffs' case at all.

The Color TV Manufacturers' Fair Trade Council is referenced in plaintiffs' post-summary judgment argument memorandum of September 22, 1980, which lists a large number of documents which supposedly reflect conspiratorial meetings. However, all of these documents are in Japanese. In the same

---

[174] Plaintiffs have asserted that the "cover-up" was engineered by EIAJ's U.S. counsel, H. William Tanaka, Esq. In addition to our observation in the text, we recall our discussion in Part VI.A.8, *supra*, to the effect that no inference of conspiracy can be drawn from joint legal action in response to a joint legal problem. Where, as in this case, the defendants for the most part merely defended themselves in a legal action, defendants' activities cannot even colorably be held to fall under the "sham" exception to the *Noerr-Pennington* doctrine. Without some showing of bad faith or an egregious attempt to clog judicial channels by instituting claims, defendants cannot be held to have violated Section 1 of the Sherman Act in their concerted activities involving governmental action. There has been no evidence offered to support such a showing.

memorandum, plaintiffs refereced a group known as "Konshin Kai."[175] They cite some 32 pages of documents referable to that group, but again, all of these documents are lodged in the document depository in Japanese. To repeat, we will not consider documents which are not in compliance with valid case management orders.

As we stated earlier, our discussion does not purport to summarize everything that the plaintiffs have said about the EIAJ and its committees and subcommittees and affiliated groups, but it sets forth everything of any significance.[176] However, nothing in any of these materials constitutes any basis, alone or in conjunction with other evidence, for creating a genuine issue of material fact as to the existence of a "unitary" conspiracy among the defendants.

We cannot conclude the EIAJ segment of this opinion without referring to the fact that, during the final summary judgment argument, defense counsel addressed plaintiffs' allegations as to the EIAJ's committees for several hours, demonstrating that the documents referenced in the FPS showed nothing, or at least did not add up too probative evidence raising any material factual issue. Yet plaintiffs have provided no citations to any documents to counter defendants' arguments, and have advanced no specific answer since the argument. They have, however, devised an approach to the problem—an attempt to shift the burden to the defendants to prove that they were *not* engaged in conspiratorial activities.

[175] As far as we can recall, this is the first mention of this group. Although it is not clear that it is an EIAJ related group, its placement in plaintiffs' brief in the same paragraph with the Color TV Manufacturers' Fair Trade Council, which is listed in the FPS as being EIAJ-related, leads us to assume that "Konshin Kai" was also so related.

[176] We repeat that we have not separately treated all of the numerous groups, committees, and subcommittees mentioned in the FPS. However, we have not been cited to any documents of these miscellaneous groups in plaintiffs' 1000-plus pages of final briefs, nor at the pretrial evidentiary hearings, that are of any significance. Nor has the FPS revealed any.

Referring during the course of his final summary judgment argument to the numerous meetings of the defendant groups, plaintiffs' lead counsel, Mr. Rome, observed that defendants "weren't just whistling Dixie" at thsese meetings (PTO 291 at 36-37). Mr. Rome argued that an adverse inference could be drawn as the result of defendants' failure to rebut plaintiffs' contentions about the conspiratorial nature of the meetings. In other words, defendants, to avoid an "adverse inference," have to prove a negative: that never during any of the hundreds of meetings of dozens of trade associations and other groups, over a period of more than two decades, did defendants do whatever it is plaintiffs are complaining about. Such an argument falls of its own weight.[177]

Continuing in this vein, plaintiffs, in their Supplemental Post-Argument Memorandum in Opposition to Defendants' Motions for Summary Judgment, have listed the names of a number of individuals who attended meetings of the export committees of the EIAJ (TV, radio, stereo, and electron tube) and have complained that "defendants have failed to provide affidavits" from any of these individuals. To repeat, under the law governing summary judgment discussed in Part V, *supra*, that is not their burden. Notwithstanding plaintiffs' innuendos, their evidence of activities of the EIAJ amounts to nothing.

[177] We note that a number of affidavits have been filed denying plaintiffs' allegations. One affidavit directly addressing the role of the EIAJ is that filed in support of Sony's summary judgment motion by Akio Morita, Sony's cofounder and chief executive officer. In Morita's affidavit, he states that

> the EIAJ is a trade association composed of companies in the electronics industry. I have served as a director and vice chairman of the EIAJ. Among other things, the EIAJ promotes research concerning safety and engages in the dissemination of statistics which are of interest to the industry. To my knowledge, it was never used as a forum for fixing prices or sales in Japan or the United States. (Morita Aff. ¶ 58).

As our discussion in the text shows, this affidavit is unrebutted by any *facts*.

4. *The JMEA and the Television Export Council*

The Japan Machinery Exporters' Association ("JMEA"), a trade association of companies engaged in machinery export, was formed in 1952. The JMEA's membership is comprised of more than 500 Japanese companies engaged in the export or manufacture for export of aircraft, ships, motor vehicles, bicycles, many kinds of industrial, agricultural, and business machinery, roller bearings, sewing machines, and home appliances, in addition to CEP's. Defendants MEI, Toshiba, Hitachi, MC, Sanyo, Sharp, and Sony, as well as various of their subsidiaries, were, at all times relevant to this case, members of the JMEA. The JMEA is divided into sections and committees that deal separately with various aspects, including exportation, of the wide range of products, including CEP's, exported by the member companies.[178] The JMEA was first established under Article XI of the Japanese Export and Import Trading Law (Law No. 299, August 5, 1952, as amended) (EIT law). Its purpose, as set forth in Article I of the Articles of Association, echoes the central language of the EIT law:

> "The purpose of this association shall be to promote the development of a sound export trade in machinery through the prevention of unfair export transactions, the establishment of an orderly system of export, and engaging in undertakings designed to advance the common benefits of its members."

JMEA's Articles of Association, Article I (1977). Despite plaintiffs' contention, this language does not point to the existence of a conspiracy.

Plaintiffs claim that the JMEA "was formed . . . to effectuate various agreements among its members regarding export of consumer electronic products from Japan," FPS at 4585, and that it provided "a forum for joint discussion and coordination of price levels of television receivers" exported to the United

[178] Appendix A lists 23 JMEA committees and subcommittees.

States, FPS at 4590. However, plaintiffs' evidence—consisting of defendants' interrogatory answers and materials from the JMEA's *Association News* and other documents of doubtful admissibility—does not bear out their claims.

According to plaintiffs' evidence about JMEA meetings (and assuming arguendo its admissibility),[179] various JMEA committees purportedly met to discuss such subjects as (1) market conditions in the United States and other countries; (2) possible, potential, or actual import restrictions, impositions of dumping duties, surcharges, or other restrictions with respect to consumer electronic products to be imported into the United States; (3) simplification of export procedures; and (4) export regulations affecting countries other than the United States.[180] None of these can give rise to liability.

Dissemination of generalized information about (U.S.) market conditions is not improper for, as we explained in Part VI.A.5, *supra*, exchange of such information is usually considered pro-competitive. Since concerted action to confront government regulation which affects an industry cannot be the subject of antitrust liability under the principles explained in Part VI.A.8, *supra*, mere discussion of that governmental regulation cannot be probative of the conspiracy alleged by plaintiffs.

The JMEA was concededly the vehicle through which the Manufacturers' Agreements which we have discussed in the preceding section were drafted and implemented. As the foregoing discussion makes clear, both the JMEA charter and its actual operation demonstrate its close relationship to MITI. Notwithstanding all of their pejorative and conclusory statements, and 270 pages of the FPS, our review of all the (trans-

[179] That is a very large assumption, wholly unsupported by our experience in this case. *See* Japanese Materials Evidentiary Opinion, where similar documents, offered for similar purposes, were excluded.

[180] We have taken up the plaintiffs' evidence with respect to JMEA-related dissemination of export related production data in Part VII.G. 2(c), *supra*.

lated) JMEA documents, including those related to the various JMEA committees, makes clear that what plaintiffs have documented about the price-related activities of the JMEA, assuming admissibility of the underlying evidence, is esentially that the Manufacturers' Agreements were developed by close cooperation between the JMEA and MITI; that the setting of check prices was effected at JMEA meetings attended by MITI representatives; and that the JMEA regularly assisted MITI in performing various ministerial duties and acted as the vehicle for implementation of the export control arrangements.

As the scope of the JMEA's activities would suggest, *see* p. 1221, *supra*, there are countless entries in the JMEA newsletters reflecting the worldwide scope of the JMEA's activities in export-related matters. For example, the JMEA Association News for the period 2/11/69 to 3/10/69 (Sony document # 0527-0531) contains such entries as: the Export Insurance Committee; Countermeasure Council on Australian Tariff; Industrial Machine Section (discussion of plan to send a group to investigate the African markets and to plan and compile a guidebook; study of intensified PR for the commodities shipped to Central and South America; and decision to survey (the Indonesian market); explanatory meeting on yen credit to the Philippines; preview of the 8mm promotional movie on pesticide disbursing equipment; and explanatory meeting on trade situation with Iraq.

The short of it is that the only evidence that plaintiffs have adduced as to the JMEA either relates to traditional trade association activities or else to the involvement of the member companies with the export control arrangements which we have described in the preceding segment of this opinion. However, we have already explained that plaintiffs, as competitors, cannot suffer antitrust injury from the Manufacturers' Agreements and JMEA Rules, Part VI.B. *supra*. Since these arrangements cannot give rise to antitrust liability, plaintiffs

have added nothing to their case against summary judgment by their dissertation upon the JMEA.[181]

We separately discuss the JMEA-sponsored Television Export Council, albeit briefly, because plaintiffs have, at least in earlier submissions in the case, asserted that it was one of the prime vehicles for implementation of defendants' export conspiracy to destroy the U.S. CEP market, and because plaintiffs offered six Television Export Council documents as putative "smoking guns" at the pretrial evidentiary hearings. The Television Export Council was created under the Manufacturers' Agreements to serve as a liaison between the manufacturers and MITI, and functioned as a vehicle for registration of customers and brand names. Television Export Council meetings were attended by MITI representatives; at these meetings, the level of check prices was often discussed.

The documents to which we have referred, DSS 1030 to 1036, are discussed at pages 1310 to 1313, of the Japanese Materials Evidentiary Opinion. For the reasons there set forth, they are inadmissible. There has been no admissible evidence called to our attention (and our independent document review reveals none) tending to show that the Television Export Council was a vehicle for conspiratorial activity as alleged by plaintiffs. Rather, at most it was the vehicle for determining the minimum or "check" price. We thus conclude our discussion of the Television Export Council with the same comment that we made in connection with our discussion of the activities of the JMEA—since the check price agreements create no liability, neither does anything that happened at the Television Export Council.

[181] If, of course, plaintiffs can produce evidence that the minimum prices were artificially low prices (set by concerted action) then they might have a case, but as will be seen, they have offered no such evidence here.

5. *The Market Stabilization Council, The Nine Essential Points of Implementation, and The Four Associations Conference*

Plaintiffs' earliest "evidence" of the alleged home market price fixing conspiracy emanates from JFTC Case No. 5 of 1957 (the Market Stabilization Council Case), which was brought against the Home Electric Appliance Market Stabilization Council, five of whose members are defendants in this action,[182] and the National Federation of the Associations of Radio and Electric Appliance dealers. In plaintiffs' submission, the Council was an industrywide group formed to "stabilize" the domestic market in electric appliances (the so-called, "white goods": refrigerators, washing machines, etc.), as well as in CEP's, by setting and maintaining artificially high prices and by policing the agreements reached by its members.[183]

We dealt in our public records opinion with the plaintiffs' efforts to introduce into evidence the Recommendation Decision of the JFTC in the Market Stabiliztion Council case. For reasons set forth at length in that opinion, at 88-111, the Recommendation Decision is inadmissible. Apparently recognizing the finality of that evidentiary decision, at least before us, plaintiffs now place heavy stress upon the alleged conspiratorial impact of a document which was an exhibit to the Recommendation Decision, but which plaintiffs never proffered or even referred to at the evidentiary hearings. That document is entitled "Nine Essential Points of Implementation."

---

[182] MEI, Hitachi, Melco, Sanyo, and Sony were members of the Council. Toshiba Shoji Company, Ltd., a non-party subsidiary of defendant Toshiba, was also a member.

[183] Plaintiffs do not advance any export references from the Market Stabilization Council case. Defendants were not exporting television receivers to the U.S. during the relevant period.

The Nine Essential Points of Implementation provide as follows:

I. Manufacturers and the National Radio Federation will, in cooperation with each other, make arrangements to complete the attachment of price cards to the three kinds of goods within a certain period of time;

II. Posters concerning selling at the list price will be printed and distributed.

III. A monitoring organ will be established for each Chapter.

IV. Vigorous implementation of the items of understanding on the prohibition of wholesale-and-retail paralleling by wholesalers. (A material indicating to this effect will be shown in the stores of the wholesalers.)

V. Badges will be made for sellers, and every member of the Association will be required to wear one.

VI. Manufacturers will jointly stage a campaign directed to sellers for the maintenance of the list price.

VII. A Price Maintenance Committee will be established.

VIII. A president's meeting will be held in the future for the purpose of adjustment of production and the maintenance of price.

IX. Manufacturers will cooperate in the advertising by department stores.

By way of laying foundation, plaintiffs have asserted that the Nine Essential Points were identified in Answers to Interrogatories of various defendants, that "defendants admitted drafting" the Points, and that defendants have also "admitted implementing" them by virtue of establishing the Market Stabilization Council. In plaintiffs' submission, the Japanese Manufacturing defendants have made these admissions by specific joint interrogatory answers by which they are bound. Defendants stoutly deny plaintiffs' contentions.

The record regarding the Nine Essential Points is not extensive. It consists of the Nine Essential Points themselves, which are set forth on a one-page, unsigned, undated document, and also that portion of the "Response of Certain Defendants to Plaintiffs' Interrogatories to Defendants Concerning Japanese Trade Associations and Other Groups"[184] that deals with the Market Stabilization Council (that portion makes reference to the Nine Essential Points). The problem with plaintiffs' position is the text of the interrogatory answer itself. The answer states that the Market Stabilization Council was formed in 1956 with sixteen Japanese Companies, including some, but not all, of the defendants in this action, as original members. It also states that in 1956, "certain of the manufacturers drafted a statement entitled 'Nine Essential Points of Implementation' setting forth a *proposed* course of action. Immediately thereafter the Council was established" (emphasis added). The record does not identify who those "certain manufacturers" were. Nor is there anything in the record to support plaintiffs' contention that "the defendants" or any of them admitted implementing the Nine Essential Points, or, indeed, that *anyone* ever implemented the Nine Essential Points. There is not even any evidence that the Market Stabilization Council ever adopted the Nine Essential Points after its formation.

It may be that plaintiffs will derive no benefit from the Nine Essential Points solely because of their failure to lay a foundation for the evidence, and that in reality, as plaintiffs surmise, the Nine Essential Points were drafted, agreed to, and implemented by these defendants. However, we cannot engage in surmise. The fact is that the absence of any record concerning the "Nine Essential Points" is a result of plaintiffs' conscious litigation strategy not to seek explanatory discovery on this subject or any other relating to material generated in Japan. *See* pages 1212-1213 *supra*.

[184] Interrogatory Answers were filed by MEI, MECA, MET, Toshiba, Hitachi, Ltd., Hitachi Kaden, Sharp, Sanyo, and Sanyo Electric Trading, Ltd. The Sony defendants filed separate answers to these interrogatories in which they stated that they do "not have any knowledge" concerning this document.

Plaintiffs have taken no depositions of anyone who is familiar with this document, anyone who was connected with the Market Stabilization Council, or anyone who attended meetings of that group. Because the plaintiffs have preferred to argue from unilluminated "bits and pieces," what we have is a mere piece of paper instead of a meaningful document. In terms of the principles enunciated in the Japanese Materials Evidentiary Opinion, plaintiffs have offered nothing which would estabish the Nine Essential Points as an admission or as a business record, or which would justify its receipt under the residual hearsay exception. This includes Melco document 20404 submitted to the court after the summary judgment argument by letter of October 20, 1980.

However, even assuming that the document containing the Nine Essential Points could be admitted into evidence against certain of the defendants, it would be of no probative weight, for it has nothing whatever to do with export matters. It also could not be used to show "war-chesting," for two reasons: (1) there is nothing in the record to show that any of its provisions were ever agreed to or, if so, were carried out,[185] and (2) it appears on its face to concern, at most, resale price maintenance at the retail level and that does not implicate any increase in the profits of the manufacturers. We add that, as appears from documents reflecting activities of the groups involved in the Six Company Case, *see* discussion *infra*, resale

[185] We also note that the interrogatory answer upon which plaintiffs rely and the (inadmissible) "Recommendation Decision" of the JFTC state that the Market Stabilization Council abandoned the challenged activities when the JFTC commenced its proceeding. Notwithstanding these statements, the plaintiffs submit that the Market Stabilization Council continued in existence throughout the relevant damage periods in this case. That point is not important in view of the lack of evidence that any activities of the Market Stabilization Council were germane to plaintiffs' alleged conspiracy.

price maintenance was a vehicle to protect the economic viability of the retail outlets of the manufacturers. A price maintenance policy which would protect retailers from cutthroat competition, thus keeping their own profit margins up, would not aid the manufacturers of the goods. Indeed, the protection of the retailer and increase in the retailer's profit margins would be at the expense of the manufacturer, and that would be inconsistent with the war-chesting theory. While, to be sure, the retailer is an important part of the distribution chain, the mere existence of the Nine Essential Points of Implementation does not suggest that the manufacturers were charging high prices as a part of a high price/war-chesting conspiracy.

In addition to the foregoing deficiencies, plaintiffs have made no effort whatever to show that prices of CEP's in Japan went up or failed to go down or were stabilized or were in any other way affected by the activities of the Market Stabilization Council or the provisions of the Nine Essential Points. Even more important, plaintiffs have made no effort whatever to show that the profits of any Japanese company regarding consumer electronic products were greater following announcement of the Nine Essential Points than prior thereto. Were plaintiffs to put the Nine Essential Points before the jury, they would not establish any facts helpful to plaintiffs' case.[186]

Plaintiffs allege that during the period between the 1957 JFTC proceedings and the origination of the groups discussed at such length in connection with the Six Company Case, *infra*, a group known as the Four Associations Conference engaged in conspiratorial activity; hence we consider this group before turning to the Six Company Case. Several of the defendants belonged to the Four Associations Conference; in plaintiffs' submission, it arose in response to the JFTC's surveillance of

[186] The FPS description of the Market Stabilization Council also refers to another document known as the "Eight Essential Points of Implementation." However, that document, which we have reviewed, adds nothing to plaintiffs' case either.

the CEP industry. However, we have canvassed the documentary references in the FPS to see if we could find any support for plaintiffs' allegations. We find none.[187]

We could have ignored the Four Associations Conference.[187A] We mention it only because of the approach which the plaintiffs have taken in connection with that group, and because that approach is endemic i.e., plaintiffs spend an enormous amount of time in their FPS demonstrating how individuals who attended meetings of one group also attended meetings of other groups. If, of course, one starts with the presumption of an overall conspiracy, such facts will plainly extend the conspiratorial skein. Otherwise we fail to see how that proves anything in the absence of evidence as to the activities of the groups.

We have now concluded our review of the many facets of the activities of certain groups and associations in Japan. However, the voluminous "evidence" adduced by plaintiffs amounts to nothing. On the arguendo assumption that there is some evidence of conspiratorial activity in Japan, we turn to an analysis of plaintiffs' "connection" documents.

H. *The "Connection" Documents*

In a variation on the export reference theme, plaintiffs have alleged that the existence of an export conspiracy is demonstrated by a showing that Japanese executives engaged in discussions of the relationship between the home and export markets. They have advanced this theme through a series of what they dub "connection documents," which we take up at

[187] What may be the key documents referenced, Melco 20572-73, are not even in the document depository. Moreover, we have looked at the surrounding Melco documents which are in the depository, and they remain untranslated.

[187A] Plaintiffs have never mentioned it during any of the hearings. They devote eleven FPS pages thereto.

this juncture.[188] The notion of "connection" documents was coined by plaintiffs but has also been used by defendants. The parties have used the term "connection" variously to refer to: (1) a relationship between home market and export prices; (2) a relationship between home market and export sales and profits; (3) a relationship between "domestic" and "export" groups; and (4) efforts to conceal from MITI and/or U.S. Customs either the extent of the disparity between home market and U.S. prices or the fact that sales in the U.S. by virtue of rebates, were below the check price reported to MITI and to U.S. Customs. The proffered entries give the plaintiffs no comfort.

We start with Yajima's diary, which includes a 1966 entry which suggests that the JFTC asked Toshiba to explain the price difference between its domestic and export TV prices. A subsequent entry in the diary, which does not purport to be the record of any meeting, would appear to be Yajima's analysis of the cost bases for the differences, including a list of various costs not incurred in export sales. A September 6th entry purports to indicate that the issue was raised at the Tenth Day Group meeting. However, the apparent conclusion of the conferees at the meeting was that there was no reason to worry about the *lack* of any connection between domestic and export prices.[189]

[188] Most, if not all, of the documents discussed in this segment are essentially similar in character to those discussed in the preceding sections, and we could have included the discussion of these documents therein. Moreover, many of the "connection" references have already been held inadmissible. However, because of plaintiffs' emphasis on the "connection" theme and because many of the documents supposedly relate to the critical matter of price, we consider them in a separate segment of the opinion so as to explore whether there is anything to plaintiffs' "connection" theory even assuming the documents were admissible.

[189] Consistent with their litigation strategy, plaintiffs have not deposed the people who attended this meeting even though it supposedly involved discussions linking domestic and export prices; nor have they, in their preclusive FPS, listed as a witness anyone present at the meeting or with knowledge of what transpired. The only other potential "connection" entry in Yajima's diary is in the Hayakawa-Olympic entry which we have explained at page 1211, *supra* and which does not advance plaintiffs' case either.

Plaintiffs also cite two "connection" entries during the same time period from the diary of Hitachi's Mr. Yamada.[190] The first entry is:

> 9/19 Department Heads Meeting(10)
>
> * * *
>
> (2) Palace Meeting . . .
>
> * * *
>
> x related Hibiya-Kai
>
> (Twentieth Day Meeting)
> Trading Division of Sanyo would like to lower, will stay with what is presently in effect for this year.
> For the next year's check price—middle of December.

(footnote omitted). One would need a crystal ball to divine what this entry means. The Twentieth Day or Hibiya Group is reputed to have dealt with export matters, and perhaps it could be inferred from this entry that someone (perhaps a Sanyo employee, but that is by no means clear) may have expressed some thoughts concerning check prices at a meeting of the Palace Group, which allegedly was a "domestic" group. That is only speculative, but even if it were true, such a fact would hardly be probative of the existence of an agreement to coordinate domestic and export prices or of any other conduct contrary to the Sherman Act.

The second entry, also referencing the Twentieth Day Group, states:

> 10/25 Department Heads Meeting (10:00 to 2:00)
>
> 1. Managing Directors Meetings

[190] As we explained in our Japanese Materials Evidentiary Opinion, Mr. Yamada's diary is generally incomprehensible and was never clarified either before the JFTC or in these proceedings.

1. Utilization of automatic [illegible].
2. Okura meeting.
3. PX-X.
4. Hibiya Meeting.

Sanyo 4800Y Check prices (5100. 5300).

(footnote omitted). This entry is even more cryptic than the one cited above, and we cannot permit the inference to be drawn therefrom of the existence of any conspiracy involving domestic and export prices.

Turning to JFTC testimony, which we have held admissible against the defendants in the Six Company Case, we find plaintiffs' position no better served. Thus, Mr. Fujio of Matsushita was asked to explain the difference between Matsushita's domestic and export prices:

> Said trial examiner: From what you have said, I understand that you are exporting a large quantity to America. How about the prices (in America) as compared with domestic prices?
>
> Said Witness: The nominal price changes. (The price of televisions which we export to America) is the price at which we deliver the TV at the Port of Kobe, that is, the CIF price, + the price at which we deliver (the commodity) at the Port Kobe is the so-called export price. Then, the importers pay the transportation expenses of shipping (the commodity) and importing (it) by paying import taxes and after making some profit they deliver (it) to the dealers. *The selling price is generally balanced with the normal price in Japan.* The reason being that they pay all expenses. The manufacturer's export price (expenses) end at the time when the commodity is delivered to the Port of Kobe. However, in Japan, we must advertise the commodity, and do other things as well. That is how we end up with the price I have mentioned. Various things are added to the price at which (the commodity) is delivered at Kobe, and these are paid by them. *This is why the price on the American markets is balanced with the price in Japan.*

(emphasis added) (footnote omitted). This testimony does not support the conclusion that there was an export conspiracy;

rather it accounts for or harmonizes differences between domestic and export prices.[191]

There being no direct evidence of an export conspiracy or of any connection between import and export prices anywhere in this voluminous record, plaintiffs have turned to other devices to attempt to estabish that connection. They have contended that an inference of an export conspiracy can be drawn from documents which established that some of the individuals who attended meetings at which domestic sales were discussed also allegedly attended meetings at which exports were discussed. Accordingly, they proffer a chart listing a number of persons whom they contend attended both domestic and export meetings. As we have explained, the existence of meetings alone without some direct evidence of what occurred at those meetings does not lead to an inference of antitrust violation, and we fail to see how nothing becomes something because a person attended several meetings.

Plaintiffs also contend that concealment of the (alleged) price disparity between the home and export markets gives rise to an inference of concerted action. This claim is advanced principally by means of the oft-cited Japan Victor document, which we held inadmissible in the Japanese Materials Evidentiary Opinion at 1303-1309. Of course, even if there had been such concealment, and if the Japan Victor document in fact tended to establish that concealment, it would not be evidence of the conspiracy pleaded by plaintiffs, because concealment of the price disparity would be at least as consistent with the concealer's self-interest (in seeking to avoid detection for MITI or U.S. Customs' violations) as with conspiracy.

---

[191] We held inadmissible in the Japanese Materials Evidentiary Opinion at 1294, the testimony of Mr. Yoshioka of Sanyo and Mr. Kamakura of Toshiba. Mr. Yoshioka's testimony was similar to that of Mr. Fujio. If admissible it would have supported defendants' position because he concluded, after making certain basic calculations, that "our customers here and the people in the U.S. will be able to buy our products at the same price." Mr. Kamakura apparently denied any connection between import and export prices.

Plaintiffs introduced a number of additional "connection" documents at the pretrial evidentiary hearings, and we take these up in the order of submision. DSS 101, dated December 11, 1965, is a one-page chart entitled "itemized minutes of the October 10 meeting of the presidents of sales companies from all over Japan." It purports to relate to a meeting at which MEI's "new sales system" was discussed with MEI's distributors. The pertinent part reads as follows:

Speaker	*Nature of Speech*	*Subjects*	*Summaries*
Vice President	Greetings	1. Expression of gratitude for a favorable export situation. 2. "Would like to establish Rules"	1. Export has reached 90-million dollar mark. This was an achievement which was supported by a foundation of domestic sales. 2. . . . not legible . . .

Despite evidentiary challenge, plaintiffs have laid no foundation for admissibility of this document over hearsay objection,[192] nor have they laid foundation to establish it as an admission of MEI. The inferences to be drawn from the document are totally speculative. We can only guess that it means to say that domestic sales were the "foundation" for export sales. The words, moreover, are not those of MEI's Vice President, but rather of an unknown recorder who may or may not have had first-hand knowledge of what was said.

Plaintiffs speculate that this is an admission that profits earned in the domestic market were used to underwrite sales to the U.S. However, given the fact that the document purportedly reflects a speech of "greetings" to a meeting of

[192] There has been no testimony or other evidence to authenticate this document or to establish it as a business record. We do not know who prepared it, whether the person who did had first-hand knowledge, where the record was kept, and who, if anyone, received a copy. Moreover, the date of the document, December 11, 1965, indicates that it was prepared about two months after the meeting it supposedly records, which leads to the conclusion that it was not made "at or near the time" of the event recorded, as is also required by Rule 803(6).

domestic sales managers, the equally if not more logical inference would be that the speaker was praising these managers by telling them that Matsushita's competitive ability stems from its domestic market share. Plaintiffs' inference that the Vice President was in actuality describing a secret conspiracy to the assembled managers is a surmise typical of plaintiffs' approach to this case.[193]

DSS 102, another alleged "connection document," is an excerpt from the testimony of Mr. Saeki of MEI in the JFTC Matsushita Resale Price Maintenance case. This testimony did not address exports at all. Rather, it discussed MEI's domestic "new sales system," which was at issue in that case. DSS 103 purports to be a "notice of regular meetings for September, 1966." It lists for September 1, 1966 a Market Stabilization Council meeting for 10:00-11:30 and a Twentieth Day Group meeting for 11:30-12:00. Since the Market Stabilization Council was a "domestic" group and the Twentieth Day Group an "export group," DSS 103 is proffered as evidence of coordination between domestic and export activities. However, the document does not tend to prove such coordination. Moreover,

[193] There is a second DSS 101, also labeled by plaintiffs as a "connection document," the lecture entitled "Commemorative Lecture at the Appreciation Sale for the Attainment of 6 Million National [MEI's Japanese brand name] TV Sets: The Road to Co-Existence and Co-Prosperity," by K. Matsushita, which we discussed at p. 1205, *supra*. It mentions neither exports nor CEPs.

The document then describes the "summit meetings" which had been taking place monthly during the previous year, during which future domestic demand was estimated, for fans and refrigerators for the purpose of avoiding over-production:

> "The first thing we discussed last year concerned refrigerators and fans. We determined the production volume of refrigerators for this year, 1965. But having summed up the total quantity produced by each company, it exceeded demand by 2 million units. The tendency is also true for fans. This should not be."

This document has nothing to do with any "connection" between domestic and export sales of CEPs.

its admissibility has been challenged and it is inadmissible under the standards set forth in the Japanese Materials Evidentiary Opinion. We do not know who prepared this document or anything about the circumstances of its preparation and, in the absence of depositions, we do not know whether the meetings noted therein actually took place, or, if they did take place, what transpired.

DSS 104 is a page from the diary of Mr. Kozukue of Sanyo, which says only that a meeting of some "20th Day Group" took place on May 20, 1965. It appears in the FPS only in Appendix B, the "calendar" of "conspiratorial meetings." It is as inadmissible as the other diaries in this case, because there is no evidence to establish it as a business record or as an admission or otherwise to justify its admissibility. Furthermore, plaintiffs do not claim that Mr. Kozukue was a member of the 20th Day Group relating to CEP's (*see* FPS Exhibit A at 473-74); therefore, if this document had reflected a meeting of this group, it could not be based on personal knowledge. Moreover, the entry is irrelevant because it does not establish any "connection" between the domestic and export markets: it does not even say what happened at this alleged meeting.

The plaintiffs also offer as "connection documents" several of the oft-cited "Ex. Hall" documents, which were marked as exhibits at the deposition of a Sears, Roebuck executive. The most celebrated among these documents is the so-called "Parson's Meeting Anti-Dumping" memo which describes the manner in which the Japanese manufacturers, or at least Sears' suppliers Toshiba and Sanyo, evaded the Japanese check price system through the rebate scheme. These documents do not show any "connection" between a home market and export conspiracy, in pricing or otherwise, and they do not aid plaintiffs' case for reasons which will be clear in our discussion of the "rebate scheme" in Part VII.L, *infra*.

Although plaintiffs have relied heavily on their ability to draw an inference from one conspiracy to another, the existence of a home market conspiracy, assuming arguendo that there was one, is no ground for inferring the existence of an export conspiracy. As we explained in Part VII.F.3, *supra*, evidence of one alleged conspiracy is not a basis for drawing an inference of the existence of some other conspiracy. *See Golf City, Inc.* v. *Wilson Sporting Goods Co.*, 555 F.2d 426 (5th Cir. 1977). Thus, in sum, the "connection" documents, separately or together, amount to nothing, and supply no evidence to support plaintiffs' case.

I. *The "Intent" Documents*

We turn next to a group of documents which the plaintiffs have denominated "intent" documents.[194] These documents fall into two basic categories. First, plaintiffs proffer the Rationales to the various Manufacturers' Agreements and the JMEA Rules to which the Japanese manufacturing defendants were signatores. Second, they rely upon statements, mostly public statements, of certain executives of the Japanese manufacturing defendants. The Rationales and the statements are interpreted by plaintiffs as clearly evincing a predatory intent to destroy the American CEP industry. Both are said to constitute evidence *aliunde* from which the existence of a low price export conspiracy among the defendants can be inferred, constituting a basis for the admission of coconspirator declarations.[195]

We address first the Rationales to the various Manufacturers' Agreements and the JMEA Rules. The operative provisions of those documents have been discussed *supra*, and copies of the initial Manufacturers' Agreement and the initial

[194] We shall deal here only with "intent" documents related to export matters. Domestic "intent" statements have been dealt with in Part VII.G.2.(b), *supra*.

[195] We note preliminarily that although the FPS devotes 396 pages to the subject of "intent" (claiming all the while that "intent" is demonstrated and established by all the facts and circumstances set forth in the *entire* FPS), the only specific evidence of intent relied upon is that contained in the Rationales and the executives' statements.

JMEA Rules, with their Rationales, constitute Appendices A and B, respectively, and are not published. Although the text of the Rationales varied from year to year, the initial Rationales which are included in Appendices A and B are fairly representative of the tone and overall substance of the later versions.

In plaintiffs' submission, the Rationales demonstrate the defendants, predatory and conspiratorial intent. Plaintiffs place particular emphasis on a relatively small number of excerpts from the Rationales. For instance, they point to an excerpt from the Rationale to the initial Manufacturers' Agreement which states that "attention is now focused upon the exportation of television sets as the new star of the nation's export electronics equipment." This Rationale continues:

> We, manufacturers of television sets, on the basis of our confidence in the international growth of the electronics industry and realizing that horizontal division of labor is a growing trend among advanced nations, hereby undertake to consolidate and establish the export system, particularly concerning television sets for the United States on the basic principle of commercial ethics among businessmen, to nurture our market in the United States which is already on its way to growth and to respond to the desires and the industry of that country.

Plaintiffs contend that the quoted statements are evidence of defendants' intention to acquire a monopoly in the U.S. television market. In plaintiffs' view, any reference to an international "division of labor" is a "euphemism" for the defendants' intention jointly to "capture and share a monopoly of the United States markets." Plaintiffs' PPTM at 95-97.

Several of the Rationales to subsequent Manufacturers' Agreements also contain the following language:

> [W]e must restrain ourselves from being enmeshed in so-called excessive competition and must further strive to establish export order so that we may avoid unnecessary friction with the U.S. industry.

Plaintiffs contend that the statement is evidence of the defendants' intention to eliminate competition among themselves.

The plaintiffs also cite several passages from the Rationales to the JMEA Rules. The Rationale to the initial version of the JMEA Rules states:

> For the current year, a conservative figure of 530,000 units has been set as the target for exportation to all regions.

In plaintiffs' submission, this comment demonstrates that the defendants jointly set a target for the volume of their exportation. The same Rationale also includes the following statement:

> Thus, the businessmen involved have decided that, acting as one body, they will strive to maintain export order and, furthermore, to aim for steady expansion of exportation. With respect to regions other than the U.S., separate measures shall be devised as needs arise.

Similar language is contained in the Rationales to subsequent versions of the Rules. In plaintiffs' submission, this language is evidence of the defendants' conspiratorial intent. For the reasons which follow, we disagree.

The statements which plaintiffs have selectively excerpted from the Rationales must be read in the appropriate context—that is, in the context both of the entirety of the Rationales from which they were taken, and of the Agreements and Rules which the Rationales accompany and purport to explain. The overall tenor of the various Rationales is that the Agreements and Rules were intended to provide the means to reduce friction between Japan and its trading partners, principally the United States. For example, the Rationales to the Manufacturers' Agreements for the years 1968 to 1971 all contain the following statements:

> [I]n recent years, the protectionist trade movement has been gaining momentum in the United States, the area to which the Agreement applies.
>
> Henceforth, even more than heretofore, we must restrain ourselves from being enmeshed in so-called excessive competition and must strive to establish sound export order and promote proper growth of exportation.

The phrase "excessive competition" appears to refer to competition between the Japanese and the U.S. manufacturers, and not to competition among the Japanese themselves. The Rationales are thus consistent with the Manufacturers' Agreements which, as we have noted *supra*, establish minimum prices for products sold for export, while permitting the signatories to sell at any price at or above the minimum level. The establishment of a minimum price is obviously the converse of concerted predatory pricing. While we are aware that on the present motions for summary judgment the plaintiffs are to be given the benefit of all favorable inferences which the law allows, the Rationales and statements therein must be considered in their proper context.

We summarize our conclusions about the Rationales as follows. First, leaving aside the extent to which the draftsmanship represents the efforts of MITI or of the Japanese manufacturing defendants,[196] as well as the question whether the agreements were mandated by MITI, we cannot draw the inference of a low price conspiracy. For even if, as plaintiffs continued in their post-summary judgment argument briefs, the MITI check price was, in fact, a low price, the language of the check price agreements cannot be contorted by plaintiffs' contentions as to the signatories' real intent; it is a minimum price which cannot injure the plaintiffs. Second, the language of the Rationales, even aside from their context, is too general, and susceptible of too many other inferences, to support plaintiffs' proposed interpretation. We turn now to the statements of the executives.

The first document of this type on which plaintiffs rely is the transcript of the JFTC testimony of Mr. Nishi of Hitachi in which he described the home electric appliance industry as "Japan's heritage" and further stated that now that the export on TV's is firmly established, the Japanese intended to "work

---

[196] The record is undisputed that MITI was heavily involved in the drafting of the Agreements.

at it until TV's become a specialty of Japanese industry." Plaintiffs assert that "specialty" is a euphemism for "monopoly," but we fail to see how this statement can be evidence of a violation of the Sherman Act.

DSS 111, which plaintiffs proffer as a group of "intent" documents, collects several articles which appeared in the "My Thoughts" column of the JMEA Association News, a trade publication put out periodically by the JMEA.[197] The articles are all filled with generalized rhetoric, and are not probative of anything. Assuming their admissibility, we take them up in no particular order.[198]

Sony 605, which is undated, purports to be an essay entitled "Theme for 1970's," by Mr. Furuyabu, identified as Managing Director and Director of Main Trade Department, Sharp Corp. In this article, Mr. Furuyabu is quoted as saying that:

> For our industry, there is no other market in the world that can replace the U.S. market. The development of other markets is, of course, to be continued in order to correct the uneven state of distribution; however, further efforts should be required to retain the U.S. market.

There is no mention of what those "further efforts" to "retain the U.S. market" are to be, or even specific mention of exports

---

[197] We again note our concurrence with defendants' view that public statements, whether in speeches, newspaper articles, or public testimony, are hardly a likely place to find evidence of a conspiracy. Putting that matter aside, however, we note that the plaintiffs have not laid any foundation for the admissibility of these statements. We will nonetheless assume admissibility.

[198] These articles, of course, have serious admissibility problems. Newspaper articles are routinely held inadmissible as hearsay. *Pallota* v. *United States*, 404 F.2d 1035 (1st Cir. 1968); *Poretto* v. *United States*, 196 F.2d 392 (5th Cir. 1952); *United States* v. *Nacrelli*, 468 F.Supp. 241 (E.D.Pa. 1979), *aff'd mem.*, 614 F.2d 771 (3d Cir. 1980); *Robert Stigwood Group* v. *O'Reilly*, 346 F.Supp. 376 (D.Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096 (2d Cir.), *cert. denied*, 429 U.S. 848, 97 S.Ct. 135, 50 L.Ed.2d 121 (1976). We know nothing about the preparation of these articles—the author, his sources, his knowledge, etc.

of CEP's rather than exports in general.[199] There is no indication that Mr. Furuyabu "intended" anything other than to continue to export successfully to the United States, through vigorous competition. That would, of course, be a lawful intent. Indeed, it would run contrary to the spirit of the antitrust laws if we were to hold that it was unlawful for a firm to have as its object the penetration of a market or the increase of its market share. At least it would run contrary to the corporate objectives of Zenith, the lead plaintiff in the case.

When Walter C. Fisher, Zenith's Executive Vice President and Senior Marketing Executive for close to a quarter century, was asked in his deposition to explain Zenith's market objectives, he replied:

> A. *I am going to answer this in a way that you are not going to like at all.* Because you don't understand marketing men at all.
>
> Q. I accept that.
>
> A. I will tell you what *my job objective* would be and will be always: *it is to get all of the market* and then expand it also. [192 A].

(emphasis added). Mr. Fisher's immediate subordinate, Robert Bowen, Zenith's Vice President of Marketing, expressed an identical sentiment immediately prior to the sale of Motorola's color television business. In a presentation to Zenith's senior management in January, 1974 Bowen stated:

> In short, despite the fact that *we already dominate* console color TV sales, *we want even more.* [182-84, 188, 392 A.]

(emphasis added).

Zenith's desire for "all of the market" was not amorphous. Under oath Mr. Fisher admitted to specifically targeting

[199] Mr. Furuyabu's duties included world-wide exports of all Sharp products, not just CEPs.

Motorola and others for elimination from the market and even claimed success in that regard:

> Q. On the next paragraph, . . . you make the statement, and I quote, in part, "I cannot, in good conscience, at this time project Zenith penetration any higher than the 23½ percent [of the U.S. color television market] shown *unless we shake out some of our competitors now in the business.*" Now, your reference to competitors, are those the competitors that are set forth on Page 64949—75?
>
> A. Yes, sir.
>
> Q. Magnavox, *Motorola*, Admiral, Sears, G.E., Westinghouse, Philco and others?
>
> A. Yes, sir. Some of those I felt were at the levels of penetration they could attain, and there would be some question of their ability to stay in the market, and *there was a shake-out.* We didn't shake them out; *we shook them into multinational corporations*, tremendous. *You know what happened:* Admiral with Rockwell, *Motorola with Matsushita*, Magnavox with Phillips (*sic*). [193-96, 520-23 A.]

(emphasis added). Plaintiffs have also invoked a statement from the deposition of Joseph J. Sullivan, a former employee both of Sony and of NUE. Mr. Sullivan testified in 1971 that, in a 1964 conversation, Akio Morita, President of Sony, said: "Sullivan San, militarily we could never defeat the United States . . . [b]ut economically we can overcome the United States and become number one in the world."

These statements of competitive desire to succeed in penetrating a market, even to become "number one," are not redolent of violation of the Sherman Act. Unless one begins with the conclusion that the utterers of such statements are monopolists, the inference of conspiratorial predatory monopolistic intent is the sheerest speculation. It not only is not a violation of the Sherman Act to want to be "number one," but it is quite consistent with the competitive ethic which underlies the act; hence the statements to that effect by executives of the Japanese defendants do not help plaintiffs' case.

Sony 909 is attributed to Mr. Motoda of Hitachi. This article, entitled "Strategy for Export," states in pertinent part:

> The most important thing for us in the future would probably be a wide-range strategy for export.
>
> * * * * * *
>
> Future, with respect to 'route sales' products, it is, needless to say, most important to establish sales routes; however, it is not enough to think clearly because problems such as what cooperative system should be established among manufacturers, Japanese trading firms and overseas trading firm, whether we should aim for export of finished products or principally for export of parts under technological corporation, or taking a step further, whether we should go into overseas production by advancing our enterprises, etc., have formed into a disorderly whole. *Therefore, we can no longer deal with problems of export and business expansion on an individual basis.* Moreover, we cannot expect a widening of the market with a leap unless we create a market by making new products which presently do not exist in the world.

(emphasis added). Plaintiffs seek to infer from this paragraph and especially from the underscored sentence that the author had an "intent" to conspire about export prices. In our view, the passage does not support such a construction, for the cooperation it suggests has nothing to do with price. Moreover, it is couched in the utmost generality, does not mention any specific product, and purports to be only the "thoughts" of the author, not necessarily the policy of Hitachi. This article does not advance plaintiffs' case one whit.

Sony 689 was apparently written in 1966, purportedly by a Mr. Tanaka, who is described as Assistant Director of the Foreign Research Section of Melco. The article, entitled "Excessive Competition and Correct Competition," first states that

> Domestically, discount sales that have become even a common sales tactic have led to a state of sales competition which is connected to a cumulative increase in losses. . . .

It further states that the same had been true for exports:

> the fact that these (check prices) are even considered to be prices for deductions or rebates is . . . the most extreme reality of excessive competition.

The article continues with the statement that, 10 years previously (*i.e.*, 1956), the Chairman of the EIAJ had stated that export transactions should be made at prices which insured "proper (just) profits" but that "the majority of persons who attended this meeting" (who were not identified)

> felt that . . . the first priority is to develop the market in some way, even with the expectation of loss. . . . I think that this was a common idea in those days. . . . Since then, ten years have passed.

The article characterizes and speculates about the views and feelings of unidentified third parties, from a period at least a decade prior to the relevant time period in this case, on the basis of second or third level hearsay. The article does not refer to any specific product category, and, since Mr. Tanaka was only the Assistant Director of the Foregin Research Section, is not shown to be a statement made on behalf of Melco. Thus, the article is inadmissible hearsay. But even assuming admissibility, it is simply too amorphous to be probative of predatory intent.

Sony 705 was purportedly written by Mr. Miyazaki, who is described as a director of the trading department of Fuji Electric, a non-party. The "intent" of a non-party is, of course, irrelevant and the article cannot be an "admission" against any party in this case. Moreover, the content of the statement does not help the plaintiffs.

We have referred above to plaintiffs' reliance upon an "essay" by K. Matsushita entitled "Toward the Year of Restored Business By Overcoming the Slump" as evidence that K. Matsushita "explained to the consumer electronics products industry in Japan that competition among rival companies must not be permitted." While plaintiffs have tried to generalize from this document, it is plain that it says nothing about any intent to restrain competition in *exports*. Indeed, agreements

to restrict capacity would drive prices up and would therefore be inconsistent with any claim that defendants were engaged in a conspiracy to flood the U.S. market with low-price goods.

Plaintiffs also cite (at p. 7923 of the FPS) to a portion of the document which states:

> Therefore, some say that we would be more successful if we would narrow down the scope of our business and concentrate on one product line on an international scale.

This statement is apparently argued to be evidence that defendants intended to concentrate on CEP's and create a worldwide monopoly. However, that is not what the document says. Nor is there identification of which companies are implicated by the "some say." This document thus does not help plaintiffs' case.

SC 555-56 is entitled "My Opinions at this Beginning of the Year," from the January 1969 issue of the EIAJ publication "*Denshi*," purportedly written by Masaharu Matsushita, President of MEI. This document contains the following statement:

> In any event, in order to deal with the waves of a floating international economy and to concentrate our efforts on export, which can be called the driving force of economic development for our country, it is necessary first of all to set up as a basic premise the establishment of order in the industry by means of *voluntary cooperation and solidarity*, and then implement it.

This document does not support plaintiffs' conspiracy theory for the same reasons, explained at pp. 1231-1232 *supra*, that the Rationales do not support it.

Plaintiffs also cite a number of internal corporate (unauthenticated hearsay) documents which reflect an interest on the part of *individual* defendants in doing business, or increasing their business, in the United States. Some of these documents purport to set goals of increasing market shares, others describe surveys taken or events occurring in the United States, and still others purport to be documents in which investments in, or the establishment of, facilities in the United States are discussed. Obviously, these indications of an individual

defendant's intent to compete in the United States do not support any inference of conspiracy; hence, we shall not detail them herein.

The plaintiffs' supply of meaningless "intent" documents is virtually limitless. At one point, they even cite an article in the *Atlantic Monthly*. We have spent as much time as we have in discussing these meaningless documents because we believe that fairness requires thoroughness in reviewing plaintiffs' proffers and because we have tried to be respectful of all the plaintiffs' submission. In this instance (as well as in some others) such an attitude has been difficult to maintain because the "intent" documents are so far afield.

J. *Plaintiffs' Allegations of Below Cost Sales*

Plaintiffs have offered Dr. DePodwin's expert testimony that four of the defendants sold their products in the U.S. at prices below their costs. In our Expert Testimony Opinion at 1352-1363, we ruled this evidence inadmissible because, *inter alia*, it was a mathematical construction based upon explicit assumptions which were contradicted by the record, and because the construction was based upon unreliable average prices by screen size.[200]

Under these circumstances, plaintiffs' argument that the predatory nature of defendants' low price export conspiracy is demonstrated by below cost sales falls of its own weight.

K. *Evidence of International Price Discrimination Between the United States and Japanese Markets*

As an element of their purported proof of conspiracy, the plaintiffs have offered voluminous comparisons of the prices which defendants charged in the United States and in the Japanese markets for allegedly comparable products. We ruled most of these materials inadmissible in our Expert

[200] We also noted that far more reliable evidence of defendants' costs was available to the plaintiffs in discovery, but that they had not availed themselves of it.

Testimony Opinion.[201] However, because of their pivotal role in plaintiffs' case, we shall assume arguendo their admissibility and thereupon consider them.

Plaintiffs' price comparisons are based on technical comparisons and model-by-model "matchups" constructed by their technical experts Walter Lukas, Karl Horn, and Vito

[201] The defendants' challenge to the admissibility of plaintiffs' evidence of price differentials between the U.S. and Japanese markets was bottomed on both Article IV (relevancy) and Article VII (opinions and expert testimony) of the Federal Rules of Evidence. Principally, they argued that the products compared were not comparable under the principles adduced in our opinion on the 1916 Antidumping Act claims, that the U.S. and Japanese prices which plaintiffs used were based on sales at different levels of distribution in the two markets, and that the plaintiffs had failed to make necessary adjustments for a variety of selling, distribution, and warranty costs borne by defendants in the Japanese market but not in the U.S. market. The Expert Testimony Opinion addressed defendants' objections to the admissibility of portions of the proffered testimony of plaintiffs' economic expert, Horace J. DePodwin Associates, Inc., which were based on the price comparisons. We ruled that portions of the DePodwin report which were based only on comparison of average prices by screen size and monochrome or color category of television receivers were inadmissible because the averaging of prices by screen size ignored highly significant differences among receivers within each screen size. Expert Testimony Opinion at 1353-1354. We also ruled that Dr. DePodwin's statistical analysis of price comparisons based on technical model comparisons prepared by Zenith personnel was inadmissible. Those portions of that analysis which were based on the defendants' answers to interrogatories 45 and 46(c) we ruled inadmissible because the interrogatory answers provided only list, as opposed to actual, prices in the domestic market. Comparing these prices with actual transactional prices in the United States fails to take into consideration the pervasive use of rebates in the Japanese market. *Id.* at 1355. Those portions of the analysis which were based on the defendants' commodity tax returns were also excluded, for the commodity tax formula results in a hypothetical construct rather than an actual price, again rendering the Japanese price incomparable to an actual price in the U.S. market. *Id.* at 1356.

A far less detailed calculation of price differentials between markets was presented in the DePodwin Report at V-32 to 36. We reserved our ruling on this calculation, *id.* at 1347-1348 because the record was unclear as to the basis for the prices in the Japanese market. Because of our conclusions herein, it is unnecessary that we reach it now.

Brugliera. The matchups and price comparisons are described more fully in our opinion granting summary judgment on the plaintiffs' claims under the 1916 Antidumping Act, 494 F.Supp. 1190, 1203-04 (E.D.Pa. 1980), *appeal pending*, No. 80-2080 (3d Cir.). In that opinion, we held that the technical differences between television receivers and most other consumer electronic products which defendants marketed in the United States and those which they marketed in Japan precluded comparison of those products under the Antidumping Act of 1916, 15 U.S.C. § 72. In the Expert Testimony Opinion at 1354, however, we held that the issue of comparability under the Sherman Act differs from that under the Antidumping Act, and that the products need not be of "like grade and quality," but need only be "sufficiently similar to make the comparison of their prices logically probative of parallel pricing." *Id.*

In plaintiffs' submission, all of their price comparisons, from whatever methodology derived, show that all of the Japanese manufacturing defendants sold comparable products at lower prices in the U.S. than in Japan. The price differential, in plaintiffs' submission, sometimes exceeded 100% of the U.S. price. The plaintiffs do not contend that the defendants each maintained the same price differential between the two national markets, either in absolute terms or as a percentage of the sales price. Indeed, such a contention plainly would not be supported by their calculations. However, plaintiffs contend that their evidence that each defendant maintained *some* price differential between the U.S. and Japan, and sold at a lower price in the U.S., is evidence of parallel business conduct which supports an inference of conspiracy under § 1 of the Sherman Act. We disagree.

Under the principles governing the inference of conspiracy from evidence of parallel business conduct, explained in Part VI.D.4, *supra*, plaintiffs' evidence of price differentials between the U.S. and Japanese markets is not probative of the conspiracy alleged in their complaint. Those principles provide that an inference of conspiracy from parallel business conduct is not permissible as a matter of law unless the plaintiffs can

show that the defendants' behavior made the inference of rational independent choice less attractive than that of concerted action, *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978). Such a showing generally requires that plaintiffs show the defendants had motivation to enter an anticompetitive agreement and that the behavior was truly interdependent, *i.e.*, that it was inconsistent with the defendants' own independent economic interests. *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975). We will assume for present purposes that plaintiffs have come forward with sufficient evidence of consciously parallel business behavior to raise a genuine issue of material fact precluding the grant of summary judgment on the parallel nature of defendants' conduct and on the defendants' consciousness of one another's behavior.[202] Nevertheless, plaintiffs have failed to raise a genuine issue of material fact as to the interdependence of the defendants' alleged price differentials between the U.S. and Japanese markets.

The fact of the matter is that the plaintiffs have never articulated a credible explanation of their theory of the interdependence of the defendants' allegedly parallel pricing. Their purpoted discussions of that interdependence are best characterized as misdirected, diffused, lacking in coherence, and even focusing on irrelevant matters, such as the defendants' establishment of production facilities in third countries like Korea and Taiwan and alleged violations of U.S. Customs laws by means of the double-invoicing system described *infra*.

[202] The defendants argue forcefully that the plaintiffs have made no showing that they conducted their business in a parallel manner, ponting principally to the undisputed facts that they sold at different prices ranging from the lowest to the highest, and that the alleged price differentials between their U.S. and Japanese prices vary widely among different products and different defendants. Defendants also point out that plaintiffs have failed to produce evidence of the competitive price levels and of where defendants' actual prices fit in relation to the competitive level. The only prices plaintiffs set forth in their FPS are charts purporting to show that defendants' prices were lower in the U.S. than their prices in Japan. However, these charts do not show any American competitors' prices, and hence

See, e.g., Plaintiffs' Supplemental Post-Argument Memorandum in Opposition to Defendants' Motions for Summary Judgment, at 210-27 (Sept. 22, 1980).[203]

do not demonstrate that defendants' prices were lower than American competitive levels. Indeed, certain defendants plaintively comment:

> Thus, as incredible as it is in a price-fixing case, the plaintiffs' evidence is totally devoid of any specific pricing data to establish low prices, parallel prices, or interdependent prices. In short, there is no basis from which a conspiracy could be logically, or in any other way, inferred from the record before this Court.

The plaintiffs submit that the alleged fact that each defendant sold at lower prices in the U.S. than in Japan is sufficient to establish parallel behavior. As to consciousness, the plaintiffs contend and the defendants deny that there is sufficient evidence of mutual awareness among the defendants of each other's business conduct in the United States. Notwithstanding the feebleness of plaintiffs' rejoinder to these points, we will accept it for purposes of the summary judgment motion, as the plaintiffs have failed utterly to come forward with any evidence of the interdependence of defendants' conduct, a fundamental precondition for inferring conspiracy even from consciously parallel business conduct.

[203] Plaintiffs' lack of a coherent theory of consciously parallel interdependent conduct is also demonstrated by the following statements by plaintiffs' counsel during the first summary judgment argument in April 1979:

> MR. E. ROME: The parallelism is found in the fact that these companies participated in the meetings of the various groups, participated and joined in the decisions reached, participated and joined in the interchange of information about the myriad details of their business, participated in a planned program fraudulently to conceal what they did, participated and joined in the decision to take over the U.S. market. . . . Consciously parallel, that doesn't mean everybody has to do the same things. It only means that they participated and knowingly agreed to that which is to be done.

PTO 167 at 591-92. And a few moments later:

> THE COURT: Before you close. Interdependence, what is the evidence of interdependence?
>
> MR. E. ROME: I thought I just stated it your Honor.
>
> THE COURT: Do you have more? Just what you stated?
>
> MR. E. ROME: A to Z, everything they ever did.
>
> MR. M. ROME: Your Honor, may I add one more thing. I would refer Your Honor to Section 876 of the Restatement of Torts which to my mind defines in tort terms persons acting in concert which is really interdependence. Interdependence is simply an antitrust word that has been adopted from the law of aiding and abetting. From the law of acting in concert.

PTO 167 at 597-98.

The essence of the plaintiffs' charges with respect to pricing is, as we have noted above, that defendants entered a conspiracy to sell television receivers and other consumer electronic products in the United States market at low prices necessary "to get the available business."[204] The fatal flaw in the plaintiffs' approach to this indispensible and elemental ingredient of an alleged conspiracy is that it describes normal business conduct. No defendant, or any other businessman for that matter, would have any motivation for entering a conspiracy to sell at low prices because one does not need a conspiracy to sell at low prices. One can do that by oneself and would not in any way be aided by a conspiracy; to do so is more consistent with competition than with conspiracy. Thus, plaintiffs' theory fails for want of a logical predicate. Indeed, plaintiffs' entire theory is inherently implausible. Unlike parallel raising of prices, parallel lowering of prices without more (and plaintiffs have adduced no evidence of either parallel reduction of prices or anything more) does not point to conspiracy. Lowering of prices is what a reasonable seller is likely to do to avoid a loss in sales. A parallel price reduction ordinarily reflects a series of market-compelled individual responses, not agreement. However, in plaintiffs' universe, circumstantial evidence of competition becomes evidence of conspiracy.[204A]

Plaintiffs' notion of "artificially low prices" makes no sense, especially since it includes prices which are at the highest price level of the U.S. market, *see* discussion *infra* respecting defendant Sony. To say that what makes the price artificially low is the mere fact that it will get the sale would mean that every

---

[204] Plaintiffs have adduced no evidence that there was any formal *agreement* to price at whatever price "was necessary to get the business" but contend that this pricing policy is evident from the record and that such a policy constitutes parallel conduct from which one can infer conspiracy.

[204A] Defendants make a forceful argument in this regard that the only logical way to infer collusion from evidence of parallel low pricing is if the defendants sell below marginal cost, as in the Areeda-Turner formulation, or at least below *some* measure of cost.

price at which a sale into the United States was ever made of any Japanese CEP was "artificially low" and "predatory," because if it were not, it would not have secured a sale.

To extend the analysis a bit further, we observe that companies do not need to conspire to sell at prices "necessary to get the sale." Indeed, when competitors make their investment, marketing, and pricing decisions, they necessarily assume that the competition "will price to get the business." While the result of such practices may be a depression of prices in the market, it is the kind of price depressing effect which flows from normal competitive pricing behavior and is precisely that which the Sherman Act is intended to secure, not condemn. Indeed, if there had been such an express agreement, the mere fact that the word "price" was mentioned would not render any such agreement in violation of the Sherman Act in the absence of an agreement upon particular price or price levels. *See* discussion at Part VI.A.(2), *supra*.

Plaintiffs' apparent inability to come up with a theory of the interdependence of the price differentials is not surprising for still other reasons. It is undisputed that the Japanese defendants are well-estalished in Japan; plaintiffs themselves have repeatedly pointed out that the Japanese manufacturing defendants collectively control more than 90% of the domestic market for television receivers in Japan. In contrast, during the pertinent times, the defendants were new entrants in the U.S. market, with unknown brand names and with no goodwill or business reputations in the United States. Thus, the defendants individually faced similar circumstances as new entrants in the U.S. market and, therefore, could be expected *unilaterally* to adopt similar pricing strategies to attract customers and gain consumer acceptance in this country. Such a reasonable response to the common business problems presented by the United States market for consumer electronic products to foreign entrants does not support an inference of conspiracy. As noted by the Ninth Circuit in *Independent Iron Works, Inc.*

v. *United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963):

> Like businesses are generally conducted alike and, as the trial judge correctly stated, similarity in operations lacks probative significance unless present "under circumstances which logically suggest joint agreement as distinguished from individual actions."

Another factor ignored by plaintiffs, though equally destructive of their theory of interdependence, is the difference in the market conditions (or, in terms of economic theory, the level and elasticity of the demand curve) between the U.S. and Japanese markets. Charging lower prices in the United States than they charged for similar CEPs in Japan would in no way undermine the unilateral character of defendants' conduct. Price differences between two markets where competitive conditions, income and spending patterns, and products differ are to be expected and, therefore, do not support an inference that the lower price is the result of an agreement.[295] Indeed, in the one case which the parties were able to locate in which evidence of geographic price discrimination was offered as proof of conspiratorial behavior, *Vanco Beverage, Inc.* v. *Falls City Industries, Inc.*, 1980-2 Trade Cas. ¶ 63,357 (S.D.Ind.1980), the court rejected the evidence as insufficient to support allegations of a conspiracy in restraint of trade. *Id.* at p. 75,820.[296]

It is, of course, irrelevant to our present inquiry that price differentials between the U.S. and Japanese markets may

[295] To establish a precedent of drawing an inference of conspiracy in restraint of trade from "low" prices alone, or from a difference between ("high") domestic and ("low") export prices, would have serious international trade consequences, as well as consequences for antitrust policy. The possibility that such an inference could be drawn, with the potential for treble damages in its wake, might result in the type of price rigidity and barriers to competition that the antitrust laws were intended to prevent. We underscore "antitrust laws" to denote that there are legitimate policy goals which can be achieved through protectionist trade policy, in contrast to the antitrust policy.

[296] *Vanco* involved the sale of beer in a single metropolitan area which covered portions of northern Kentucky and southern Indiana, with higher

have: (1) rendered the defendants liable for antidumping duties under the Antidumping Act of 1921, a nonantitrust, protectionist statute; (2) may have violated the Manufacturers' Agreements and JMEA Rules in contravention of Japanese law; (3) may have been accompanied by violations of U.S. Customs law as a result of the double invoicing system; or (4) may have violated the Antidumping Act of 1916 which forms the basis of distinct counts of the plaintiffs' complaints. The question we are considering is only whether or not the price differentials give rise to an inference of conspiracy in violation of the Sherman Act, and not whether the price differentials violate some other law, American or Japanese, which does not require proof of collusion.

The plaintiffs claim that the violation of other laws demonstrates the interdependence of defendants' pricing behavior, but we find no logical basis for this claim. Although we, of course, do not condone violations of any law, it is obvious that under certain circumstances, a firm might find violating a price-control law to be in its own independent economic interests. In an analogous context, the Third Circuit rejected a claim that a conspiracy may be inferred from violations of a price control law by means of allegedly illegal rebates. *Knuth* v. *Erie-Crawford Dairy Cooperative Ass'n*, 463 F.2d 470, 476 (3d Cir. 1972) (Gibbons, J.), *cert. denied*, 410 U.S. 913, 93 S.Ct. 966, 35 L.Ed.2d 278 (1973). *See* discussion at Part VI.A.(7), *supra* and VII.L., *infra*. Thus, in the absence of any elucidation by the plaintiffs of a link between the alleged violations of other laws and the interdependence of the defendants' pricing, those alleged violations are not evidence of conspiracy.

Finally, plaintiffs contend that the interdependence of the defendants' price differentials is supported by evidence that

prices charged in Indiana. While the evidence of parallel discriminatory pricing was, as stated in the text, insufficient to support a finding of collusion among beer distributors, it did support a finding of violation of the Robinson-Patman Act.

that the Japanese defendants' U.S. subsidiaries sustained losses on their operations in the U.S.[207] Such evidence does not provide logical support for an inference of conspiracy. Although *Venzie* requires a showing that the defendants' conduct was "in contradiction of their own economic interests," 521 F.2d at 1314, the mere fact that some of the defendants lost money in the initial years of their entry into the U.S. market, or that they lost money on particular transactions, does not meet that test. A company's long-range independent economic interests may require it to operate at a loss for several years in order to become established in a new market. Certainly, this might have been true of the defendants as new entrants in the U.S. consumer electronics market. The particular documents cited by the plaintiffs to show that the defendants sustained losses are entirely consistent with the conclusion that the

[207] To show that the defendants incurred losses on their U.S. operations, the plaintiffs have relied primarily on a mathematical construction in the DePodwin Report, which we have ruled inadmissible, and which we therefore do not consider on these motions. F.R.Civ.P. 56(e). In addition, plaintiffs rely on three other types of evidence: (1) U.S. tax returns and financial statements of the U.S. subsidiaries of the Japanese defendants, which in plaintiffs' submission show losses during some of the years in the period 1962-75; (2) documents which tend to show losses on particular transactions between the U.S. subsidiaries and their customers; and (3) other documents which contain or report general statements that the Japanese companies, or a particular company, sell products at a loss in the United States. *See* FPS at 7970-99 & 8001-28; Plaintiffs' Memorandum in Reply to Motions for Summary Judgment of Certain Defendants, Matsushita Defendants and Sears, Roebuck & Co. at 105-09 (April 2, 1979). We have not ruled on the admissibility of the latter three categories of documents; many of them are plainly hearsay and may be inadmissible. We assume in this opinion that the plaintiffs do have sufficient evidence to create a genuine issue of fact that the Japanese defendants' U.S. subsidiaries made some sales at a loss and incurred losses on their operations as a whole during some of the early years of their entry into the U.S. Market, but find that such evidence fails to satisfy the *Bogosian/Venzie* test for an inference of conspiracy, for reasons stated in the text.

We have already seen that there is no admissible evidence that the defendants sold below cost in the U.S.

losses were incurred by the defendants in the course of gaining a foothold in the U.S. market and in no way indicate anything other than legitimate independent competitive activity. Thus, we conclude that plaintiffs' putative evidence of losses sustained by the defendants in attempting to enter the U.S. market is insufficient, as a matter of law, to support an inference of conspiracy.

This discussion presages the final point which must be made with respect to plaintiffs' efforts to infer a conspiracy from alleged international price discrimination. Even if there were evidence that defendants had incurred losses in a concerted effort to take over the U.S. CEP market, plaintiffs' export conspiracy claim makes no sense in the absence of evidence of: (1) an increase in prices to reap "monopoly" profits after penetration of the U.S. market had been achieved; and (2) an administrative mechamism capable of effectively managing or policing the alleged joint strategy or of a means to share profits or recoup losses. Turning to the latter point first, we note that even plaintiffs' own "experts" have stated that an effective conspiracy of this type would have included as one of its key elements "some administrative mechanism capable of enforcing the joint strategy, such that the rewards of monopoly and U.S. market share could be equitably shared among the coconspirators."[208] Yet, no such profit and loss sharing mechanism by defendants is even alleged by plaintiffs in their FPS, and no evidence thereof is offered.[209] This lacuna is magnified upon recollection that the Japanese manufacturing defendants are supposedly joined in the conspiracy by many if not most of the other CEP manufacturers in Japan, as well as by dozens of alleged coconspirators of other nationalities as well.

[208] Nehmer Report at II-8.

[209] *Cf.* DePodwin Report at I-4, where it is acknowledged that profit and loss sharing is generally listed as one of the critical elements in an effective antitrust conspiracy.

More importantly, plaintiffs' allegation that defendants deliberately sustained losses in the United States in the hopes of taking over the U.S. CEP market and charging "monopoly" prices at a later date simply makes no sense in light of the evidence. There is no evidence that the defendants, after having achieved a foothold in the United States market, ever raised their prices to recoup their losses, or earned monopoly profits. But, even the notion that this might happen makes no sense, for the defendants, as new entrants with relatively small market shares, could not rationally have hoped to recoup sustained losses in the United States in view of both the dominant market positions already held by RCA and Zenith (maintained, according to the record, to this day) and the ability of European manufacturers, other Far East companies, and major American firms swiftly to increase their United States CEP sales if higher "monopoly" prices were ever charged. We also note in this regard that there is no evidence of high entry costs or barriers in the U.S. CEP manufacturing and distribution industry.

In sum, plaintiffs' purported evidence of international price discrimination amounts to nothing. We turn to another of the major components of plaintiffs' case, the alleged colusive predatory export rebate scheme.

L. *Plaintiff's Evidence of the Operation of the "Predatory Export Rebate System for Collusive Concealment of Dumping"*

1. *Elements of the Rebate Scheme*

Plaintiffs' description of the operation of what they describe as a "predatory export rebate system for the collusive concealment of dumping" proceeds in contrapuntal style. Referencing the Manufacturers' Agreements, plaintiffs first claim to have demonstrated that the Japanese manufacturing defendants and their coconspirators, as a means of coordinating their concerted export drive, applied for and attained an exemption from the Japanese Antimonopoly Law to meet together to discuss and establish minimum or "check" price levels for tele-

vision receivers to be exported to the United States, for the purpose of protecting and preventing the destruction and disruption of the United States TV manufacturing industry (although in reality they sought to destroy that industry). Then, in plaintiffs' submission, defendants and their coconspirators proceeded "commonly and systematically" to sell and export TV receivers to customers in the United States and to market TV receivers in the United States through subsidiaries created for that purpose at prices far *below* the "check prices" (also referred to by plaintiffs as "reference" or "benchmark" price levels), as well as below U.S. domestic price levels.

Plaintiffs contend that defendants' representatives met and negotiated with their registered U.S. private label an original equipment manufacturer (OEM) customers and that, "with the knowledge and adherence of their confederates to the scheme, agreed upon export prices far below the so-called check prices sufficiently low to obtain the business and to depress prices in the United States to unremunerative levels." Plaintiffs allege that in order to conceal the actual export prices in these transactions, the invoices, purchase orders, letters of credit, export validation forms, shipping documents, United States Customs' invoices, and other formal documents reflecting the price at which the goods were being exported from Japan and imported into the United States were "systematically falsified" by the entry and declaration of erroneous prices, in most instances higher than the prices actually agreed upon between the Japanese suppliers and their customers in the United States. The difference between the fictitious invoice prices and the concealed actual prices is said to have been secretly rebated or otherwise returned to the United States importers and customers.

Plaintiffs further allege that the Japanese manufacturers, trading companies, subsidiaries, and certain customers: (1) deliberately established and maintained double sets of books for their television transactions involving the United States; (2) purged purchase orders and invoices reflecting actual pricing; and (3) substituted purchase orders and invoices setting

forth false information for the true documents for the purpose of frustrating and evading investigations, litigation, or inquiries from the U.S. Bureau of Customs, the United States Treasury Department, and other United States law enforcement agencies. Alternatively, plaintiffs allege that certain manufacturers, trading companies, and importers of Japanese television receivers adopted the deliberate policy of refraining from keeping records reflecting the difference between the fictitious prices and the actual prices or records reflecting the receipt of the clandestine payments, allowances, and adjustments therefor.

Plaintiffs particularize their allegations as follows:

> Under the scheme of fraudulent concealment employed by defendants and their confederates to avoid detection, United States purchasers of Japanese televsion receivers lodged letters of credit in Japan for the value of the television receivers calculated at the higher, fictitious prices, instead of the actual, negotiated prices. The export transactions, therefore, created an overpayment or balance in the hands of the Japanese manufacturer or vendor which was reimbursed to the purchaser. This balance, equal to the difference between the "invoice price" or "camouflaged price" and the "*actual price,*" was referred to by a variety of terms. Since the "actual" or negotiated price per unit was often several dollars below the "invoice price" or the "check price," the aggregate difference between the "*check price*" and "*actual price*" for an entire transaction was usually substantial. Because of the size of the sums of money to be rebated to the customer, a variety of devious and illegal means were employed to rebate the over-payments to the United States customers.

Plaintiffs enumerate the following labels, euphemisms, or devices for rebates of the difference between the check price and the actual negotiated contract price:

1. "difference money"
2. "behind-the-scenes money"
3. "check price balance" or "c. p. balance"
4. "loyalty discount"

5. "excess inspection," "100% inspection," "inspection fees" or other "inspection" costs
6. credits or payments for "rework" or "service" charges
7. credits offset against tooling costs
8. travel expenses
9. entertainment
10. "free goods"
11. "replacement" allowances for allegedly "defective" products or "excessive warranty cost"
12. free spare parts
13. "warehousing"
14. "commissions" or "sales commissions"
15. deposits in customers' yen accounts in Japan
16. "compensation" for purchase by the Japanese vendor of valueless "market research" from the customer
17. credits toward the purchase price of other products, including a system known as "over-and-under" or "over-and-under billing," under which the difference between the higher "invoice" price and the "actual" price is credited toward and deducted from the actual purchase price of another product and, in this manner, refunded to the purchaser
18. "advertising allowance"
19. "usance" or "usance interest"
20. "refunds"
21. "rebate" or "rebate check"
22. "Sharp money" or "Sharp Fund"
23. "adjustments to invoice prices"
24. travelers checks
25. telegraphic transfers through Swiss, German, Hong Kong, and other foreign banks.

The plaintiffs then proceed to describe in some 2,000 pages of their FPS the details of the operation of the "rebate scheme." This segment of the FPS is bottomed largely upon deposition taken by plaintiffs of American importers and documents produced in discovery, mostly by American importers that supported the transactions between the importers and the various Japanese manufacturing defendants. Many of the documents submitted by plaintiffs during the *in limine* hearings were of the genre.

Notwithstanding the length of the FPS narration, we shall not attempt to describe in replete detail plaintiffs' specifc allegations as to the alleged scheme.[210] That is because, assuming admissibility of the various documents,[211] the defendants,

[210] Plaintiffs' FPS first describes the "dumping and predatory export rebating scheme of defendants Sears, Sanyo, and Toshiba." It is undisputed that Sanyo and Toshiba's largest U.S. customer was defendant Sears, and that after the demise as an independent entity of Sears' erstwhile private label supplier, Warwick Manufacturing Company, Sears bought all its television receivers from Sanyo and Toshiba. The dollar sums involved were substantial. Between 1963 and 1975, Toshiba shipped to Sears over 3 million TV receivers, almost two-thirds of them color sets, with a value of some 285 million dollars. Sears is alleged to have been a co-conspirator in a plan to sell CEP's to it at prices far below the fair market value of the products, far below the levels at which Zenith and other manufacturers could compete, and far below the level which Sanyo and Toshiba sold the same or similar products on the Japanese home market.

After some 494 pages of initial description of the Sears-Sanyo/Toshiba relationship, the plaintiffs then move on to the relationships between various defendants and U.S. private label and OEM customers, including such firms as Magnavox, J.C. Penney, W. T. Grant, Montgomery Ward, Midland International, and defendant Motorola.

[211] We note that during the *in limine* hearings the defendants challenged the admissibility of most of these documents and, in general, the plaintiffs failed to lay a foundation for them as business records. Although many of the documents are internal company memoranda, generated in a business context, we reject plaintiffs' contention that, merely because a lawyer or executive writes a memorandum describing what took place at a meeting, the memorandum qualifies as a business record within the meaning of F.R.E. 803(6). Rather, it must meet the requisites set out in the Japanese Materials

or at least most of them, concede with respect to U.S. import transactions that: (1) the price listed on the invoice for the various CEP's at issue was the check price reported to MITI; (2) the actual or negotiated price per unit was often several dollars below the invoice price; and (3) the aggregate difference between the check price and the actual price was rebated by a variety of means, *i.e.*, one of these listed by the plaintiffs at p. 1242, *supra*.[212] Moreover, it is not in dispute that the United States purchasers would lodge letters of credit in Japan for the value of the television receivers calculated at the higher prices, instead of at the actual negotiated prices.[213] There is

Evidentiary Opinion. Notwithstanding the extensiveness of their program of substantive depositions of officials of American purchasers of Japanese CEP's with respect to the alleged rebate scheme, for some reason laying a foundation for admissibility of documents did not make plaintiffs' priority list.

The requisites of F.R.E. 803(6) are described in great detail in our Japanese Materials Evidentiary Opinion. Our sense of the matter in the wake of considering many of these documents at the *in limine* hearings is that a document-by-document analysis would result in the holding that the vast bulk of these documents do not pass 803(6) muster. Neither have plaintiffs laid a foundation to establish the documents as statements against interest or under the residual exception of the hearsay rule. Most of the documents are probably admissible as nonhearsay admissions of the company whose employee authored the document, but under such circumstances the document is admissible only against that company, most of which are not parties.

Notwithstanding these comments, although a considerable amount of time was expended at the *in limine* hearings in considering DSS's that related to U.S. import transactions, we shall not make formal admissibility determinations because it is not necessary. As we have stated in the text, even assuming admissibility, these documents do not create a genuine issue of material fact.

[212] The plaintiffs themselves were not strangers to this scene. There is uncontradicted evidence that NUE negotiated and received a rebate from Hitachi.

[213] There are, of course, matters with respect to the rebate scheme which are in dispute, mainly those related to the questions of concealment and customs fraud, and the question whether the customer knew that the prices at which it purchased were "substantially below the actual market values and

thus no genuine issue of fact on these matters, rendering extended discussion wasteful. Whether the facts are material is quite another question, one which will be addressed *infra*. In the meantime, a few additional words about the rebate scheme as it is fleshed out in the record will be helpful to the discussion which ultimately follows.

Plaintiffs themselves admit that there was no consistent pattern to the "predatory export rebate conspiracy." They allege that well over a dozen techniques were employed and that still more were considered.[213A] For example, Sanyo employed a "loyalty discount" scheme in sales to Sears which rewarded Sears with a periodic refund check for purchasing a certain number of television receivers during the contract period. Toshiba and Sears are said to have engaged in "overbilling and underbilling between television receiver models." Acccording to plaintiff, Toshiba over-billed Sears on models initially priced below the check price and underbilled Sears on models initially priced above the check price so that the differences would "wash." Plaintiffs claim that Hitachi paid GE rebates in the guise of payments for "worthless" technical information. A proposed rebate scheme between Sharp and Motorola allegedly involved consideration of the payment of "engineering fees," "inspection charges," "refunds in other products," and selling through three different possible intermediaries.[214]

wholesalers' prices of television receivers manufactured and sold by the supplier in Japan." Defendants stoutly deny plaintiffs' contentions on such matters.

[213A] Plaintiffs do not have evidence that all of the techniques listed above were actually used.

[214] The number of customers granted the alleged rebates also varies greatly. For television receivers, Sanyo is charged with rebating to over ten different customers, Toshiba is charged with rebating to two customers, and Matsushita is charged with rebating to six different customers. The "Mitsubishi Defendants," which according to plaintiffs include both Melco and MC, are charged with rebating to five different customers. Hitachi is charged with rebating to three different customers, and Sharp is charged with rebating to three customers. The bulk of plaintiffs' evidence on alleged rebating, however, concerns Sanyo's transactions with Sears, Toshiba's transactions with Sears, and Matsushita's dealings with J.C. Penney.

Plaintiffs do not contend that defendants gave rebates to all of their customers. Each defendant sold to many customers, yet plaintiffs only identify one or two customers of each defendant who received rebates. For example, Toshiba sold television receivers to J. C. Penney, Sears Roebuck, Singer, and R. H. Macy & Co. and to its American sales subsidiaries Toshiba America, Inc. and Toshiba Hawaii, Inc. Yet only Sears Roebuck and J.C. Penney & Co. are cited as allegedly receiving rebates, Sears by the so-called "over and under billing" method for the period 1972-1975 and J.C. Penney by the payment of interest, on two occasions, on monies deposited with Toshiba for the later purchase of television sets. Finally, plaintiffs have not alleged that Sony gave any rebates. (Sony did not sell to any private label or OEM customers.)

Plaintiffs' assertions of alleged rebates are also confined to a particular time frame. The first television check price agreement and regulations went into effect in September 1963, but the earliest alleged television rebate identified by plaintiffs occurred in 1967 (FPS at 5582), with the vast majority of alleged rebates occurring after 1970 (*after* NUE commenced this litigation). Thus, the television check price agreements were in effect for almost four years before the alleged rebating occured. Similarly, with radios, although the check price agreements went into effect in 1958, the earliest of the two alleged radio rebates cited by plaintiffs in their FPS, a purported rebate from Toshiba to J.C. Penney, occurred in June of 1965. FPS at 10156. Thus, radio check prices were in effect over seven years before any rebate is alleged by plaintiffs to have been granted. The only other alleged radio rebate was from Hitachi to RCA in 1973. Yet, the Radio Export Regulation had terminated in 1972 and the last radio check price agreement terminated at the end of 1965. See Part VIII.A, *infra*.

Our emphasis heretofore has been on documents. Rebating, however, is the one area of the case in which plaintiffs have proceeded extensively by way of depositions. Another reason (in addition to defendants' concessions about the payment of rebates) why we need not engage in an extensive description of the rebate documents is that the plaintiffs have, by depositions (e.g., the deposition of Mr. Brennan of Sears), come forward with sufficient evidence of the existence of the rebate scheme to create a factual issue as to its existence. If the mere existence of the scheme would defeat summary judgment, we would be obliged to deny defendants' motion.

Plaintiffs' principal emphases in their description of the rebate scheme are upon its clandestine nature and the facts that it was pervaded by attempts of the exporter and the importer to conceal: (1) from MITI the fact that there were sales below check price and (2) from U.S. Customs authorities the fact that the price reported to Customs was not the true sales price. Of course, the higher price reported to Customs would result in a higher normal duty. However, in plaintiffs' submission, the defendants and their coconspirators feared that discovery of the true price for the goods would lead to the assessment of dumping duties under the 1921 Antidumping Act, which would be even higher than the elevated normal duty; hence, the "cover-up." Plaintiffs thus expend many pages of their FPS relating excerpts from depositions and from documents which support their contention that various defendants attempted to conceal from MITI and from U.S. Customs the actual prices at which CEP's were being bought. Again, although we could write at length on these points, we shall refrain from doing so, because we agree that there is evidence of the concealment of the rebate scheme from MITI or from U.S. Customs by at least some of the defendants. We will therefore assume for purposes of summary judgment that many of the defendants concealed the rebating practices.

The existence of the "rebate scheme" is not in and of itself sufficient to create a genuine issue of material fact, however. For it to create a *genuine* issue what the plaintiffs must show is some evidence, direct or circumstantial, that the rebating was done in concert, in pursuance of collusive activity, and in such a manner as to support plaintiffs' claim of a predatory export conspiracy. Plaintiffs have sought to establish this essential portion of their case in two ways. First, they contend in their FPS that "through continuous meetings among themselves, including meetings at the highest levels, the defendants and their affiliates coordinated their export pricing." Second, plaintiffs approach the matter indirectly or circumstantially by contending that:

> the Japanese defendants and their subsidiaries and certain favored large importers had full knowledge of the rebating system and accompanying "double-pricing" devices and patterns of customs fraud, and that with full knowledge that other defendants and co-conspirators were giving their adherence to and accepting the benefits of this unlawful system of export trade, each defendant and each co-conspirator gave its adherence to and participated in the combination and conspiracy.

We turn now to plaintiffs' evidence of collusive rebate activity.[215]

2. *Alleged Collusion in the Export Rebate System*

The plaintiffs have made conclusory allegations in their FPS that through meetings of their executives at every level of management, defendants and their subsidiaries and affiliates coordinated their export pricing. More specifically, the plaintiffs have alleged that the "dumping price levels" at which export sales were made were established in concert by the Japanese manufacturing defendants, their trading companies, and coconspirators as part of a "joint export system devised and implemented by them and related to certain common reference price levels, known as check prices or 'MITI prices.' "[216]

---

[215] In addition to alleging that the private label or OEM customers of the Japanese manufacturing defendants participated in the rebate scheme, plaintiffs allege that those customers purchased television receivers at prices which both they and the Japanese manufacturing defendant knew were substantially below the actual market values and wholesale prices of television receivers manufactured and sold by the supplier in Japan. We have examined the documents which plaintiffs proffer in support of this point, but find that they do not support it. The plaintiffs do offer evidence which supports a related point, *i.e.*, that the defendants were concerned about proceedings by United States Customs and Treasury authorities under the 1921 Antidumping Act, and that individually (as well as collectively) they sought to combat the charges. Defendants concede that point, though arguing it to be of no help to plaintiffs' case. We discuss that matter *infra*.

[216] This allegation is addressed to defendants' pricing practices in general, not just to the rebate scheme, but we consider it here because plaintiffs' ultimate theory (the intertwining of the rebates and the check prices) makes the two notions coalesce.

However, we have reviewed every document which has been cited by the plaintiffs in support of such allegations and find no evidence to support them.

As we have noted, in addition to claiming that there was overt agreement, plaintiffs rely upon the assertion that defendants' rebates were "parallel," "interdependent," and that defendants had "knowledge" of each other's rebates.[217] All of this, they claim, adds up to "interdependent conscious parallelism," which allegedly supports an inference of conspiracy. In a variation on this theme, plaintiffs assert that liability may be predicated on the fact that each of the defendants and importers, with knowledge that the price levels at which products were sold from Japan into the United States were dumping levels, and with knowledge that it was necessary in order to avoid the imposition of dumping duties by the United States Customs Bureau and Treasury Department to conceal the actual prices, and even with knowledge that they were participating in a criminal offense, nonetheless participated in this scheme.

Plaintiffs' evidence in support of their claims of interdependent and conscious parallelism and of defendants' "knowledge" of each other's rebates was reviewed in detail in the *in limine* hearings and during the summary judgment arguments. Defendants' counsel have represented that in preparation for the summary judgment arguments they reviewed every document cited by the plaintiffs in support of their claim that the rebate scheme was common knowledge among the defendants and that concerted rebate activity could be inferred, including all of plaintiffs' "starred" DSS's,[218] all the

[217] We add here that many of the statements in the segment of the FPS which deals with "the conspirators' knowledge of an acquiescence in defendants' unlawful, collusive export system" (p. 7542 *et seq.*) actually deal with the domestic market.

[218] The "starred" or "asterisked" DSSs were those DSSs which plaintiffs represented during the *in limine* hearings had especial importance in proving the existence of a conspiracy.

documents cited for this point in the FPS, all the documents cited in plaintiffs' various briefs and exhibits, and all the documents contained in plaintiffs' supplementary list submitted to the court for *in limine* consideration. Defendants' counsel summarized the results of their review during the summary judgment argument (PTO 289 at 97-137 and PTO 291 at 260-71), representing that while these documents show that there was general awareness of the existence of rebate practices, they provide no evidence of collusion among the defendants in connection with rebate activity. Our own review confirms that defendants were correct in this conclusion.

Some of plaintiffs' documents show that U.S. purchasers were aware of rebates being given by more than one manufacturer, that practically every exporter in some manner attempted to bypass the check price system, and that the importers generally were aware of the fact that it was difficult for the Japanese firms to compete by selling at the check price. However, plaintiffs have not developed any facts which demonstrate that information about the amount of rebates was gleaned by Japanese manufacturers from each other. Rather, the evidence shows that the individual defendants learned about their competitors' rebates through their own U.S. purchasers. Moreover, there is significant evidence that the U.S. purchasers who provided the Japanese manufacturers with this information did so in an effort to put pressure on them to lower their prices to meet competition.[219] There is also evidence

[219] For example, plaintiffs have proffered a document which shows a communication from Midland, an importer, to Sharp, one of the Japanese manufacturing defendant-exporters. The letter states that other manufacturers have proposed rebating and asks the same arrangement of Sharp. The letter, however, does not disclose who had been granting rebates or in what amount. *See* DSS 1164. Other of plaintiffs' documents show specific price quotations by a customer to induce an even lower price from the supplier's competitor. For example, a 1967 internal Sanyo memo (which is probably not admissible) describes a Matsushita offer to Magnavox which had apparently been communicated to Sanyo, which presumably impelled Sanyo to attempt to meet it. Other documents proffered by the plaintiffs suggest that plaintiff NUE itself (through its predecessor, Emerson Radio Corporation) pressured Melco for a better deal on the basis of its knowledge of a Sanyo price.

that efforts were made by Japanese manufacturing defendants to prevent the other Japanese manufacturing defendants from learning about their rebate structure.[220] Thus, if these documents advanced by plaintiffs are admissible,[221] they show that: (1) rebates were paid; (2) they were necessary to enable individual Japanese manufacturers to meet competition; (3) the American importers played the Japanese manufacturing defendants off against one another in order to get the best price; and (4) the defendants sought to keep information about their rebates from one another. This pattern of conduct sounds more in competition than in antitrust conspiracy.

Plaintiffs rely heavily on allegations of clandestine customs fraud, but it is uncontroverted that there was widespread knowledge at all relevant times of the existence of the practice of reporting the MITI price to U.S. Customs and of consummating the transaction (via a rebate) at a negotiated or actual price less than the reported price.[222] Indeed, it was even a matter of public record, as is evident from a reading of the *Continental Forwarding* cases, *see United States v. Continental Forwarding Co.*, 297 F.Supp. 1396 (Cust.Ct. 1969), *aff'd*, 311 F.Supp. 956 (Cust.Ct., App. Term 1970), *aff'd*, 463 F.2d 1129 (2d Cir. 1972). That litigation, which began in the early 1960's, raised the question whether certain binoculars

[220] There are documents in the record which, if admissible, would reflect that Sharp requested Motorola, at a time when the Matsushita acquisition of Motorola's Quasar division was imminent, not to tell Matsushita of Sharp's past rebates to Motorola.

[221] In discussing the evidence in this segment of the opinion, we assume admissibility.

[222] Plaintiffs have made much of the alleged secrecy of the rebating practices and have sought to relate that secrecy to the alleged conspiratorial scheme. To counter plaintiffs' contentions, a number of defendants, during the course of the summary judgment argument, called our attention to documents which demonstrated that they had in fact informed U.S. Customs of rebate transactions in which they, themselves, had been involved. Plaintiffs make a forceful argument *contra*, and for summary judgment purposes we decline to posit that any defendant made full disclosure.

imported from Japan should be dutied at the MITI price at which they were entered and appraised, or at the actual contract price, which was below the MITI price by virtue of a rebate paid to the importer. The facts set forth in all of the reported opinions in that litigation, one as early as 1961, make it clear that the whole industry, as well as United States Customs officials, knew of the rebate practice.[223] The ultimate holding of the *Continental Forwarding* cases was that the lower contract price (after the rebate), rather than the higher MITI price, prevailed for Customs purposes. The *Continental Forwarding* litigation thus demonstrates that the practices which plaintiffs proclaim to have been clandestine were, in fact, widely known.

In the wake of these observations, it should be plain that knowledge of the existence of the rebating practice does not suggest collusion as to those practices. Moreover, the very divergence of approaches to rebating described above is sufficient in and of itself to suggest conduct consistent with competition, or at least with the exporters' self interest. Additionally, and still more important, the evidence shows that prices at which the various CEPs were sold under the different rebate schemes were very different, that the amounts of the rebates given by individual defendants were different, and hence that the net prices were significantly different. More precisely, plaintiffs' evidence demonstrates that, even during the same year, identical screen size televisions were sold by different sellers to different buyers at different prices involving alleged secret rebates which were also different.[224] As we will under-

[223] For example, in an opinion filed and published in 1964, *Continental Forwarding, Inc.* v. *United States*, 52 Cust.Ct. 629 (1964), an appeal from a reappraisement decision, the head note reads: "Binoculars, imported from Japan—MITI or check price not export value." That decision reversed *Continental Forwarding, Inc.* v. *United States*, 46 Cust.Ct. 579, Reap. Dec. 9910 (1961), which also set forth the background of the case. The Court noted that "this controversy is familiarly referred to as the 'MITI' case," 52 Cust.Ct. at 630.

[224] For example, in 1972, according to plaintiffs, Sharp allegedly sold 17" color television receivers to Gambles, Midland, and Montgomery Ward at

score below in our further discussion of the inferences which are drawable from the rebating practices, these differing prices and rebate amounts are inconsistent with collusion, or at least, they are as consistent with competitive, rational, independent behavior by each individual defendant.[225]

---

alleged "actual" prices of $181.80, $167.70, and $160.00, with alleged rebates associated with these sales of $1.60, $15.70, and $23.00, respectively. FPS at 7190 (Gambles), 7193 (Midland), and 7208 (Montgomery Ward). Plaintiffs also allege that, in 1970, 15'' color television receivers were sold by Nippon Electric Corp. to Midland at $139.03, from Sharp to Midland at $140.44, and from Sanyo to Sears at $135—transactions in which rebates were alleged to have been $8.97, $11.56, and $13.00, respectively. FPS at 7133 (Nippon-Midland), 7185 (Sharp-Midland), and 7238 (Sanyo-Sears). Plaintiffs also allege Matsushita's participation in differing rebate schemes as well. *See* FPS at 10590-650. By way of additional example, at page 7140 of the FPS plaintiffs state that in 1969-70 Nippon Electric Co. (a non-defendant) allegedly sold 9'' Black and White TVs to Midland for $38.023/unit, while allegedly falsely representing that the price was $41.00/unit, thus giving Midland a rebate of $2.97/unit. However, during the same time period, MEI and MET allegedly sold Magnavox 9'' black and white TVs for a much higher $56.40/unit price, while allegedly falsely representing that the price was $59.70/unit, and giving a higher rebate of $3.30/unit. FPS at 6875. Similarly, in the 12'' black and white TV market, in 1971, Nippon allegedly received $39.98/unit from Midland, while falsely claiming that the price was $41.00/unit, for a rebate of $2.20/unit, FPS at 7143, whereas, in 1972, MEI and MET allegedly received a higher $47.35/unit from W.T. Grant, while allegedly falsely claiming $48.90/unit for a rebate of only $1.55/unit. FPS at 7076.

Toshiba's pricing arrangement with Sears and J. C. Penney was apparently different from that of either Nippon, MEI, or MET. Toshiba in 1973 allegedly sold Sears 12'' black and white TVs for $55.49/unit. FPS at 7018. more specifically, it is alleged that in their negotiations concerning Model 50721A, Sears and Toshiba agreed on an actual unit purchase price of $57.29 fob Japan, but that in order to conceal the actual price, Toshiba and Sears agreed to falsify Sears' purchase price of each to make the unit price appear to be $55.49 fob Japan, or $1.80 *lower* that the actual price. Toshiba is alleged utlimately to have declared the unit price to be the fictitious lower unit price of $55.48, thus understating the unit price by $1.81. This unusual variation of the theme is unexplained by plaintiffs.

[225] On November 24, 1980, we received a letter from plaintiffs' counsel, Mr. Rome, in the nature of a response to:

> the unsupported assertion found in the latest filing of the defendants to the effect that plaintiffs have failed to '*cite any evidentiary support*' for

Another approach taken by plaintiffs in an attempt to adduce some evidence of collusiveness in rebate-related export practices lies in their contention about certain meetings which took place in the wake of the U.S. Treasury antidumping investigation. These meetings were attended by executives of and counsel for a number of defendants and their pivate label customers to whom they had paid rebates and with whom they had apparently engaged in "double invoicing." The conferees apparently discussed the Treasury Department dumping investigation from a number of points of view. *Inter alia*, they sought information about the investigation and discussed its anatomy, scope, and potential consequences, and appropriate strategies for defending against it. J.C. Penney and Matsushita actually brought lawsuits challenging the Treasury Department's conduct at the dumping investigation involving television receivers from Japan.[226] Plaintiffs seek to draw an inference of con-

---

> the fact that defendants engaged in a joint and concerted system of double invoicing and Customs fraud in pursuance of their combination and conspiracy and in concealment thereof and that this system was common knowledge among the defendants and many of their principal customers . . .

Plaintiffs maintain in the letter that the documents and deposition testimony "unquestionably" establish the concerted nature of the defendants' double pricing invoice system. Plaintiffs thereupon set forth a half-page list of documents and deposition transcripts in support of their thesis (many of which were not lodged in the document depository, and many of which that were lodged therein were not translated). Having examined all of this material (or more properly, reexamined, for most of it was invoked earlier) we are reinforced in our earlier conclusion. To be sure, this material demonstrates the existence of rebate schemes with various importers (that "everybody was dong it"—or almost everybody). The documents also suggest knowledge on the part of the various parties that others were engaged in rebating, although we must note in this regard that the various declarations as to what others were in fact doing are all excludable under F.R.E. 805. The materials also reflect the joint response of various companies to the joint legal problem posed by the Treasury Department 1921 Antidumping Act investigation. However, none of these materials in any way demonstrate what plaintiffs maintained in their November 24, 1980 letter that they had established, i.e., concerted activity in connection with the alleged rebate scheme.

[226] The case of *J. C. Penney Co., Inc.* v. *U.S. Treasury Dept.*, 319 F.Supp. 1023 (S.D.N.Y. 1970), *aff'd*, 439 F.2d 63 (2d Cir. 1971), *cert. denied*, 404 U.S. 869, 92 S.Ct. 60, 30 L.Ed.2d 113 (1971), was dismissed for lack of jurisdiction

spiracy from these discussions and suits. However, as we have seen in our legal discussion, Part VI.A.8, *supra*, it is impermissible to draw an inference of conspiracy from that fact.

As the foregoing review demonstrates, there was no consistent pattern to the so-called rebate conspiracy. There were at least 25 different rebating techniques which were considered or employed. Plaintiffs have been unable to adduce any direct evidence as to collusive activity by the defendants with respect to rebates, nor have they cited any facts to support their claim that defendants adopted a common rebating strategy, or that there was any agreement among defendants concerning rebates. Rather, by listing a series of alleged rebating transactions involving individual Japanese defendants for some 2,000 plus pages of the FPS, plaintiffs assert, *ipse dixit*, that this by itself leads to an inference of conspiratorial behavior. The fact, however, is that plaintiffs' rebating evidence in actuality is at least as consistent with, and actually supports, just the opposite inference—that defendants engaged in unilateral conduct which was neither "parallel" nor "interdependent," but rational, independent, and procompetitive. We take this opportunity to summarize our analysis of what inferences are drawable from the evidence adduced by plaintiffs about the "rebate scheme."

We start with the proposition that it is illogical to infer joint conduct from disparate behavior. Most of the alleged rebating, according to plaintiffs' submissions, was random and was done by one or two defendants with one or two customers.[227] As we have noted above, *see* n. 214, the number of customers granted the rebates varied greatly, and plaintiffs do not contend that defendants gave rebates to all their customers. Moreover, it is plain that rebating "to get the business" does not meet the *Bogosian/Venzie* test. It is not against, but rather in one's own self-interest to rebate if doing so obtains the sale.

We have already rejected, in Part VI.A.7, *supra*, the notion that secret rebates to get business violate the antitrust laws, *see Knuth v. Erie-Crawford Dairy Cooperative Ass'n*, *supra*, and the related notion that concealing such rebates from a governmental organ, such as MITI or U.S. Customs, in an effort to circumvent barriers to competition, can form the basis for an antitrust violation, *see Citizens & Southern National Bank*, *supra*.[228] Instead, we have noted that such activities are

---

in the District Court. The case of *Matsushita Electric Ind. Co.* v. *U.S. Treasury Department*, 67 Cust.Ct. 328 (1971), *aff'd*, 485 F.2d 1402 (C.C.P.A.1973), was dismissed essentially as premature.

[227] Defendants note that there were twenty-seven, not fifteen, signatories to the Manufacturers' Agreements. (Actually, the 1963, 1964, 1965, and 1966 Television Manufacturers' Agreement had 21 signatories, the 1967 Television Agreement had 20 signatories, the 1969 Television Agreement had 19 signatories, and the 1970 and 1971 Television Agreement had 18 signatories.) Of these 27 signatories, plaintiffs in their FPS only identify eight companies as having granted rebates: Sanyo, Toshiba, Melco, MEI, Hitachi, Sharp, Nippon Electric Co., and The General Corp. Thus, defendants say, plaintiffs' charge of "pervasive rebating" among the alleged coconspirators, is predicated on the fact that only eight of the twenty-seven signatories to the MITI-mandated check price agreements allegedly granted rebates. As defendants have also pointed out (see n.214, *supra*), the challenged rebating was limited in time sequence.

[228] Defendants have argued that any attempt to prove customs fraud during the course of the trial would create a lengthy and complicated peripheral issue. In defendants' submission, in addition to all the other complicated pricing and economic data the jury would have to analyze, they would have to consider data depicting prices communicated by importers of merchandise from defendants to United States Customs. This material, defendants contend, would have no probative value, but would cause significant and unfair prejudice to defendants if plaintiffs could portray them as "inveterate lawbreakers" because of their alleged customs fraud. Defendants thus argue that the customs data is inadmissible under F.R.E. 403. Their argument is buttressed by problems which underlie the plaintiffs' efforts to support their customs fraud claims. The supporting documents were not offered at the pretrial evidentiary hearings; hence, we would not be considering them before trial. These are various internal Customs memoranda which are evaluative in nature, but which probably do not qualify for admissibility under 803(8)(C) as that rule has been explicated in our Public Records Opinion. Extensive trial time would thus be consumed in hearings and rulings upon the admissibility of such documents. Accordingly, defend-

in reality pro-competitive. Accordingly, the probative value of plaintiffs' evidence of secrecy in the rebating practices, without more, is nil.

Evidence that a customer of one of the defendants informed that defendant of a rebate being offered or granted by another defendant, or even evidence showing that manufacturers and their customers had general knowledge that rebates were available, or that these rebates might cause problems under the 1921 Antidumping Act, is also not a basis for drawing an inference of concerted action. It is commonplace for competitors to learn from customers or potential customers about "deals" being offered by other manufacturers. This is precisely how customers induce price competition between one manufacturer and another. As we have pointed out, there is widespread evidence in the record of this case that this was being done by the American purchasers of Japanese CEP's in an effort to "whipsaw" or induce the Japanese manufacturing defendants, competing among themselves, to give better discounts, rebates, allowances, etc. in order to get the business.

What plaintiffs must adduce evidence of, but have failed to, is that this "knowledge" was gained through communications between or among the defendants or that it relates to a rebate conspiracy. Moreover, the extremely diverse rebating practices followed by the defendants and the independent self-interest which they had to engage in rebating themselves preclude any inference that there was an agreement concerning the amounts or types of rebates being offered by the defendants. At the very least, the evidence is as consistent with competition as with conspiracy.[229]

---

ants' argument that the (minimal) probative value of the evidence would be outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, and by considerations of undue delay and waste of time is forceful indeed. However, in view of the result we reach herein, we need not decide the Rule 403 question.

[229] Plaintiffs seem no longer to press seriously what has been described as their "blowing the whistle" argument, but to the extent that they have not abandoned it, we give it passing mention. Plaintiffs have suggested that

The foregoing discussion concentrates on the inferences to be drawn as to the Japanese manufacturing defendants. To complete our discussions, however, it is necessary to consider what inference can be drawn as to MC and MIC, Motorola, and Sears, who were not manufacturers but rather purchasers of Japanese CEP's. Flipping the coin, however, does not alter the result. First, there is no evidence that the rebates paid to Sears follow a pattern similar to that paid to any other importer of Japanese CEP's or, in fact, that Sears' two principal suppliers, Toshiba and Sanyo, acted in parallel fashion in their rebating practices vis-a-vis Sears. Indeed the evidence is to the contrary. There is evidence of only one rebate paid to Motorola, that by Sharp, and there is only questionable evidence of a rebate paid to MC; but there is no evidence of parallel activity in those instances.

More significantly, it is plainly in the interest of a purchaser to obtain a rebate so as to get the lowest possible price. Although plaintiffs decry the activities of Sears in securing rebates from Sanyo and Toshiba, noting that they made it possible for these companies to compete vigorously with Zenith, it appears to us to be pro-competitive and in Sears' interest for Sears, or any buyer, to attempt to get the best price it can.[230]

M. *Plaintiff's Evidence Concerning the Depletion and Destruction of the United States CEP Industry*

Plaintiffs devote some 131 pages of their FPS to what they describe as "the debilitation and destruction of the United States consumer electronic products industry." They offer this

---

evidence of the rebate conspiracy is to be found in the failure of the defendants to notify U.S. Customs about their supposed competitors' customs violations, or to notify MITI about sales below check price. It is, however, obviously in each defendants' own self-interest not to "blow the whistle," since doing so might focus attention on their own Customs violations.

[230] We shall discuss planitiffs' rebating claims vis-a-vis MC and MIC, Motorola, and Sears in greater detail *infra* when we reach the evidence as to their alleged participation in the conspiracy.

evidence in an attempt to draw an inference therefrom of conspiratorial behavior—i.e., an inference of intent and anticompetitive acts from "effects." Plaintiffs' presentation falls into three discrete areas. First, plaintiffs offer a plethora of statistics relative to increases in Japanese imports into the United States, the decline in production of U.S. television receivers, and related matters. Second, plaintiffs proffer certain findings about injury to U.S. industry emanating from administrative proceedings before the United States Treasury Department; the United States Tariff Commission, and the United States International Trade Commission. Third, plaintiffs advance an analysis based upon the notion of "retail price points" in the U.S. market which are alleged to have deteriorated as the result of defendants' activities.

In the first of these categories, the statistics, plaintiffs have submitted data demonstrating a considerable increase in imports of monochrome and color television receivers from Japan into the United States during times relevant to this case. For instance, U.S. imports of color television receivers from Japan increased from less than 0.7 million units in 1968 to 3.7 million units in 1976. In terms of private label sales, U.S. imports of color television receivers from Japan increased from 192,000 in 1966 to 376,000 in 1970, and total U.S. imports of private label television receivers (monochrome and color) from Japan increased from 758,000 units in 1966 to 1,309,000 units in 1970. In terms of percentages, in 1965 Japan supplied about 10% of the United States consumption of television receivers, compared to 28% in 1970.[231]

Plaintiffs also set forth figures showing a significant decline in the number of United States produced complete television

[231] The figures cited in the text are broken down further into various screen sizes. For example, imports from Japan of monochrome sets having 10 to 13 inch screens incresed from 25% of the U.S. market in 1965 to 50% in 1970. Imports from Japan of monochrome sets having 17 to 19 inch screens increased from 1% of the domestic mrket in 1965 to more than 15% in 1970. None of the statistical data cited is challenged by defendants.

receivers and United States assembled receivers. Additionally, the advance statistics as to the number of U.S. producers of television receivers between 1960 and 1976 which show that the number of companies producing television receivers in the United States declined from 18 in 1968 to 12 in 1975.[232] Moreover, during the same period, the number of U.S. establishments in which television receivers were assembled declined from 30 to 15. Finally, plaintiffs adduce figures showing: (1) underutilization of U.S. television receiver assembly plants; (2) decline in operating profit of U.S. producers of television receivers; (3) decline in the average number of persons employed in U.S. establishments in which television receivers were assembled; and (4) decline in man hours worked on television receivers, all during periods relevant to the case.[233]

As to agency findings, plaintiffs have set forth a number of "injury" findings of the U.S. Tariff Commission and the U.S. International Trade Commission. They quote at length from portion of those Commissions' findings giving conclusory opinions as to the source of the decline in the U.S. television industry. They also offer the Less Than Fair Value findings of the Secretary of the Treasury in connection with the 1921 Antidumping Act Proceedings.[234] All of these findings are

[232] Plaintiffs neglect, however, to point out that between 1960 and 1968, during most of which period the Japanese manufacturing defendants were not even exporting color television sets to the United States, the number of U.S. television receiver producers declined from 27 to 18.

[233] Plaintiffs offer still further charts showing such matters as the ratio of net operating profit or loss to net sales for domestic producers; charts showing aggregate profit and loss experience on TV operations of U.S. producers; wholesale price indices for TV receivers; and a host of other financial data reflecting that the times in question were not good ones for the U.S. television receiver manufacturing industry.

[234] Plaintiffs also attach charts from the Tariff Commission Report as to the extent by which wholesale net selling prices of imported television receivers sold to distributors were lower than those for U.S.-made sets.

discussed at length in our Public Records Opinion, in which they were all excluded from evidence on grounds of trustworthiness and lack of relevancy.

Finally, plaintiffs devote some 67 pages of the FPS to a discussion of the "deterioration of television retail price points" in the U.S. caused by the alleged activities of the Japanese defendants. The term "price points" refers to retail price levels to which consumers have become accustomed and which are the maximum levels they expect to pay. In the television receiver market from the mid-1960's to the early 1970's, in the case of the middle and lower price range sets, plaintiffs assert that the price points were set by the mass merchandisers. Plaintiffs contend that the Japanese "cartel" concentrated on brands in the low price niche in the market, which included Emerson (predecessor of plaintiff NUE) and Dumont (an Emerson label). Defendants are said to have done so by their sales to mass merchandisers such as Sears, J. C. Penney, W. T. Grant, and R. H. Macy. Although prior to the Japanese "invasion" Emerson/NUE was capable of manufacturing and selling sets in the middle to lower price range by meeting price points with sufficient margin for the dealer to warrant continued purchases from Emerson/NUE, plaintiffs submit that after the Japanese saturation of the market at the lower end of the price range, the deterioration in the price points enabled the Japanese to dominate that segment of the market, leaving Emerson/NUE unable to compete.

Plaintiffs have thus engaged in an extensive presentation of the manner in which Japanese pricing and marketing policies caused a lowering of prices in the domestic television receiver market, though they fail to mention that what they portray looks very much like the competitive model. The purpose of the presentation is to support plaintiffs' theory that: (1) failure of NUE and other U.S. television manufacturers and (2) the deterioration of the profit margin of Zenith and others which also resulted, in plaintiff's submission, from the vast increase in Japanese imports and the destruction of television retail price points in the U.S. market lead to an inference of defend-

ants' conspiracy. Plaintiffs, however, cite no authority which supports this proposition.[235]

It is plain that the depletion of the U.S. CEP industry is as consistent with a number of other inferences, such as efficient foreign competition or inefficient U.S. management,[236] as it is with the inference that the industry was harmed by a conspiracy among these particular defendants. But even beyond this observation, in the total absence of any evidence of collusion or, indeed, of any evidence of anticompetitive activities on the part of the defendants from which collusion could be inferred, it is impossible as a matter of law to infer the conspiracy

---

[235] There was some suggestion at oral argument that *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) could be read to support an inference of conspiracy from effects alone. Plaintiffs rely for this theory upon *Gypsum's* footnote 13, which points out that *Gypsum*, which analyzed the type of intent needed to sustain a criminal conviction under the Sherman Act, left "unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect," *citing Container Corp., supra.* But plaintiffs have ignored the fact that the anticompetitive effect which can sustain an inference of a civil Sherman Act violation must have been the result of some anticompetitive *conduct*, such as the exchange of specific current prices in *Container Corp.* or the exchange of detailed price verification data in *Gypsum*. We fail to see how conduct can be inferred merely from proof of alleged consequences of that conduct, and *Gypsum* does not so hold. We note in addition that the Supreme Court in *Gypsum* expressly stated that it was not discussing what evidence might support an inference of an "intent to agree, but only intent 'to effectuate the object of the conspiracy.' " 438 U.S. at 443 n.20, 98 S.Ct. at 2877 n.20.

[236] One subject extensively explored during discovery was the question whether NUE's demise was a function of poor management and inefficiency. Defendants have offered significant evidence to support their claim that NUE was operating from an antiquated facility, that its production and marketing operations were inefficient, and that its management was mediocre. According to the defendants, most of NUE's distributors were operating "in the red" long before the defendants had achieved a significant U.S. market share. NUE denies these contentions.

plaintiffs allege from deterioration of the U.S. CEP industry. Such an "inference" would in reality be mere speculation.[237]

N. *Plaintiffs' Claims Concerning Defendants' Acquisitions of United States Manufacturers and Their Establishment of Manufacturing Facilities in the United States*

1. *Introduction*

Plaintiffs devote over 70 pages of the FPS to their claims of "take over and elimination by the defendants and their co-conspirators of United States manufacturers through a pattern of unlawful acquisitions, mergers, joint ventures, and the establishment of manufacturing facilities in the United States." Plaintiffs complain of four acquisitions:

(1) the acquisition by Matsushita of the consumer electronics products ("Quasar") division of Motorola;

(2) The acquisition of Magnavox by N. V. Philips;

(3) the acquisition of Warwick Electronics, Inc., (Warwick) by Sanyo;

(4) the acquisition of Fisher Corporation (Fisher) by Sanyo.

---

[237] To the extent that plaintiffs rely upon evidence of destruction to particular companies—NUE for example—as opposed to evidence of injury to the entire industry, we note that such an approach would be unavailing. Because the antitrust laws are designed to protect competition, not competitors, evidence which shows only injury to individual firms cannot be used to infer injury to the competitive process. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Thus, without specific evidence of anticompetitive conduct and effects, the most that could ever be inferred from the demise of NUE or the decrease in Zenith's profit margin would be an "intent" to obtain business to the detriment of a particular competitor—an intent which is not a violation of the antitrust laws . We note too that under the principles of *Brunswick, supra*, as further enunciated in *Murphy Tugboat Co. v. Crowley*, 454 F.Supp. 847, 852 (N.D.Cal. 1978), injuries suffered by a firm from the competitive process are not compensible, even if the defendants are engaged in unlawful conduct.

Plaintiffs contend that each of these acquisitions is an overt act in furtherance of the conspiracy among the defendants. Additionally, the Quasar and Warwick acquisitions are the subject of Zenith's claims under Section 7 of the Clayton Act, which are discussed separately *infra*.

We recite in this segment the facts of record relevant to plaintiffs' "acquisition" claims. As a matter of convenience, we shall also set forth the facts relative to Sanyo's defense that Warwick was a "failing company" when acquired by Sanyo. While those facts are principally relevant to Sanyo's defense to plaintiffs' claims under § 7 of the Clayton Act, to the extent that they could be used at trial to deflect the claim that the Warwick acquisition was an anticompetitive act in furtherance of the conspiracy they have some bearing on plaintiffs' Sherman Act § 1 claim, even if only in a peripheral way.

The FPS presentations about the acquisitions are extremely lengthy, in part because they describe in replete detail the negotiations for the various acquisitions and the terms of the acquisition papers. We need not summarize those matters here; rather, we will set forth only those matters essential to our disposition of the pending motions.[238]

2. *The Quasar Acquisition*

On May 28, 1974, an agreement was reached between Matsushita and Motorola under which Matsushita ultimately acquired, for a consideration of $100,000,000 and "reciprocal arrangements" in the solid state and related fields, the entire consumer electronic products division of Motorola, including Motorola's "Quasar" trade name, its manufacturing facilities throughout the United States, and its complete United States consumer electronic products distribution system. Matsushita

---

[238] Plaintiffs ask us to look at each acquisition as an overt act in furtherance of the "unitary" conspiracy. The discussion in the following sections examines whether, as to each individual acquistion, an inference of conspiratorial activity can be drawn.

(MEI) kept open and has continued to operate a number of former Motorola television production facilities.[239]

Plaintiffs' primary allegations concerning the Quasar acquisition relate to what plaintiffs see as collusion in its background. In 1972, desiring to market television receivers in Japan, Motorola officials discussed with Mr. Morita, the President of Sony, Motorola's desire to establish a long-range cooperative association with the Japanese manufacturer.[240] From this discussion came a suggestion that Quasar sets be marketed in Japan in cooperation with AIWA, an audio equipment company controlled by Sony. As of June 6, 1973, Motorola and AIWA agreed upon the terms for AIWA to become the exclusive sales agent for Quasar brand color television receivers in Japan. A short time later, in mid-August, 1973, they announced an agreement under which AIWA would import four television receiver models manufactured by Motorola to be sold in Japan under the Quasar label. However, shortly thereafter, MEI entered into negotiations with Motorola, ultimately completing the Quasar acquisition. MEI insisted from early in the negotiations that the sales contract between Motorola and AIWA be dissolved. Accordingly, the AIWA arrangement was formally terminated by Motorola after the acquisition by Matsushita. Motorola paid $250,000 to AIWA in consideration for termination of their arrangement.

Plaintiffs contend that the termination of the Motorola-AIWA agreement was evidence that the Japanese manufacturers, in this instance specifically MEI and Sony, were determined to keep the Japanese market closed to U.S. competition,

[239] Plaintiffs complain that although Matsushita represented to the Department of Justice that it would keep *all* of the plants open and retain *all* of the Motorola employees, it did not do so, instead closing several plants and laying off numerous employees. We fail to see what relevance that fact, if true, has to this case.

[240] According to its president, Mr. Galvin, Motorola believed that it could sell its television receivers in Japan at lower prices than those at which comparable sets were being sold by Japanese manufacturers.

thereby safeguarding their own ability to continue their high-price domestic conspiracy. In addition, plaintiffs contend that Motorola was "pressured" concerning the ongoing Quasar negotiations by virtue of "startling [price] increases from its Japanese suppliers of component parts" in January, 1974. This allegation is apparently intended to give rise to the inference that Motorola's Japanese suppliers participated in a conspiracy either to make it financially unattractive for Motorola to enter the Japanese market or to weaken Motorola in order to ease MEI's takeover. This allegation is not supported by the three documents listed to support it at page 8424 of the FPS, however. Moreover, it is strongly controverted by a variety of Motorola sources, including the testimony of Motorola's president, Mr. Galvin, and a letter from Motorola's counsel, Mr. Nygren, to the Justice Department.

We have carefully considered all of plaintiffs' allegations about the background of the Quasar acquisition, but we fail to discern in them any hint of a link to the "unitary" conspiracy. Rather, we see evidence of rational pursuit of economic self-interest, antithetical to notions of conspiracy.[241] Motorola's plans to compete in the Japanese market were certainly in its own self-interest and totally contrary to plaintiffs' claims that Motorola was a participant in the conspiracy. Motorola's sale of a division which was losing money, *see* Part VII. Q.11, *infra*, was obviously in its own self-interest as well. There is no evidence or indication that MEI's acquisition of an American CEP manufacturing division was anything other than unilateral and in its own interest pursuant to a desire to establish a production facility in the U.S., a significant market for its goods.

Motorola's participation in the conspiracy is asserted to stem in part from its accession to the demands of MEI and Sony with respect to cancellation of the AIWA contract. However, we

[241] Since the acquisitions are said to be a function of consciously parallel interdependent action, hence (circumstantially) conspiratorial, we apply *Bogosian/Venzie* analysis.

see no evidence of a conspiratorial role. If Motorola wished to conclude a favorable agreement with MEI, it apparently had no choice but to cancel the AIWA contract, and it was plainly therefore in Motorola's self-interest to do so. Although plaintiffs suggest that Mr. Morita's acquiescence in the termination of the AIWA deal was against Sony's interest and in furtherance of the conspiracy, the fact is that Sony was compensated for the termination of the AIWA venture. Moreover, it would appear that Sony had little choice, faced with MEI's plans, unless it wished to sue. There is no evidence that the settlement was inadequate, and we cannot speculate that it was, elevating the fact of settlement into evidence of a conspiracy.[242]

Finally, MEI had an interest in not having its own subsidiary manufacture TV sets which would compete with it in Japan. Merely because its own interest in this one regard is parallel to that of other Japanese manufacturing defendants does not constitute evidence of conspiracy. In fact, all of plaintiffs' conclusions in this area are speculation.

Turning to plaintiffs' remaining factual development about the Quasar acquisition, plaintiffs set forth in their FPS the U.S. television receiver market shares of Motorola and MEI at the time of the acquisition (1974). These figures include reported sales of MEI's "Panasonic" brand and those of the "Penncrest" brand marketed by MEI's private label customer, J. C. Penney. According to these figures,[243] the joint Motorola-MEI market share was 15.6% of the monochrome market, 11.4% of the portable market, and 9.9% of the console market. The 1973 Trendex statistics for the U.S. color television market are as follows: Zenith, 23.8%; RCA, 20.1%; Magnavox, 7.8%; Sears, 7.3%; Motorola, 7.3% G.E., 5.7%; Sony, 4.5%; Sylvania, 4.5%; Philco, 3.2%; Admiral, 3.1%; Panasonic, 2.1%; Montgomery Ward, 1.6%; Penncrest, 1.1%; Grants, 0.9%; Hitachi, 0.7%; Sharp, 0.7%; Sanyo, 0.6%; Packard Bell, 0.6%; Western Auto, 0.5%; Emerson, 0.3%; all others, 3.6%.

[242] Plaintiffs also seek to draw an inference from the fact that Mr. Morita was a guest in the private airplane of Mr. Galvin, the President of Motorola, when certain conversations took place. That fact does not make up for missing evidence.

[243] Plaintiffs' figures are drawn from "Trendex" statistics relative to the television market. The "Trendex" figures are generally accepted by the parties as reliable.

Aside from potential impact on plaintiffs' Clayton Act § 7 case, we fail to see how these figures in any way support plaintiffs' conspiracy claims, and plaintiffs do not explain how they do. Indeed, armed with these and other uncontested figures, the defendants suggest that the fact of overriding significance concerning the U.S. color TV market is that every year for the last eight years Zenith has sold more color television sets in the U.S. than any other company, American or Japanese.

3. *The Warwick Acquisition*

Warwick was a Delaware corporation which manufactured consumer electronic products, musical instruments, and dining room furniture, with its principal manufacturing facilities located in Arkansas.[244] During the 1960's, Warwick was Sears Roebuck's principal television supplier. Jerome Brennan, Sears' senior buyer of televisions from mid-1967 through mid-1974, testified at a deposition that throughout his tenure it was Sears' policy to purchase from Warwick all of its requirements for television sets which Warwick was able to supply on a competitive and profitable basis. Plaintiffs themselves assert in the FPS that on June 30, 1969, Sears affirmed its determination to develop Warwick as a home entertainment electronic products source "second to none in the industry in every facet of its business," to purchase most, if not all, of its requirements from Warwick, and to concentrate in Warwick the maximum volume of Sears' purchases which competitive conditions would permit.

[244] Warwick also had manufacturing facilities in Mexico.

Prior to September, 1966, Sears was Warwick's majority shareholder, and at all times since September 1, 1966, Sears has owned at least 25% of Warwick's outstanding shares. Consistent with is policy of developing and purchasing from Warwick, Sears heavily financed Warwick's operations. Warwick's audited consolidated financial statement for its fiscal year ending March 30, 1968 reflects long-term (ten years at the prime rate) loans from Sears of $15,000,000. Moreover, in 1970, Sears increased its financial assistance to Warwick, agreeing to purchase finished products from Warwick "as manufactured" rather than "when shipped" as in the past. By this device Sears, in effect, assumed the burden of financing Warwick's finished goods inventory, assistance which Warwick valued at $2,500,000 in that one year. In 1975, approximately 66% of Warwick's net sales consisted of sales of color television receivers and related service parts, virtually all of which were sold to Sears. In that year, Warwick was the sole domestic, and on a dollar volume basis, the largest single supplier to Sears of color television receivers.

All of the foregoing facts are undisputed. Also undisputed is the fact that Warwick had been losing money "hand over fist." After 1973, Warwick was unable to generate a sufficient volume of business to remain viable, and continued to operate at a loss and to lose business. Warwick lost 3.8 million dollars in 1974, ending the year with negative retained earnings.[245] In 1975, Warwick lost 8.9 million dollars, ending the year with a stockholder's equity deficit in excess of $5 million dollars and a retained earnings deficit of nearly $10 million dollars. After being advised that Sears would purchase no table-top color TV's from it after June of 1976, Warwick terminated all of its engineering personnel, leaving itself with no future in the television business.

While the parties have differing contentions as to the reason for Warwick's demise, two important facts are undisputed.

---

[245] Mr. Nevin, the board chairman of Zenith, testified at this deposition that Warwick was, for practical purposes, out of business by 1974.

First, Sanyo and Toshiba offered to sell and, in fact, did sell color TVs to Sears for lower prices than Warwick could profitably meet. Second, the quality of the imported color TVs available to Sears was vastly superior to those which Sears was buying from Warwick, resulting in enormous dollar savings on warranty expense.[246]

As a result of the better quality and lower prices available from Sanyo and Toshiba, Sears gradually reduced its color TV purchases from Warwick.[247] Because of the 1974 recession, Sears further reduced its purchases from Warwick. At one point, because Warwick had indicated disinterest in producing those TV receivers that would not make a significant contribution towards its fixed costs, Sears had to make plans to import 19,015 sets which Warwick had the ability to produce. The only set which Sears was planning to buy abroad in 1975, and which Warwick both could make and wished to make,[248] was offered

---

[246] Mr. Brennan testified that, in terms of quality, serviceability, and number of service calls in the field, the imported television receivers purchased by Sears from Sanyo and Toshiba were clearly superior to those which it purchased from Warwick. He further testified that this superiority was a significant factor in Sears' decision to buy from Sanyo and Toshiba. Even Mr. Nevin, Zenith's board chairman and chief executive officer, testified that the quality and performance of the product Sears was getting from Warwick was "second rate." Field failures of Warwick TVs had sent the service call rate on Sears' color TV sets soaring and, by the first quarter of 1974, Sears had the highest service call rate in the industry for color sets within the quarter in which the set was purchased. Moreover, Sears' cost of honoring the warranties it gave to customers on sets which it had purchased from Warwick had doubled from 1973 to 1974 and was three times as great as its cost of honoring the warranties which it gave customers purchasing imported sets. In October, 1974, Sears' home entertainment buying department estimated that Sears would save over $9,000,000 in service costs if it could achieve on the 340,000 color TV sets Sears planned to buy from Warwick in 1975 the same low incidence of service calls it was enjoying on the imported color sets it had purchased.

[247] Warwick had earlier discontinued its monochrome (black and white) TV operations.

[248] Warwick was unable to make a number of television sets in which Sears was interested.

by Warwick at a higher price than the comparable imported model, even before considering the higher service costs.

As of September 15, 1975, Sears found that it had paid to Warwick price premiums over import prices exceeding $1.2 million; that Warwick was over 11,000 sets behind its contracted production schedule for Sears; that Warwick had an inventory of over 18,000 finished sets which it was unable to ship pending repairs of manufacturing defects; and that the defect rate of Warwick products sold to Sears was over four times higher than that of the imported products Sears bought. By October 31, 1975, Sears finalized its decision to discontinue purchasing table-top color television sets from Warwick in favor of sets offered to it by Sanyo and Toshiba which had better specifications, brighter pictures, lower power consumption, better serviceability, and lower costs.

In 1976, Sanyo acquired the controlling interest in Warwick's television business through a complicated tripartite transaction among Sanyo, Sears, and Whirlpool (Warwick's largest stockholder). The essentials of this transaction were that: (1) defendant Sanyo Manufacturing Company (SMC), a new corporation, was organized; (2) Sears retained its 25% interest in the reorganized corporation; (3) Sanyo acquired virtually all of the outstanding stock of SMC other than that held by Sears; and (4) Sears and SMC entered into a contract by which Sears agreed to purchase at least 70% of its console color television requirements from SMC, provided SMC's prices and features were competitive.[249]

Zenith has alleged that Warwick was debilitated by the "whip-saw price tactics" that Sanyo and Toshiba aimed at Warwick, to the point where it was vulnerable to the demands of the cartel. Zenith has, however, offered no facts, admissible or otherwise, to support this contention.

[249] The agreement was for a three year period with automatic renewal on an annual basis subject to notice of termination by either party.

We will comment *infra* on the significance of the foregoing facts to plaintiffs' Clayton Act § 7 claims, including Sanyo's "failing company" defense. In terms of the conspiracy claims, however, we fail to see how the acquisition by Sanyo of a controlling interest in Warwick constitutes evidence of conspiratorial activity. What Sanyo acquired was not a viable company (the facts make clear that Warwick's demise was inevitable, if not already a fact), but rather a manufacturing facility. The desire of an individual defendant to improve its competitive position in the United States market by establishing manufacturing facilities here is not only consistent with unilateral behavior and self-interest, but indeed with notions of competition rather than restraint of trade.

There is certainly no evidence that Sanyo acted in concert with any of the other Japanese defendants in connection with the Warwick acquisition. As for Sears, its self-interest was served by continuing Warwick as a viable entity for two reasons. First, Sears' financial interest (stock ownership and notes payable) was thereby protected. Secondly, a domestic facility remained as a potential source of supply. There is simply no evidence to support plaintiffs' claim that the Warwick acquisition was yet another link in the chain of defendants' "unitary" conspiracy; all plaintiffs have adduced is speculation.

4. *The Sanyo-Fisher Acquisition*

Fisher Corporation (Fisher) is engaged in the production and sale of stereo and audio equipment in the United States. It was acquired in 1969 by Emerson Electric Company of St. Louis, Missouri,[250] and was subsequently acquired from Emerson by the Sanyo interests.[251] The FPS contains a list of Sanyo, Emerson, and Fisher personnel who discussed the acquisition,

[250] Emerson Electric Company of St. Louis is unrelated to the Emerson Radio Co., NUE's predecessor.

[251] The acquiusition was divided among Sanyo Denki (the parent manufacturing corporation), Sanyo Trading (the Japanese sales corporation), and Sanyo Electric Trading Company, Ltd. (the American sales subsidiary).

as well as various financial and organizational data with respect to Fisher, whose gross sales in 1974-1975 were estimated by it to be in the $28 to $35 million range. But other than basic background data, the plaintiffs, in their FPS, tell us nothing about the impact of the transaction except to allege that the acquisition immediately eliminated a competitor of Sanyo, increased Sanyo's share of the United States consumer electronics market, integrated the former Fisher facilities with "highly vertical integrated production facilities" in the Far East, and increased concentration in the United States CEP market. More precisely, plaintiffs have told us nothing specific about the impact of the transaction of Zenith or the U.S. stereo market.

We will explain in Part VIII.B., *infra*, that plaintiffs have offered virtually no evidence in support of their stereo claims. We extend this discussion only to note that the acquisition of Fisher by the Sanyo interests is in no wise demonstrated to have even the vaguest connection with the overall "unitary" conspiracy. There is no evidence of concerted activity; there is no indication that the acquisition was other than in Sanyo's self-interest, stemming from its desire to improve its competitive position in the stereo market. There is only speculation.

5. *The Philips-Magnavox Acquisition*

N.V. Philips Gloelampenfabrieken, incorporated in the Netherlands, is one of the world's largest industrial corporations. Though highly diversified, Philips is heavily involved in the manufacture and sale of consumer electronic products, including television receivers. Philips' American subsidiary, North American Philips Corporation, is a large corporation which manufactures and sells a large variety of products, including certain products imported from Philips in the Netherlands. The plaintiffs take some 75 pages of their FPS to tell us that (1) the Philips interests were seeking to acquire a U.S. television manufacturer; (2) at one time they considered the acquisition of Zenith; (3) Magnavox's market situation and corporate well-being were deteriorating; and (4) Magnavox

was ultimately acquired by North American Philips Development Corporation, a subsidiary of North American Philips Corporation created for the purpose of acquisition of the Magnavox stock, in a transaction that was financed by Philips itself.

That is all plaintiffs tell us about the acquisition except to suggest that it somehow corroborates the worldwide scope of the alleged conspiracy because of certain "cooperation agreements" between Philips and Matsushita, discussed in Part VIII.C., *infra*. Plaintiffs intimate that although Philips had been interested in acquiring Motorola, and although Matsushita had been interested in acquiring Magnavox, they had adopted a "hands-off" policy towards each other's "turf" after the other's intention became known. There is, however, no admissible evidence offered to support this contention.

Plaintiffs have made a number of allegations, against the background of the Philips-Matsushita "cooperation agreements," *see* Part VIII.C., *infra*, which they apparently have injected into the Philips-Magnavox acquisition section of the FPS to elevate the significance of the transaction. First, plaintiffs allege that Philips and Matsushita "consulted on their respective plans with respect to consumer electronic product manufacture and sales in the United States." However, the documents which plaintiffs reference in support of this allegation (MIH 029201-210) are in the document despository only in Japanese. Plaintiffs have alleged that Philips and MEI conferred from time to time concerning the marketing strategy to be employed with respect to the sale of products manufactured by Matsushita Electronics Corp. (MEC). But that would not be improper, for MEC was a joint Philips-Matsushita venture, not shown to be itself unlawful. Finally, plaintiffs cite a document (MIH 029415-17) which is not in the document depository, but which, according to the copy furnished in one of plaintiffs' submissions to the court, does nothing more than evince the friendship between Philips and Matsushita and speak amorphously about having a positive long-term relationship. This adds nothing to plaintiff's case, nor to the significance of the Philips-Magnavox acquisition.

We shall not extend this discussion by a lengthy summation. Suffice it to say that, just as in the case of the acquisitions discussed in the preceding sections, there is no evidence of concerted action; the transaction appears to have been unequivocally in Philips' own best interest; and there is nothing here from which an inference (as opposed to speculation) of conspiratorial activity can be drawn. Indeed, there is nothing here which links Philips in any way to the alleged conspiracy.

6. *Plaintiffs' Claims About Establishment of United States Manufacturing Facilities by the Japanese Defendants*

Plaintiffs contend that the Japanese manufacturing defendants furthered their conspiracy to take over the American CEP market by establishing manufacturing facilities in the United States. Although they devote approximately thirty pages of their FPS to this aspect of the matter, what emerges is the following. In 1972, Sony established a manufacturing facility in San Diego, California. By virtue of the Quasar acquisition, Matsushita obtained manufacturing facilities in Franklin Park, Illinois and Caguas, Puerto Rico, By virtue of the Warick acquisition, Sanyo obtained a manufacturing facility in Forrest City, Arkansas. In 1978, Melco constructed a manufacturing facility in Irvine, California, and one in Los Angeles, California. In 1978, Toshiba constructed a manufacturing facility in Lebanon, Tennessee, and, in 1979, Sharp constructed a manufacturing facility in Memphis, Tennessee.

This very review reflects the random nature of the complained of acquisitions, negating any claims of parallel, much less concerted, activity. These acquisitions are incontrovertably in furtherance of the interest of the company establishing the facility, giving it a better position in the American market, thus enhancing competition.

In sum, we fail to see how plaintiffs' claims concerning defendants' establishment of manufacturing facilities can in any respect be used as a basis for drawing an inference of conspiratorial activity.

O. *Plaintiffs' Evidence Concerning "Defendants' Systematic Price Discrimination in the U.S."*

Plaintiffs devote over 100 pages of their FPS to what they describe as "Defendants' Systematic Price Discrimination in the U.S." This segment consists of page after page of schedules purporting to reflect prices of U.S. sales subsidiaries of the Japanese manufacturing defendants to their various customers and comparisons of sales analysis reports to price lists. The latter documents purport to analyze invoices produced in discovery and demonstrate that similar goods were sold to different customers for different unit prices. The ultimate thrust of plaintiffs' claims as to each of the sales subsidiaries, as exemplified by the following passage concerning MECA, is that the:

> price lists, price schedules, sales bulletins, promotional bulletins, sales analysis reports, sales invoices and sales allowances establish that MECA regularly sold its models of consumer electronic products at prices substantially lower than the prices for such models set forth or disclosed in MECA's answers to plaintiffs' interrogatory Nos. 45 and 46 and supplemental interrogatory Nos. 10 and 11. . . . Further, MECA's price lists, price schedules, sales bulletins, promotional bulletins, sales analysis reports, sales invoices and sales allowances prove that MECA regularly charged substantially lower prices to its large, preferred customers and chain stores than defendant charged to its regular dealers for identical models of its consumer electronic products.

Plaintiffs contend that this material is evidence of the "unitary" conspiracy.

The material contained in these FPS pages constitutes the basis for Zeniths' Robinson-Patman Act claims discussed in Part X, *infra.*[252] We point out there, *see* n.394, *infra*, that there are serious problems with plaintiffs' proof. We highlight in that discussion defendants' contention that Zenith has failed to

---

[252] NUE has filed no Robinson-Patman Act claims.

provide proof of certain jurisdictional elements required by the words of the Robinson-Patman Act. Various defendants claim, for example, that Zenith has not come forth with sufficient evidence of at least two contemporaneous sales of comparable merchandise to at least two different purchasers. They argue that Zenith does not have evidence of actual sales prices, as opposed, for example, to list prices, and that only actual sales prices will support a Robinson-Patman claim. They also contend that the instances of price discrimination in plaintiff's FPS are in any event *de minimis*. The Matsushita defendants claim that Zenith has failed to show that the commodities were sold for use or resale within the United States. We have examined these contentions and have found that in most, though not in all, instances, they were well-founded.

It is plain that there is no evidence of any logical connection between the supposed price discrimination and the "unitary" conspiracy, even if there is some cognizable evidence of price discrimination. First we note that there is no evidence of any collusion on connection with alleged price discrimination. Plaintiffs have adduced no direct evidence of collusion in pricing, and the documents described in plaintiffs' FPS show widely disparate patterns. We have been cited to no authority supporting the proposition that disparate conduct gives rise to evidence of conspiracy. Second even assuming parallel conduct, there is no suggestion that such price discrimination as may have existed was contrary to the interest of the seller. It does not militate against the self-interest of a seller to regularly charge substantially lower prices to its large preferred customers and chain stores than to other regular customers for identical models of CEP's. Such conduct reflects rational independent choice, not conspiracy. The plaintiffs thus "fail" the *Bogosian/Venzie* test. Finally, there is an absence of focused evidence of sales to other types of customers below the prices set forth in defendants' answers to plaintiffs' interrogatories 45 and 46(c). The random nature of the evidence and the lack of any focus totally precludes any contention that the defendants' price discrimination in the U.S. is evidence of the "unitary" conspiracy.

P. *Plaintiffs' Contentions Based Upon the "Undisputed Facts and Legal Propositions" Identified by Plaintiffs' Counsel in the Course of Summary Judgment Argument on August 28, 1980*

As we have earlier observed, we invited counsel to take as much time as they wished during the final summary judgment arguments in August, 1980 to pull out of the massive piles of documents which constitute the sinews of plaintiffs' case those documents which demonstrate the presence or absence of a genuine issue of material fact. Defendants' counsel accepted our invitation, notwithstanding the added challenge of proving a negative. As we have said, they spent four days reviewing and analyzing plaintiffs' critical documents. Plaintiffs' counsel, Mr. Rome, however, declined the invitation, instead devoting the bulk of his argument to what he described as "undisputed facts and legal propositions." Indeed, with what we might call a touch of bravado, Mr. Rome stated that he was content to rest his case in opposition to defendants' motions on those undisputed facts and legal propositions which he proceeded to elucidate.[253]

Despite Mr. Rome's offer, we plainly do not rest our decision of these summary judgment motions upon analysis of the success or failure of his argument from "undisputed facts and legal propositions." However, in view of the fact that Mr. Rome devoted most of his final summary judgment argument to this approach, and also because it is useful as a kind of "retrospective," we shall take up plaintiffs' argument from these alleged undisputed facts and legal propositions.

Preliminarily, we note that it is not correct that all of the listed facts are undisputed. Many of the facts asserted by Mr. Rome to be undisputed are not even supported by the record, and many of the alleged facts are gleaned from inadmissible

[253] Mr. Rome's argument was amplified in Plaintiffs' Supplemental Post-Argument Memorandum in Opposition to Defendants' Motions for Summary Judgment, filed September 22, 1980, from which we draw the list of undisputed facts and propositions which follows.

evidence. However, except as otherwise noted, we will assume lack of dispute and addmissibility for purposes of this analysis. Plaintiffs' list of undisputed facts and legal propositions is as follows:[254]

1. The defendants have colossal wealth and combined financial power, are engaged in extensive lines of business, and have a huge sales volume.

2. There are interlocking officers and directors among the defendant groups, including mutual stock ownership, financial guarantees and loan arrangements, control and dictation of decisions by the parents, and absorption by the parents of losses of U.S. subsidiaries.[255]

3. Mr. Yamaguchi was selected by the President of Melco in 1974 to become the head of MSI.

4. Personnel are exchanged among parent and subsidiary companies.

5. The Japanese defendants are members of the EIAJ, JMEA, and many other groups and committees, and designated representatives at all levels within each company attended meetings of numerous groups and committees.

6. Various defendants attended meetings of these intercorporate groups and committees consistently over extended periods of time.

7. Defendants themselves have admitted in answers to interrogatories and in documents that they discussed and ex-

[254] We ignore several "legal propositions" contained in the list because they are germane only to the Act of State and Sovereign Compulsion defenses which we do not reach.

[255] Defendants do not concede control and dictation of decisions. Nor do they concede absorption of losses. (The record is clear that many of the subsidiaries were profitable.)

changed information on production, shipment, inventory, and other business data.[256]

8. "The Japanese defendants met and discussed their acting together concerning the penetration of the U.S. market and they put it all down in written documents, actually signed by the head of companies each year over many years."[257]

9. Copies of the "cartel agreements" went to the Japan Light Machinery Information Center in New York, of which the defendants' U.S. subsidiaries and related companies were members.

10. The defendants' coordinated pricing was intended to be applicable to the United States market.[258]

11. The Japanese defendants agreed to allocate customers among themselves by means of the Five Company Rule and the customer registration provisions.[259]

12. No Japanese manufacturers other than Toshiba and Sanyo were the historical suppliers of Sears.

13. The Manufacturers' Agreements were recognized as cartels by the OECD, an internationally recognized entity.

14. The "cartel agreements year-by-year report, with satisfaction and pride on the part of the signatories, the enormous increase in their sales of televisions in the United States."

[256] These facts are not admitted in the expansive sense in which they are stated, *see* discussion at Part VII.G, *supra*. This statement is followed in plaintiffs' "undisputed facts" presentation by some four pages of citations to documents, a number of which have already been held to be inadmissible in the Japanese Materials Evidentiary Opinion. These documents supposedly reflect conspiratorial meetings, but add nothing to our discussion at Part VII.G, *supra*, about the activities of groups and associations in Japan.

[257] This refers to the Manufacturers' Agreements and their "Rationales" discussed at Parts VII.F.1 and VII.I, *supra*.

[258] This "fact" is disputed and unsupported. *See* Parts VII.K. and L, *supra*.

[259] This "fact" is disputed and not supported. See Part VII.F.2, *supra*.

15. The number of United States companies involved in this industry has dwindled significantly during the same period of time covered by these "cartel agreements." At least 20 companies, including NUE, left the field, throwing out of their jobs literally tens of thousands of employees. Moreover, RCA and General Electric have sustained substantial losses in their television business.

16. The "cartel agreements" were being discussed by the participants at the same time the JFTC was pursuing the Six Company Case.

17. Mr. Nishi, a senior official of Hitachi, stated that the success of the Japanese industry in the U.S. had been achieved entirely on their own without government assistance.

18. Defendants agreed upon a check price for items destined for sale in the United States, and this price was knowingly used by defendants to conceal the actual price.[260]

19. Defendants systematically sold at prices "substantially below the dumping levels of the check prices."[260A]

20. The statements in the "cartel agreements" are admissions by each of the heads of the Japanese defendant companies who signed them.

21. "Fourteen of the great men of the Japanese consumer electronics industry who signed the cartel agreements year after year" did not file any affidavits in this proceeding.

22. "There are literally at least 200 other individuals, who attended the various meetings of the conspiratorial groups, who have not signed or filed any affidavits in this case."[261]

[260] Knowing concealment is denied.

[260A] This "fact" is disputed.

[261] Plaintiffs thereupon go on for some 13 pages listing individuals who attended meetings of the various groups and associations in Japan who have not signed or filed any affidavits. Plaintiffs fail to mention that they at no time sought to depose any of these individuals.

23. "There is a strange, suspicious and unexplained absence of notes, minutes, memoranda, and other documentation relating to most of the defendants' meetings at the conspiratorial groups."[262]

24. The JFTC investigated both horizontal and vertical price fixing agreements covering certain CEPs in Japan, growing out of the pricing activities of certain of the Japanese defendants.[263]

25. The National Women's Consumer Organization in Japan organized a boycott of the Japanese television manufacturers in Japan.

26. Meetings of the leading Japanese defendant manufacturers were held to discuss a concerted reaction to the consumer boycott, and as a result of these meetings, prices were lowered in the home market.[264]

[262] Plaintiffs thereupon provide the following partially annotated list of groups that met regularly and for which no minutes or documents were produced by the defendants:

Four Associations Conference—2 meeting minutes produced
—met once every 2 months

Twentieth Day Group

MD Group—some agenda—no minutes

Palace Group

TS Group

Palace Preparatory Group

Okura Group

Japan Light Machinery Information Center

TV Export Council (several)

Defendants, needless to say, reject the plaintiffs' innuendo.

[263] The defendants deny price fixing in Japan. *See* Part VII.G, *supra*.

[264] Planitiffs asserted in the final summary judgment argument that the 1970 consumer boycott in Japan demonstrates that CEP prices were high and that the boycott caused a reduction in those prices. The record contains no competent evidence of the consumer boycott. At all events, the supposed

27. Incident to Motorola's deal with AIWA it was publicized in Japan that Motorola's TVs were to be marketed through AIWA and were going to be sold for as much as 150,000 yen under the prices then prevailing in Japan.

28. A condition of Matsushita's deal to buy Motorola's color TV assets was the requirement that Motorola withdraw from the deal with AIWA and not sell its sets in Japan.

29. An internal memo of Motorola's states that the announced reasons for ending the AIWA deal were false.[265]

30. Manufacturers had television plants in Korea and Taiwan, and the output of those factories was exported to United States and not to Japan.[266]

31. The Japanese manufacturers admitted and agreed in the cartel agreements that if they were to sell in the United States below the so-called "check-price" or "minimum price" it would disrupt the United States market and "there is also no

opinions of anonymous Japanese consumers could not be admissible on both hearsay and other grounds to prove the alleged high price conspiracy.

At the argument we asked the plaintiffs to support their claim that domestic prices were actually lowered as the result of the consumer boycott and, if so, to demonstrate whether it was the defendants or retailers who did the lowering. In their responsive brief, planitiffs claimed that both retailers and manufacturers lowered their prices, but there are no translated documents in the depository to support this claim. This argument is at best a makeweight.

[265] This statement is misleading, and is not supported, as stated, by the record.

[266] According to plaintiffs' theory, advanced in their supplemental briefs, defendants took advantage of the lower offshore labor costs in order to increase their production capacity sufficiently to flood the U.S. market with cheap CEPs. Such moves, however, are as consistent with a theory of intense competition as with anti-competitive activity, and do not logically point to conspiracy. We did not deem this point worthy of a special section of this opinion and simply note it here.

dispute that defendants' counsel in last week's argument acknowledged the fact."[267]

32. There is no affidavit from any defendant manufacturer to the effect that they sold in the United States only at the check price.

33. The failure to report the actual prices of a transaction on a United States Customs Form No. 5515 is a violation of the United States laws.

34. The United States Customs Form No. 5515 were falsified by at least some of the defendants; some of the United States subsidiary defendants acted at the direction of their parent companies as conduits for the payments of rebates; some of the Japanese parent companies at the request of their subsidiaries transmitted funds or otherwise aided and abetted the payment of rebates; the non-disclosure of the rebates and the falsification of the 5515 document resulted in the payment of a higher Customs duty on the imported goods; and the higher Customs duties were less than the dumping duties which might otherwise have been imposed.

35. There is no affidavit from any cartel signatory of any Japanese company, other than Mr. Morita (of Sony), attesting that he has personal knowledge that his company did not rebate and that he had no knowledge that other defendant companies were rebating.

36. "One would not normally pay a higher Customs duty unless there was some secret purpose to be served, a purpose which by its secrecy we suggest is necessarily a fraudulent one."

37. Mr. K. Matsushita gave an interview concerning a meeting in which he said, "It is important that top leaders of

[267] This "undisputed fact" is based upon an alleged statement of Matsushita's counsel, Mr. Millstein, during the summary judgment argument, but it mischaracterizes Mr. Millstein's statement.

enterprises hold talks and get the whole industry to act in concert"; and further

> To overcome, this difficulty, today, it is important, first of all, that top leaders of enterprises hold talks and get the whole industry to act in concert . . . top level conferences—the first of the kind in the appliance industry—were started last year at my suggestion for the purpose of achieving cooperation and stabilization in the industry through the good sense of all those concerned. In this way, we are striving to seek a way out of the present difficulties.

38. In 1964, Akio Morita, Chairman of the Board of Sonam and President of Sony, said to Joseph Sullivan (then a sales manager for Sonam):

> "Sullivan-san, militarily we could never defeat the United States. *But economically we can overcome the United States and become No. 1 in the world.*" (emphasis supplied).

39. No defendant filed an affidavit contending that the Japanese manufacturers sold at the same price in the United States at which they sold in Japan.

40. Additional costs are involved for a Japanese company seeking to sell its product in the United States. It would normally be concluded, therefore, that the export price would be higher because of packaging, shipping, ocean freight, insurance, and Customs duty.[268]

41. A company would not normally pay any higher taxes than it is obligated to pay. The Japanese Commodity Tax is based upon the selling price disclosed by the defendants.

[268] Plaintiffs spend a number of pages of their FPS documenting secret rebates paid to defendants by ocean carriers enabling defendants to ship their CEPs at rates below those provided by law, thus obtaining, in plaintiffs' submission, an unfair competitive advantage. But the "extraction" of rebates from shippers does not point to the existence of a conspiracy; at the least it is equally consistent with intense competition. We fail to see how this theory in any way contributes to plaintiffs' case. We did not deem this point worthy of a special section of this opinion, and simply note it here.

Therefore, defendants would not normally overstate their selling price. To do so would be to overstate the basis for calculation of their tax obligations. Therefore, the commodity tax information is a permissible and acceptable source for price information.[269]

Because we have covered virtually all of these points in our previous discussion, and because the ones that we have not covered are of no significance, we shall not extend this opinion with seriatim comment on the "undisputed facts and legal propositions." We do, however, make several points. First, the foregoing litany is remarkable for the number of instances in which plaintiffs argue from the *failure* of defendants to come forth with affidavits, even though, in the present posture of this case, that is not their burden. Secondly, it is clear beyond cavil that this presentation adds nothing to what we have already analyzed and that the "undisputed facts and legal propositions" are not sufficient to get the plaintiffs beyond the motions for summary judgment. Indeed, it would be incredible if claims of the magnitude asserted by the plaintiffs could rest on such a flimsy foundation. The fact that plaintiffs relinquished the opportunity afforded them during final summary judgment argument to spend unlimited time detailing how the documents or other evidence they have proffered could create a genuine issue of material fact and instead devoted their time to a discussion of these "undisputed facts and legal propositions" reflects the bankruptcy of their case.

Q. *Evidence of the Participation of Individual Defendants in the Conspiracy*

1. *Introduction*

In order for plaintiffs to survive the motion for summary judgment as to any given defendant with respect to the conspiracy aspects of their claims, they must come forward with evidence not only of the existence of a conspiracy to restrain

[269] *See* discussion in Expert Testimony Opinion at 1356.

trade, but also of the membership of that defendant in the conspiracy. Accordingly, in the final major facet of our evidentiary review of plaintiffs' Sherman Act § 1 and Wilson Tariff Act conspiracy claims as to television receivers we consider and assess the evidence against each individual defendant advanced to show that defendants' complicity in the alleged scheme.

Prior to commencement of the pretrial evidentiary hearings, we were confronted time and again with the defendants' contention that plaintiffs had consistently lumped all of the defendants together, and had not identified evidence discrete as to each defendant which linked that defendant to the "unitary" conspiracy.[270] The plaintiffs rejoined that their evidence applied to all of the defendants because they were all involved in the same conspiracy, and that plaintiffs' proffered items of evidence would, if admissible, apply to more than one defendant. That is certainly so in many instances, as in the case of the JFTC testimony. Many other items of evidence are common to many defendants, such as participation in the export control arrangements. Having in mind that we have already discussed all of plaintiffs' primary evidence, we will focus here on matters specially relevant to each defendant. In view of the length of the opinion, we will make the summary as brief as possible.

---

[270] There is no doubt that this was the theme most frequently voiced by defendants counsel throughout the issue development and pretrial management phases of the case. Our acceptance of the legitimacy of that plaint is embodied in a provision of Pretrial Order 154 which provides in ¶ III.C:

> In view of the primacy of the conspiracy claims in plaintiffs' case and defendants' counterclaims, the FPS shall itemize all overt acts to be proved at trial. In particular, the FPS shall enumerate with specificity the facts (i.e., the evidence *aliunde*) upon which they rely to prove that each defendant (including counterclaim defendant) or other entity knowingly joined in the alleged conspiracy and all facts, separately as to each defendant, upon which they rely as to each defendant's participation in the alleged conspiracy. Where any facts will be offered against fewer than all parties, the FPS shall identify the parties against which the facts are or are not offered.

Before commencing this task, a word is in order about the use of coconspirator declarations, for it is plain that the success of plaintiffs' trial strategy depends at least in part upon the admission under F.R.E. 801(d)(2)(E) of numerous pieces of evidence against all of the defendents on the theory that they are declarations of coconspirators. We explained in section VI.D.6, *supra*, the requisites for admissibility of coconspirator declarations. If we find by a preponderance of the evidence independent of the coconspirator statements that a conspiracy exists among the declarant and the defendant against whom the statement is offered, the coconspirator statements will be admissible, and must be considered as part of the record in determining whether a genuine issue of material fact exists as to any given defendant. This preliminary determination will be made *infra;* our consideration in this section of the evidence of the participation of the individual defendants in the conspiracy will help lay the foundation for that determination.

Our review of the evidence of participation of individual defendants in the conspiracy will commence with the evidence concerning the six companies (MEI, Toshiba, Hitachi, Sanyo, Sharp, and Melco, in that order) who were defendants in the Six Company Case. In conjunction with this summary, we will also describe the plaintiffs' evidence (or lack of it) against those subsidiaries of the six companies that have also been named as defendants. Since the vast bulk of the evidentiary review already conducted relates to the six companies, our task will be simplified, for that material can be incorporated by reference here. We will discuss the Matsushita defendants in the greatest detail. The length of that discussion will make it possible to abbreviate the others.

We shall then take up the evidence as to Sony, which contends that it sold in the United States market at the highest prices, and therefore could not logically be charged with membership in a predatory low price export conspiracy. Next, we shall take up the evidence against MC and MIC, which did not manufacture CEP's, but rather purchased Japanese CEP's for resale, *inter alia*, in the United States market.

Turning to U.S. companies, we shall take up the evidence as to Sears, which imported Japanese CEP's, and that with respect to Motorola, which on at least one occasion also imported Japanese CEP's. In these respective subparts we shall also discuss plaintiffs' claims against Sears and Motorola arising out of their respective roles in the acquisitions by Sanyo and Matsushita, respectively, of U.S. companies. We shall conclude our review of the evidence of participation by individual defendants in the conspiracy with some comments about plaintiffs' claims against subsidiaries of the Japanese manufacturing defendants. In the case of each defendant, our evidentiary review will be followed by comment as to the legal sufficiency of plaintiffs' evidence measured against the legal principles that have already been outlined.

2. *The Matsushita Defendants*

We begin the discussion of the plaintiffs' evidence as to the various entities constituting the Matsushita interests by taking up the parent company, Matsushita Electric Industrial Co., Ltd. (MEI).[271] We will then turn to Matsushita Electric Trading Company, Ltd. (MET), MEI's Japanese sales subsidiary; Matsushita Electronics Corporation of America (MECA), MEI's U.S. sales subsidiary; and Matsushita Electric Corporation (MEC), the MEI-Philips joint venture.[272]

[271] We shall not attempt here to rescribe the conclusions set forth at length in earlier segments of this opinion as to plaintiffs' lack of evidence of conspiracy, even though some of that discussion pertains to the Matsushita defendants. We incorporate our earlier discussion by reference and address here only those evidentiary matters specially relevant to the Matsushita defendants.

[272] Quasar Electronics Corp., a fifth Matsushita defendant, is involved only in the transactions surrounding its acquisition by MEI, which we have discussed in Part VII.N.2, *supra*, and is at most a passive figure in this case. We incorporate that discussion here by reference, and note that there is no evidence anywhere in the record to link Quasar to the alleged conspiracy. Plaintiffs' meritless Clayton Act § 7 claims against Quasar are addressed in Part XI, *infra*.

(a) *MEI*

The evidence of any potential significance proffered with respect to MEI consists essentially of the following: (1) documents reflecting its participation in the check price agreements and in the activities of the various groups and associations in Japan; (2) the JFTC materials; (3) the "connection" documents which allegedly show some relationship between MEI's domestic and export prices and activities; (4) the "intent" documents; (5) documents reflecting attendance at meetings concerning possible responses to the 1921 Antidumping Act proceedings; and (6) miscellaneous matters, including the Motorola acquisition and the arrangement with Philips concerning MEC. We take these up in the order mentioned.

MEI admits to having been a party to the MITI-related export control arrangements, and to membership in the JMEA, the T.V. Export Council, and the EIAJ. However, as we have seen, the plaintiffs were not injured by, hence have no standing to assert, a claim based upon minimum price agreements or the Five Company Rule. In any event, plaintiffs have adduced no direct or circumstantial evidence that the export control arrangements or group activities were part of any low price export conspiracy.

Turning to the materials from the Six Company Case, we ruled in the Japanese Materials Evidentiary Opinion that, except for certain export references, the JFTC testimony of witnesses employed by the six companies was admissible under F.R.E. 804(b)(1) against the six companies who jointly defended the Six Company Case. With respect to "export references" we held that the testimony would be admissible only against the witness's employer. Four MEI employees testified: Mitsuo Tsuruta, Hiroyuki Oshima, Takuma ("Ta") Fujio, and Tsuyoji ("Tsu") Fujio. The only export references were in the testimony of the two Fujio's, but those references contain no suggestion of a low price export conspiracy or of any other conspiracy. Rather, they state that "the price on the American market is balanced with the price in Japan."

In terms of the home market aspect of the "unitary" conspiracy, and for the reasons explained in our discussion thereof, *see* Part VII.G.2.(b), *supra*, the testimony of the various witnesses in the Six Company Case, including those employed by MEI, was not probative of the alleged high price conspiracy in Japan. Nor is there anything in the testimony of any of the witnesses upon which an inference of "war-chesting" could be built. Indeed, the only reference to profitability at all was a comment by Mr. Tsu Fujio that profits in the Japanese CEP industry were very low (DSS 61).

We held in the Japanese Materials Evidentiary Opinion that protocols are admissible only against the employer of the person who gave the protocol. No MEI employee gave a protocol; hence no protocols are admissible against MEI. Similarly, we held that diaries seized by the JFTC would be admissible only against the employer of the diarist. The only diary entries by an MEI employee are short excerpts from the Tokizane diary, DSS's 56 and 57. However, the Tokizane diary was held to be inadmissible. *See* Japanese Materials Evidentiary Opnion at 1285-1286.[273]

Plaintiffs' proffers from two other cases before the JFTC—the recommendation decision in the Market Stabilization Council case and the consent decision and other materials from the Matsushita Retail Price Maintenance case—were held to be inadmissible in our Public Records Opinion; hence they cannot add to plaintiffs' case.

We described in Section VII.H, *supra* the so-called "connection" documents which allegedly demonstrate a connection between the so-called domestic and export aspects of the "unitary" conspiracy. In our description we explained that the bulk of the "connection" documents are either inadmissible or are not probative of any relationship between the domestic and

[273] We note that, in any event, the portion of the Tokizane diary relied upon by plaintiffs does not advance their conspiracy claims.

export markets. Several of the "connection" documents were directed at MEI. The most notable among them, the Japan Victor document, was dealt with at length (at 1303-1310) in the Japanese Materials Evidentiary Opinion, where we held it to be unauthenticated and inadmissible on a number of grounds. The additional export references set forth by plaintiffs' counsel in the February 12, 1980 letter, *see* n. 152, *supra*, are no more availing. That letter set forth countless references from the Six Company Case, the vast bulk of which were ruled inadmissible in the Japanese Materials Evidentiary Opinion. None of those materials link MEI to an export conspiracy.

Plaintiffs rely heavily upon the meetings of counsel concerning the Treasury Department's 1921 Antidumpting Act proceedings. The only evidence concerning MEI's activities in this area are third-party memoranda relating to discussions among counsel concerning tactics for dealing with the antidumping proceeding and other third-party internal documents relaying hearsay information about the antidumping proceedings which make passing reference to a Matsushita strategy. DSS 1266 contains documents concerning an alleged agreement between J. C. Penney and MEI to split costs and legal fees arising out of the defense of the dumping proceedings. There are, as we suggested earlier in our discussion of the so-called rebate scheme, *see* n. 211, *supra*, serious problems of admissibility with many of these documents. They are tainted by primary hearsay and laden with internal hearsay. However, the short of it is that, admissible or not, these documents do not offer evidence probative of collusive behavior. As we explained in Part VI.A.8, *supra*, an attempt to work out a common response to a common legal problem does not establish the existence of a conspiracy, and is protected activity. In sum, none of the "connection" documents or those relative to the defense of the 1921 Act proceedings serve to link MEI to the alleged "unitary" conspiracy.

We discussed the "intent" documents at Part VII.I, *supra*. As that discussion demonstrates, those documents, insofar as they are admissible, are meaningless, or at least totally non-

probative in establishing the "unitary" conspiracy alleged by plaintiffs. The documents offered to show the intent of MEI are statements purportedly made by K. Matsushita and M. Matsushita appearing in "Denshi" (DSS 112) and an excerpt from the diary of an unknown person that purports to relate the remarks of an unidentified chairman of MEI's board (presumably K. Matsushita) (DSS 116). These documents are not probative of conspiracy, or at least no more so than the statements of Zenith's officials, *see* pp. 1232-1233, *supra*, relative to their desire to improve their business and increase their market share.

Plaintiffs' supplementary *in limine* list contains a potpourri of documents referring to MEI, mostly relating to the Quasar acquisition and to MEI's meetings with Philips concerning the business of the MEI/Philips joint venture, MEC, which we will address in our discussion of plaintiffs' evidence as to non-TV products in Part VIII, *infra*. None of these documents support plaintiffs' conspiracy claims. ZSX-0021, a 1971 Sanyo memorandum, reports that the president of "Matsushita Electric" complained to Sanyo about prices which he believed were too low. MOT 2507, a 1964 Motorola "trip report," suggests that Motorola attempted, apparently without success, to induce MEI to lower its TV tube price in order to meet the competition. Ex. Westinghouse 12 is a series of memoranda and charts depicting widely varying price quotations that Westinghouse had obtained from many different Japanese manufacturers, including MEI. We need not go so far as to say that these documents establish the existence of competition, although we might; at least they do not tend to establish the existence of a conspiracy between MEI and the other defendants.

Other than the foregoing, there is no evidence in the record of any potential significance as respects MEI. We find that fact revealing, for MEI is the largest consumer electronic products manufacturer in the world, and Konosuke Matsushita, its founder and chairman, is alleged by the plaintiffs, *see* p. 1232 *supra*, to be the prime architect of the domestic strategy which led, in plaintiffs' submission, to the "unitary" conspiracy com-

plained of herein. And yet, when we turn from allegations to hard evidence, we find that plaintiffs' evidence against MEI amounts to nothing; certainly there is no significant probative evidence of MEI's participation in the "unitary" conspiracy.

(b) *MET*

MET is MEI's domestic trading subsidiary. Plaintiffs point first to MET's participation in the export control arrangements and in trade association activity. MET's involvement, however, is minor compared to that of MEI. Since, as we have seen, there is no probative evidence arising out of these arrangements or participation in the various groups and associations which implicates MEI (or any other defendant) in the alleged conspiracy, *a fortiori* there is none as to MET.

Secondly, plaintiffs point to individual rebate transactions between MET and its private label customers, J. C. Penney and W. T. Grant. Many of the documents offered by plaintiffs to show MET's rebating practices are transactional documents which relate to private label sales.[274] All plaintiffs have thus advanced, however, is a group of documents which show, at most, the existence of individual rebate transactions. MET has conceded that it paid rebates.[275] As we have explained above,

[274] For example, DSS's 1267, 1268, 1269, and 1271 are MET documents identified in MET's interrogatory answers pursuant to Fed.R.Civ.P. 33(c). Also on plaintiffs' DSS list are Penney transactional documents which relate to these transactions, including a series of documents pertaining to a single purchase contract between Penney and MEI, which plaintiffs claim show a rebate (DSS 1240-47), along with other shipping documents (DSS 1249-1260), invoices (DSS 1249-1260; DSS 1267), credit forms (DSS 1268; DSS 1269-70), 90 day letters of credit (DSS 1271), shipment schedules (DSS 1271; DSS 1401); and tooling charges and debits to private label customers (DSS 1267). There are certain additional documents contained in DSS's 1267, 1271, 1272, 1318, 1398-1400, and 1401 (MET 25724, 25726, and 25729) which plaintiffs allege indicate that items of value were given to these same private label customers. In addition, MET is alleged to have agreed to reimburse Mangavox for dumping duties which might be imposed. *See* DSS 1316.

[275] In the Supplemental and Amended Answers of MEI and MET to Interrogatory 51 of Plaintiffs' Interrogatories to Defendants, Set No. 1, MET

that does not create a genuine issue of material fact in this case. What would be significant is concerted rebate activity, but plaintiffs have produced no evidence that MET (or any other Matsushita defendant) engaged in any actionable collusive rebate activity.

Plaintiffs also ground their case against MET on the fact that it is a subsidiary of MEI, with interlocking directorships. Indeed, this theory is advanced by plaintiffs with respect to each subsidiary of all the principal Japanese defendants named in the complaint. Most defendants concede the subsidiary and interlocking directorship status, but vigorously argue that far more is needed to establish participation in a conspiracy by a separately incorporated subsidiary. We shall describe our approach to plaintiffs' agency and "functional alter-ego" theories in Part VII.Q.12, *infra*, and shall not, until then, separately mention this aspect of plaintiffs' claim against each subsidiary. At all events, there is plainly no evidence, direct or circumstantial, of MET's individual participation in the conspiracy.

(c) *MECA*

MECA is MEI's U.S. sales subsidiary. The case against MECA consists principally of (1) its alleged rebates and knowledge of MET's rebates; and (2) miscellaneous matters.

Once again, all that plaintiffs allege with respect to rebates is individual rebate transactions. For example, in its answers to interrogatories[276] MECA stated that in 1969 and 1970 Magnavox demanded that MECA retroactively cut its TV prices if it wanted to obtain any future business from Magnavox. As a

stated that it gave the following "things of value" to private label customers: payments totalling $9,000 to the J. C. Penney Purchasing Corporation during a portion of 1967-68; acceptance of payment from Penney by 90 day letters of credit from April 1969 to September 1971; and reduction or elimination of tooling charges respecting certain television purchases by Penney (1971-73) and Grant (1971-72).

[276] Supplemental Answers of MECA to Planitiffs' Interrogatores, Set No. 1.

result, MECA refunded to Magnavox $46,000, some of which is reflected in document MA 33722-6 on plaintiffs' supplementary list. Similarly, plaintiffs invoke MA 031001-12, transactional documents and correspondence relating to MECA sales to Philco; these are also offered to show rebates. MECA argues that, as a U.S. company, it is not bound by the check price, and that therefore these transactions cannot even be characterized as rebates designed to circumvent the export control arrangements. Although MECA thus denies that it gave "rebates," whether it did is not a material fact on this motion, for, as has already been explained, even if we assume *arguendo* that rebates were given, that fact could not defeat summary judgment in the absence of evidence of collusive rebating activity.

Plaintiffs have also proffered documents, such as handwritten price sheets (DSS's 1273 and 1275) and general handwritten references to rebates (DSS 1274)[277] which they allege show that MECA had knowledge of and was involved with rebates given by MET. Assuming *arguendo* the admissibility of these matters,[278] and further assuming *arguendo* that plaintiffs in-

[277] Other documents plantiffs cite for this proposition are: DSS 1275; MA 31001-13; ZH-48; ZB-54; ZB-54A-G, J, L; MA 033722, 23, 26; MA 019953-60; MA 029447, 29453, 29465, 29496, 33634, 33707; TPB 689-90.

[278] DSS's 1273 and 1274 were produced by MECA in response to plaintiffs' interrogatories to MECA, *see* interrogatory No. 51, which requested MECA to indicate whether it gave credit to its customers. In answer, MECA stated that "Documents MECA has in its possession which are responsive to this Interrogatory have been made available for plaintiffs inspection at MECA's headquarters. . . ." Plaintiffs argue that the format of the documents indicates that they are business records. The customer order numbers, model numbers, and prices in the documents were compared by Arnold Kalman, Esq., one of planitiffs' attorneys, with other documents produced by defendants, *see* PTO 277 at 270-78. Defendants, on the other hand, state that there is no evidence as to who prepared any of the documents, no evidence that they were prepared in the regular course of business, no authentication of the documents, and that plaintiffs never took a deposition of a single MECA witness to explain the documents or lay foundation for their admissibility, and that they are therefore inadmissible on multiple grounds. We shall not, however, rule on admissibility at this time. We shall, however, note that, working with what he had, Mr. Kalman's general presentation on rebates was very impressive.

terpret the documents correctly, there is still no evidence suggesting the existence of the agreement posited by the plaintiffs among the Matsushita defendants and the other defendant groups and their importer-coconspirators to grant rebates as part of a predatory low price export conspiracy.[279]

Plaintiffs have also proffered several documents for the purpose of demonstrating communication between MECA and MEI or MET concerning the check prices. However, since the prices at which MECA purchases from MET are affected by the check prices, such communication is to be expected, and is no basis for an inference of unlawful conspiracy.

Finally, plaintiffs have cited a number of miscellaneous documents; telexes concerning a customs check on MET in-

[279] The evidence cited in the text could be read to create an inference of agreement between MEI and/or its trading company subsidiaries (MET and MECA) with respect to the granting of rebates. In fact, Mr. Brown, attorney for the Sanyo defendants, conceded during argument that, to the extent the Sanyo parent company knew of rebating practices, its trading subsidiaries shared that knowledge. This comment would apply to many of the Japanese defendants. We ignore here the pro-competitive aspect of the "rebate scheme" which we discuss at Parts VI.A(7) and VII.L., *supra*, which renders planitiffs' rebate claims, insofar as they have evidence to support them, inoperative as a basis of liability. Rather, given the apparent knowledge of the various Matsushita defendants about rebates paid by various Matsushita subsidiaries, we consider the logical question whether plaintiffs can evade summary judgment by allegations of an intra-enterprise conspiracy within the Matsushita family. *See Columbia Metal Culvert Co., Inc.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978).

The answer to this question is essentially twofold. First, plaintiffs have never framed their Sherman Act § 1 or Wilson Tariff Act conspiracy claims in this fashion. To so frame them now would be antithetical to plaintiffs' posture during a decade of this litigation. The integrity of our case management orders prevents plaintiffs from changing their approach to their case at this late date. Secondly, any attempt to construct the case like the spokes of a wheel, asserting that each group of defendants is engaged in a separate intra-enterprise conspiracy, would be improper. *See* discussion of *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) and its progeny at note 30, *supra*.

voices relating to J. C. Penney (DSS 1277); the text of a price assurance given to Treasury by MEI and MECA (DSS 1279); handwritten notes speculating as to what Penney is doing or should do about the dumping proceedings (DSS 1278); handwritten notes concerning a meeting of counsel concerning the 1921 Act proceedings (MA 48332-379); a telex from Isomura (MEI) to Yamato (MECA) referring to an EIAJ meeting at which Penney's suit against Treasury was discussed (DSS 1276); a letter from Kamihira (MEI) to Glenn (J. C. Penney) regarding contract prices being changed from dollars to yen (DSS 1246); various Magnavox documents discussing the pros and cons of purchasing on the basis of fob Japan prices vs. fob U.S. prices, which refer to purchases from MECA (DSS's 1290, 1299, 1319, ZR 54, ZM 328, ZH 206); and telexes from an unidentified source, presumably from one of the Matsushita companies, discussing radio quotas (MA 29466), prices to be charged to MECA's customers (MA 33690, 29453, 2511), and customer information (MA 29447, 33669). We could mention others. The point is that this potpourri of documents, however, shows nothing unusual or suspicious, and goes nowhere toward establishing the existence of the conspiracy alleged in this case. There is no significant probative evidence against MECA in this record.

(d) *MEC*

MEC, which was involved solely in the manufacture and sale of components, is not implicated in plaintiffs' case as to television receivers. Plaintiffs' entire case against MEC is based upon: (1) the MEI-Philips agreements discussed in Part VIII.C, *infra;* (2) documents purporting to record meetings between MEI and Philips relative to those agreements; and (3) the fact that from January to August, 1973, MEC was a party to the Electron Tube Export Control Arrangement. When we examine plaintiffs' evidence as to non-TV products in Part VIII, *infra*, we will explain that the MEI-Philips documents do not contain any evidence connecting those companies to the

conspiracy alleged by plaintiffs.[280] Moreover, we have already explained, *see* Part VII.F, *supra*, that the various Manufacturers' Agreements, such as the Electron Tube Export Control Agreement, do not help plaintiffs' case.

In sum, there is no evidence against any of the Matsushita defendants which directly or circumstantially involves or gives rise to an inference of involvement of any of the Matsushita defendants in the "unitary" conspiracy charged by the plaintiffs.

3. *The Toshiba Defendants*

(a) *Toshiba*

Any discussion of the evidence against Tokyo Shibaura Electric Co., Ltd. ("Toshiba") must begin with what plaintiffs, for the first nine years of this case, heralded as their "smoking gun": the Yajima diaries.[281] Seiichi Yajima, it will be recalled, was employed by Toshiba and Toshiba Shoji (Toshiba's domestic sales corporation, not named as a party to this litigation) as "Manager of the Second Section of the TV Business

[280] For reasons explained in Part VIII.C, plaintiffs' claim that the Matsushita-Philips agreement provides an "improper" 15% discount to MEI on MEC sales of components is contrary to the otherwise monolithic theme of this litigation. The main foci of the MEI-Philips meetings, as reflected in the "minutes" cited by plaintiffs in their supplementary *in limine* list, were general world-wide market trends and a study of the possibility of involving MEC in Philips research at an early stage (MIH 29339). These documents do not give rise to an inference of participation by MEC (or Philips) in the "unitary" conspiracy. Plaintiffs have asserted a Robinson-Patman Act claim against MEC on account of alleged price discrimination in the sale of components. This claim is disposed of in n.395, *infra*.

[281] We shall not attempt here to rescribe the conclusions set forth at length in earlier segments of this opinion as to plaintiffs' lack of evidence of conspiracy, even though some of that discussion pertains to the Toshiba defendants. We incorporate our earlier discussion by reference and address here only those evidentiary matters specially relevant to the Toshiba defendants.

Department."[282] However, in the Japanese Materials Evidentiary Opinion, at 1267-1277, we held the Yajima diaries inadmissible on a host of grounds, but essentially as unintelligible and untrustworthy hearsay. Even assuming admissibility, however, the alleged export references contained in the Yajima diaries are obscure and unintelligible and do not provide any evidence of the low price conspiracy to invade and take over the United States CEP market alleged by plaintiffs.

Plaintiffs have also offered three Toshiba internal memoranda, DSS's 96, 97, and 98, as evidence of Toshiba's involvement in the alleged conspiracy. However, we excluded all of these memoranda in the Japanese Materials Evidentiary Opinion at 1299-1301, on the same grounds that we excluded the diaries.

The other Toshiba-related materials from the Six Company Case are equally unhelpful to plaintiffs' case. Plaintiffs have offered the testimony[283] of three Toshiba employees as evidence of Toshiba's involvement in the alleged conspiracy: Tadashi Kamakura (DSS 69), Mr. Yajima (DSS 70), and Ryozaburo Kawahara (DSS 71). This testimony does not constitute evidence tending to show Toshiba's involvement in either the home market or export facets of the "unitary" conspiracy.[284]

[282] That department had no role in export matters. As Mr. T. Kamakura of Toshiba stated in his protcol: The Department of TV Business has a Management Section, the First TV Section, the Second TV Section, and the Business Technique Section. These sections exist in both Tokyo Shibaura and Toshiba Shoji and the Section Managers serve concurrently, but the staff members separate. The work is the same. *The TV Business Department is in charge of the domestic business;* the first TV Section is in charge of black & white TV; and the Second TV Section is in charge of color TV. DSS 81, pp. MJ003294-2, MJ003294-2 (emphasis added).

[283] We repeat that we found the testimony of all witnesses before the JFTC as to domestic matters admissible against the "Six Companies"; "export" or "war-chesting" references, however, with certain exceptions not relevant to Toshiba, were excluded.

[284] Moreover, the only reference to export in any of the Toshiba materials is contained in Mr. Kamakura's testimony, where he notes in response to a question concerning export pricing that export matters were "beyond my area of responsibility." DSS 69, pp. MJ002081-1, MJ002082-1.

Plaintiffs have offered the protocols of Mr. Yajima (DSS's 75, 76, 77, and 78). Mr. Kamakura, (DSS's 81 and 82), Mr. Seigo Narita, (DSS's 79 and 80), Mr. Ryunosuke Kamuro (DSS 83), and Mr. Kawahara, (DSS 84), all Toshiba employees, as evidence of Toshiba's involvement in the alleged conspiracy. We have held protocols admissible against the employer of the giver of the protocol. These protocols are not probative of home market high prices or "war-chesting." Moreover, there are no references to export matters in any of these protocols (or in fact in any of the other protocols offered by plaintiffs). Indeed, the record does not reveal that any of these Toshiba employees had any responsibilities with respect to export matters.

With regard to matters common to all six defendants, Toshiba was a signatory to the Manufacturers' Agreements and was a member of the JMEA. However, for reasons explained above, the export control arrangements memorialized in these documents are not a possible source of antitrust injury to the plaintiffs. Toshiba, like all of the six companies, has conceded membership in the numerous groups and associations mentioned in the Six Company Case and in the EIAJ. However, as we have seen, these memberships and attendance at meetings do not constitute evidence of conspiracy. Nor, as we explained in Part VII.G, *supra*, have plaintiffs adduced any admissible probative evidence of conspiratorial activity by any of the defendants in conjunction with their membership in these groups.

Turning to Toshiba's alleged role in the "rebate scheme," we note that although Toshiba sold private label merchandise to J. C. Penney and Co., Singer Corp., Philco Electronics Corp., and R. H. Macy, as well as to Sears, plaintiffs have only charged Toshiba with granting rebates to Sears. We have already explained that a genuine issue of fact exists on the question whether the Japanese manufacturing defendants, including Toshiba, paid rebates to their U.S. customers. However, we have also explained that the issue of fact is not *material* in the absence of evidence of concerted activity with respect to the rebate scheme. Plaintiffs have advanced no such evidence.

In a segment of their "Memorandum Concerning Plaintiffs' Conspiracy Evidence Relating to the Toshiba Defendants," Toshiba counsel submitted that the absence of several items of evidence against Toshiba was "telling." That catalogue of evidence that plaintiffs have failed to present is as follows:

> 1. No evidence, direct or circumstantial, that Toshiba discussed or agreed with anyone to sell television receivers in the United States at unreasonably low prices;
>
> 2. No evidence, direct or circumstantial, that Toshiba's pricing of television receivers in the United States or Japan was parallel to any other defendant herein or any other competitor;
>
> 3. No evidence, direct or circumstantial, that pricing of Toshiba television receivers sold in the United States market was below the competitive price levels for such products in the United States market (and no showing of what the competitive price level was in the United States market); and
>
> 4. No evidence, direct or circumstantial, of sales of television receivers in the United States market below any defined level of costs.

This listing is accurate, and could be augmented to detail other areas of plaintiffs' failure to offer evidence in opposition to the motions for summary judgment.[285] Suffice it instead to say that plaintiffs have simply offered no evidence, direct or circumstantial, which could create a genuine issue of material fact as to Toshiba's involvement in the "unitary" conspiracy.

(b) *Toshiba America, Inc. (TAI)*

The bulk of plaintiffs' allegations against Toshiba, themselves unavailing, are not even applicable to Toshiba's U.S.

[285] This listing also applies to the other defendants. As we explained in Part V, *supra*, while defendants have the burden of showing the lack of a material factual issue, plaintiffs must come forward with "significant probative evidence" and cannot rest on their allegations.

sales subsidiary, TAI. There are no references to TAI in the JFTC-related diaries, testimony, or protocols; indeed, TAI never employed any of the witnesses who testified or gave protocols before the JFTC (or whose diaries were seized). Neither is TAI implicated in any way in the Toshiba internal memoranda (DSS's 96-98). TAI was not a signatory to the Manufacturers' Agreements and was not a member of the JMEA, hence was not involved in any check price rules or regulations. TAI was not involved in the Six Company Case or Market Stabilization Council Case, or in any other case before the JFTC, and was not a member of any Japanese group or trade association. Moreover, during the time periods applicable to this litigation, TAI did not sell private label merchandise, and plaintiffs have made no claim that TAI granted illegal rebates to its customers.

With respect to TAI, there is no evidence, direct or circumstantial, of discussions or agreements to sell television receivers in the United States at unreasonably low prices, or that TAI's prices were parallel to any other defendant or any other competitor, or of sales below competitive levels in the U.S. market. Neither is there any evidence of sales by TAI below cost, or that TAI acquired any U.S. CEP manufacturer.

In fact, the only real allegations as to TAI's involvement in the alleged conspiracy are those set forth in plaintiffs' brief in response to defendants' motion for summary judgment at pages 147-56 (*see also* FPS 1641 *et seq.*), where they assert the following:

1. TAI is a subsidiary of Toshiba;
2. Toshiba made capital contributions to TAI;
3. Toshiba has guaranteed TAI's loans;
4. TAI sold Toshiba television receivers in the United States;
5. Certain TAI employees were previously employed by Toshiba;
6. TAI was a member of the Japan Light Machinery Information Center; and

7. TAI's income tax returns indicated that TAI lost money during the period 1965 through 1977.

We consider *infra* the general legal principles applicable to the question whether the subsidiaries of the Japanese manufacturing defendants are sufficiently intertwined with their parents to be considered functional alter-egoes or agents, hence chargeable vicariously with their parents' actions. Addressing TAI as an independent entity, however, it is plain that the evidence is insufficient to create a genuine issue of material fact as to its membership in the "unitary" conspiracy.

4. *The Hitachi Defendants*

As with the Toshiba defendants, it is appropriate to begin our discussion of the Hitachi defendants[296] with the JFTC materials, for among the evidence most strongly stressed by the plaintiffs prior to our Japanese Materials Evidentiary Opinion were the Yamamoto and Yamada diaries.[297] At the time of the writing of the diaries, Mr. Yamada was Department Manager, Electrical Appliances Department, Consumer Products Division, of Hitachi, Ltd. and Mr. Yamamoto was Manager of the Television Section of the Television Department of Hitachi Kaden. In the Japanese Materials Evidentiary Opinion, at 1277-1283, we held the Yamamoto and Yamada diaries inadmissible on a host of grounds, but essentially as untrustworthy hearsay. We add, however, that the alleged export references contained in these diaries are unintelligible and do not provide any evidence of the home market war

[296] We will treat together Hitachi, Ltd. ("Hitachi"), the parent corporation, and Hitachi Kaden Hanbai Kabushiki Kaisha)"Hitachi Kaden"), the domestic sales corporation. There will be brief separate consideration of Hitachi Sales Corporation of America (HSCA), *infra*.

[297] We shall not attempt here to rescribe the conclusions set forth at length in earlier segments of this opinion as to plaintiffs' lack of evidence of conspiracy, even though some of that discussion pertains to the Hitachi defendants. We incorporate our earlier discussion by reference and address here only those evidentiary matters specially relevant to the Hitachi defendants.

chesting conspiracy or the low price export conspiracy to invade and take over the U.S. CEP market alleged by the plaintiffs. Moreover, at the time the diaries were written, neither Mr. Yamada nor Mr. Yamamoto had responsibility in export matters.

Turning to the JFTC testimony, it will be recalled that we made several exceptions to our ruling in the Japanese Materials Evidentiary Opinion excluding "war-chesting" or export references. One of those exceptions was as to the testimony of Mr. Nishi, which we found admissible against his employer, Hitachi.[288] However, Mr. Nishi's testimony, although it does discuss the success of the Japanese CEP industry in the export field, does not supply any evidence to aid plaintiffs' conspiracy theory. It will be recalled that it was Mr. Nishi who used the "it is our heritage" language which plaintiffs cite frequently as evidence of defendants' predatory intent, but which, as we explained in Part VII.I, *supra*, does not aid plaintiffs' case one iota. Indeed, Mr. Nishi testified that the ability of the Japanese television manufacturers to compete effectively in export markets was significantly the result of intense competition in the Japanese domestic market.

Plaintiffs have offered the protocols of Mr. Adachi (DSS 85) and Mr. Yamamoto (DSS 86) as further evidence of the alleged conspiracy. Although these protocols are admissible against Hitachi, there is nothing in them having any relationship to export-related matters. The protocols concern only domestic Japanese marketing and prices. Neither the protocols nor any other Japan-side evidence supports plaintiffs' claim of a home market high price war-chesting conspiracy.

Plaintiffs have also offered the so-called Shimizu memorandum (DSS 95) as evidence of the Hitachi defendants' participation in the alleged export conspiracy. We discussed the Shimizu memorandum at 1297-1299 of the Japanese Materials Evidentiary Opinion, where we excluded it from evidence, holding that is not admissible under any of the exceptions to the hearsay rule and that it does not qualify as an admission of Hitachi.[289]

[288] The testimony of Messrs. Adachi and Yamamoto of Hitachi contains no export references and in no respect tends to show Hitachi's involvement in the alleged conspiracy. It should be noted that Hitachi does not accept plaintiffs' translation of Mr. Nishi's testimony.

Hitachi, Ltd., like all of the six companies, was a signatory to the Manufacturers' Agreements. Both Hitachi, Ltd. and Hitachi Kaden were members of the JMEA, hence subscribers to the Rules. However, as we have seen in our extensive discussion above, the export control arrangements do not advance plaintiffs' case. Hitachi has also conceded membership in the numerous groups and associations discussed above. However, as we have also explained, the evidence relating to those groups and associations is equally nonprobative, and does not tend to show any Hitachi involvement in any conspiracy. As for Hitachi's alleged role in the rebate scheme, plaintiffs have offered DSS's 1359 through 1374 as evidence that the Hitachi defendants participated in rebate activity.[290] However, neither

[289] Hitachi maintains that the Shimizu memorandum, if admissible, would evidence not anticompetitive activity, but independent rational competitive behavior. It relies on the statement in the memorandum that Hitachi should strive for a sizeable market share in Japan and that Hitachi would not export until export prices went up. Moreover, the "Memorandum of Hitachi Defendants Concerning Lack of Evidence Which Would Justify an Inference of Conspiracy," filed September 19, 1980, notes that at the time the Shimizu memorandum was written, Hitachi was not even involved in the export of color television receivers.

[290] The Hitachi defendants concede the payment of rebates and highlight the evidence of rebates paid by Hitachi Sales Corporation of America to one U.S. buyer—plaintiff NUE/Emerson. In their memorandum cited at n.289, *supra*, the Hitachi defendants argue that the plaintiffs have engaged in "unprincipled hypocrisy" in charging that the practice of rebating could be an essential vehicle for carrying out the objective of the conspiracy since one of the plaintiffs was involved in that very practice. Additionally, they point to the rebates as demonstrating that U.S. buyers and Japanese manufacturers were independently acting in their economic self-interests by negotiating competitive prices in a very competitive market. They also point to the fact that the evidence concerning the NUE rebates demonstrates the existence of a competitive motivation to maintain the confidentiality of prices actually paid.

these documents nor any others constitute any evidence of involvement in concerted rebate activity. Although a genuine issue of fact exists on the question whether the Japanese manufacturing defendants, including Hitachi, paid rebates to their U.S. customers, we have already explained that that issue of fact is not material in the absence of evidence of concerted activity with respect to the rebate scheme.

The plaintiffs have attempted to show, through the DePodwin report, that Hitachi sold television receivers in the United States below cost. For reasons explained in the Expert Testimony Opinion, DePodwin's opinion is inadmissible. In terms of the other aspects of plaintiffs' claims, we can incorporate by reference the Toshiba defendants' catalogue of evidence that plaintiffs have failed to present, *see* page 1273, *supra*, for the same failings exist with respect to Hitachi. In sum, plaintiffs have offered no evidence, direct or circumstantial, which would create a genuine issue of material fact as to the involvement of Hitachi or Hitachi Kaden in the "unitary" conspiracy.

We could also rescribe our discussion about the evidence adduced against Toshiba America, Inc., for what was said about TAI (p. 1273, *supra*) is transferable to Hitachi's U.S. sales subsidiary, HSCA. Rather, we shall merely incorporate that discussion by reference and note that there is no evidence, direct or circumstantial, of the involvement of HSCA in the alleged conspiracy. Although the plaintiffs set forth in replete detail the intercorporate relationships among Hitachi and its affiliates, this does not supply proof of a conspiracy.

5. *The Sanyo Defendants*

The Sanyo defendants[291] are involved with the export control arrangements to the same extent as the Matsushita, Toshiba, and Hitachi defendants, with the same lack of consequences

[291] We take up together the evidence against Sanyo Electric Co., Ltd. ("Sanyo Denki" or "Sanyo"), the parent company; Sanyo Electric Trading Company, Ltd. ("Trading"), Sanyo's Japanese Trading Company; and Sanyo

insofar as plaintiffs' conspiracy claims are concerned. Looking briefly first at the Six Company Case, we note that unlike the other defendants, there is very little evidence in the record which even purports to be applicable to Sanyo. The JFTC obtained no diaries written by any Sanyo Denki employees; nor did they obtain any other documents from the files of Sanyo Denki which allegedly set forth conspiratorial discussions at any trade association or sub rosa meetings. The plaintiffs have proffered the JFTC testimony of three Sanyo officials, Mr. Hirano (DSS 62), Mr. Yoshioka (DSS 63), and Mr. K. Iue (DSS 74). While this testimony is admissible at least as to domestic matters, neither the testimony nor any other evidence implicates Sanyo in a home market high price "war-chesting" conspiracy. Moreover, the testimony of Mr. Hirano and that of Mr. Iue contains no export reference. While the testimony of Mr. Yoshioka does, we expressly held at page 1294 of the Japanese Materials Evidentiary Opinion that that reference was inadmissible.[292] Mr. Yoshioka's protocol (DSS 104) was also offered. We have held protocols admissible against the employer, but Mr. Yoshioka's protocol contains no export references.

Plaintiffs cite as a "connection" document in their February 12, 1980 letter, *see* n. 152, *supra*, a certain calendar book which was seized by the JFTC in November 1966, but not used by it

---

Electric, Inc. ("Inco"), its American sales subsidiary. The only allegations with regard to Sanyo Manufacturing Corp. relate to the Warwick acquisition, discussed in Part VII.N.3, *supra*. That discussion is incorporated here by reference.

We shall not attempt here to rescribe the conclusions set forth at length in earlier segments of this opinion as to plaintiffs' lack of evidence of conspiracy, even though some of that discussion pertains to the Sanyo defendants. We incorporate our earlier discussion by reference and address here only those evidentiary matters specially relevant to the Sanyo defendants.

[292] Even if that export reference were admissible as an admission against Sanyo, it would not help the plaintiffs. The reference (MJ002250-1 and MJ002251-1) is merely a passing one, serves Sanyo's interest, and in any event does not tend to show the conspiracy alleged by plaintiffs.

and not marked as an exhibit in the Six Company case. The calendar was returned to Sanyo Denki by the JFTC following discontinuance of the Six Company case and was produced for plaintiffs' inspection and copying in May, 1979. That document, however, contains only references to the time and place of meetings of some of the sub rosa groups. It is untranslated, but it is represented to us that it does not contain any textual description of the meetings or set forth the purposes of or conversations at the meetings; hence it is equally unavailing, even if admissible. The foregoing are the only "Japan-side" documents which relate specifically to the Sanyo defendants.

Turning to Sanyo's role in the "rebate scheme," the plaintiffs have offered numerous documents purportedly demonstrating Sanyo's involvement in the alleged scheme. There have been heated disputes about the admissibility of many of these documents, but we need not engage in that dialogue, because we have assumed that there is a genuine issue of fact about the payment of rebates.[293] But nowhere in any of the myriad documents offered by plaintiffs is there any evidence or suggestion of *concerted* activity among Sanyo and any other defendants relating to rebates to any of these customers. For the reasons explained above, these rebate documents reflect pursuance of Sanyo's self-interest and are as consistent with the forces of competition as with the forces of conspiracy.[294] There is no evidence that Sanyo had firsthand knowledge of the details of

---

[293] Sanyo is claimed to have paid rebates to the Magnavox Company (DSS 1280 through DSS 1319, DSS 1333A and 1333C); to Sears Roebuck and Company (DSS 1070 to DSS 1135); to General Electric Company (DSS 1375-1378, DSS 1382, and DSS 1074); and to several other private label and OEM customers. Sanyo does not deny the payment of rebates, the principal vehicle for which was the so-called "loyalty discount" program.

[294] DSS 1239, Trading document No. B-1185(38)-(41), Trading Document No. B-1106, Sanyo INCO document No. ZSX-0247, Trading document B-1113(4)-(9), and INCO document No. ZSX-0134 (the latter documents were contained in plaintiffs' postargument submissions, though not given the stature of DSS's) all corroborate Sanyo's contention of competitive conditions, with each of the Japanese defendants responding to market conditions.

any rebates or discounts being offered or paid by any of its competitors, and vice versa. Even with respect to Sears, whose business Sanyo shared with Toshiba, there is no evidence that Sanyo had knowledge of Toshiba's rebate program with Sears or that the Sanyo and Toshiba rebate programs were coordinated in any way.

Neither have plaintiffs been successful in demonstrating below cost sales by Sanyo. Dr. DePodwin's cost analysis has been excluded.[295] Although the plaintiffs have invoked scattered references in other documents allegedly showing lack of profitability of certain product lines at certain intervals, this evidence does not begin to amount to probative evidence of below cost sales or predatory pricing.[296]

---

including price competition from other Japanese companies, in an attempt to get American private label and OEM business. They also reflect a policy of *not* disclosing rebates to competitors.

[295] Sanyo also points out that DePodwin's analysis examines only factory data, not overall company data, and ignores the data concerning Trading, the company which exported products manufactured by Denki. Sanyo observes that DePowdin's finding that the Gifu plant was not profitable during the six month fiscal term ending in November 1969 fails to highlight that that was the first year of Gifu's operation, and that it turned a profit in 1970, the first full year of its operation, bringing it in line with the rest of Sanyo's profitable operation.

[296] Plaintiffs rely in this regard on DSS's 1236 and 1237 and a number of other documents. The Sanyo defendants take umbrage at DSS 1237, pointing out that plaintiffs therein missrepresented a monetary exchange-rate loss for an operating loss and overstated the figures at issue by a factor of a thousand by confusing a yen sign for a dollar sign. Although plaintiffs also rely heavily on DSS 1236 as demonstrating the existence of dumping and predatory pricing, we find it susceptible of no such interpretation. Rather, assuming admissibility of the document, it reflects the competitive desire of Sanyo to turn around the loss it was incurring as an entrant in a market as soon as possible. Viewing DSS 1236 as a whole (including the memo from Mr. Tachibana of Sanyo to Mr. Yano of INCO, together with the various attachments in the folder), we find indications only of competition, not of conspiracy. In any event, a fair reading does not support plaintiffs' statement that the document "made clear that the penetration of the . . . market was a consequence of Sanyo's and its co-defendants' massive and widespread predatory dumping . . . and was achieved only at substantial sales losses."

In sum, our review of the evidence as it relates to Sanyo reveals no evidence that Sanyo discussed or agreed with anyone to sell television receivers into the United States at unreasonably low prices or evidence that Sanyo's pricing of television receivers in the United States or Japan was parallel to that of any other defendant or any other competitor. Indeed, Sanyo's series of rebate programs was unique to Sanyo. Neither is there any evidence that pricing of Sanyo television receivers in the United States market was below competitive price levels. While much heat was generated over the question whether Sanyo disclosed the existence of rebates to U.S. customs (Sanyo contends that it did), we have already explained *supra* that nondisclosure of rebates would be in Sanyo's self interest and more consistent with rational independent action than with conspiratorial activity. There is just no evidence of Sanyo's participation in the "unitary" conspiracy.

Turning to Sanyo's subsidiaries, plaintiffs have offered no discrete evidence as to Trading or INCO which would involve them in the "unitary" conspiracy other than the fact that they are subsidiaries of and therefore allegedly functional alter-egos or agents of Sanyo Denki. More particularly, with respect to the Sanyo subsidiaries, there is no evidence, direct or circumstantial, of discussions or agreements to sell television receivers in the United States market at unreasonably low prices or any other of the kinds of activity which the plaintiffs have described as ingredients in the "unitary" conspiracy of which they complain. We already discussed, in Part VII.N.3, *supra*, whey the allegations against Sanyo Manufacturing Corp. with respect to the Warwick acquisition do not give rise to an inference of conspiracy. Treating the subsidiaries as independent entities, the evidence is not sufficient to create a genuine issue of material fact on the issue of their participation in the alleged conspiracy.

6. *The Sharp Defendants*

Sharp[297] stands in the same shoes as the other Japanese manufacturing defendants with respect to the export control arrangements, having been a signatory to the Manufacturers' Agreements and a member of the JMEA, hence a subscriber to its Rules. For the reasons explained above, the export control arrangements cannot help the plaintiffs. Sharp has also conceded membership in the various trade associations and the sub rosa groups mentioned in the Six Company Case and attendance from time to time at their meetings. However, as we have seen, these memberships and attendance at meetings do not constitute evidence of conspiracy. There were no diaries of Sharp officials seized by the JFTC. Mr. Ogawa, of Sharp, gave testimony before the JFTC (DSS 72 and DSS 73), but his testimony contained no export references. Two Sharp employees, Mr. Saeki and Mr. Maekawa, gave protocols to the JFTC. We excluded Mr. Maekawa's protocol in the Japanese Materials Evidentiary Opinion, and Mr. Saeki's protocol contains no export references. There are no miscellaneous Sharp documents, "smoking guns" or otherwise, which come to us from the JFTC proceedings. Plaintiffs have adduced no admissible evidence of Sharp-related conspiratorial activity in conjunction with the sub rosa groups (or of the groups themselves), either in terms of home market high price "war-chesting" activity or predator low price export activity.

Sharp sold private label merchandise to a number of American buyers, and a genuine issue of fact exists as to Sharp's

---

[297] We address in this segment plaintiffs' evidence against both Sharp Corporation (formerly Hayakawa Electric Company, Ltd.), one of the Japanese manufacturing defendants, and its American sales subsidiary, Sharp Electronics Corporation (SEC).

We shall not attempt here to rescribe the conclusions set forth at length in earlier segments of this opinion as to plaintiffs' lack of evidence of conspiracy, even though much of that discussion pertains to the Sharp defendants. We incorporate our earlier discussion by reference and address here only those evidentiary matters specially relevant to the Sharp defendants.

participation in the rebate scheme. However, that issue of fact is not material because there is no evidence that Sharp was involved in concerted activity with respect thereto. To the contrary, the documents produced by Midland, one of Sharp's private label customers, showed that Sharp, Hitachi, and JVC, among other Japanese companies, competed with each other for Midland's import business.[298]

In sum, what has been said of the other Japanese manufacturing defendants may also be said of Sharp. Plaintiffs have adduced no evidence, direct or circumstantial, that Sharp discussed or agreed with anyone to sell television receivers into the United States at unreasonably low prices, or that its pricing of television receivers in the United States or Japan was parallel to that of any other defendant or any other competitor, or that Sharp sold television receivers in the United States market below the competitive price levels in that market, or that Sharp sold television receivers in the United States' market below any defined level of cost. For all of these reasons, and for the reasons explained in our more generalized discussion *supra*, plaintiffs have adduced no evidence, direct or circumstantial, which could create a genuine issue of material fact as to Sharp's involvement in the "unitary" conspiracy. We note, in addition, that Sharp has filed the affidavit of Mr. Y. Fukao, Senior Executive Director of Sharp, controverting in detail

[298] It is useful to comment on plaintiffs' offer of DSS 1141 as evidence of Sharp's participation in the conspiracy. That document, produced by Montgomery Ward, reflects a meeting between Mr. A. Saeki and Mr. Y. Fukao of Sharp and Mr. R. A. Noreen of Ward. It is apparently offered by plaintiff as evidence of collusive rebate activity. Leaving aside the serious questions of admissibility (one problem is that the document gives only Mr. Noreen's impression of what Sharp's officials said), at best the document reflects a rebate arrangement between sellers and buyers, each acting in their own best interests. To the extent that the document could be read to give rise to an inference of customs fraud, we note again that that does not help the plaintiffs.

plaintiffs' allegations about conspiratorial activity.[299] Mr. Fukao's affidavit stands essentially uncontroverted.

A similar (uncontroverted) affidavit was filed on behalf of SEC by Mr. T. Tani, Executive Vice President, Treasurer and Controller of SEC. Leaving aside the questions of corporate agency or "functional alter-egos," our review of the evidence reveals that plaintiffs have adduced no evidence, direct or circumstantial, of SEC's involvement in the alleged conspiracy.

7. *Melco and Melco Sales, Inc. (MSI)*[300]

Plaintiffs' strategy as to the Melco defendants has been essentially threefold. First, as was the case with the other Japanese manufacturing defendants, they have attempted to link Melco to the conspiracy by virtue of its participation in the MITI-related export control arrangements and in the various groups and associations in Japan. Secondly, plaintiffs have made numerous submissions with respect to Melco's alleged involvement in the "rebate scheme." Finally, plaintiffs have devoted considerable efforts to developing the concept of the

[299] Mr. Fukao, who states that he has personal knowledge of the pricing of Sharp's export CEPs, flatly denies that any agreement among competitors ever affected Sharp's export pricing decisions. (¶ 4). He avers that no communications or discussions at any of the meetings alleged by plaintiffs or otherwise ever entered into Sharp's export pricing decisions. (*Id.* ¶¶ 4-8). The Fukao Affidavit states that not only did Sharp set its own export prices and run its own business independently of any of the defendants and alleged coconspirators, but also that export CEP prices at Sharp were determined without regard to domestic profits, were set at a profit-maximizing level, and in fact consistently resulted in a positive contribution to Sharp's profits. (¶ 4). Additionally, the Fukao Affidavit denies that Sharp's export prices or practices were predatory or that they were ever intended to be so. (¶¶ 10-11).

[300] In July 1980, MSI changed its corporate name to Mitsubishi Electric Sales America, Inc. (MESA). However, we refer to it throughout as MSI.

"Mitsubishi Group," attempting to link the activities of Melco and MSI with those of MC and MIC, discussed *infra*.[301]

Melco, like the other Japanese manufacturing defendants, was a signatory to the Manufacturers' Agreements and, by virtue of membership in the JMEA, a subscriber to the JMEA Rules. We have already explained how participation in these export control arrangements does not aid plaintiffs' conspiracy case. The plaintiffs have offered the JFTC testiomony of two Melco witnesses, Mr. Okuma and Mr. Kihara, but the testimony of neither contains any export references. Plaintiffs also offer the protocols of Mr. Okuma as well as Mr. Ito of Melco, but, again, neither protocol contains any export references. Plaintiffs offer no miscellaneous Melco documents seized in the JFTC proceedings.[302] Melco, like the other defendants, has conceded membership in numerous groups and associations in Japan, including the various sub rosa groups. However, plaintiffs have not offered any evidence connecting Melco to any

[301] We shall not attempt here to rescribe the conclusions set forth at length in earlier segments of this opinion as to plaintiffs' lack of evidence of conspiracy, even though some of that discussion pertains to Melco. We incorporate our earlier discussion by reference and address here only those evidentiary matters specially relevant to the Melco defendants.

[302] Although none of the diaries seized by the JFTC which plaintiffs have sought to introduce were written by Melco employees, during the discovery period there was much controversy about the diary of Mr. T. Kiuchi, a Melco employee. While the extent to which the plaintiffs advance Mr. Kiuchi's diary as evidence of conspiratorial activity is not clear, having read the diary in translation we are satisfied that it does not aid plaintiffs' case one iota. It is a personal diary which lists Mr. Kiuchi's golf dates and social engagements as well as business meetings, and which does not give any substantive information about any of the entries. The plaintiffs seek to draw inferences from such items as Mr. Kiuchi's dinner appointment with Mr. "Super" Yamaguchi, once a Melco employee who became the president of MSI at its inception in 1974. The dinner apparently occurred at the Yoshida Restaurant on April 10, 1968 in company with several other Melco employees. We do not have the faintest notion what occurred at this dinner, and, as we have seen, mere meetings among individuals, even those affording the opportunity to conspire, cannot create an inference of conspiracy.

conspiratorial activity of either a high price home market warchesting or a predatory low price export nature.

As we approach plaintiffs' claims about Melco's alleged involvement in the "rebate scheme," and look not just at the "trees" but also at the "forest," it appears that the Melco aspect of the case has taken on a qualitatively different cast than the rest of it. We take a paragraph to explain what that difference is and why, at least in our perception, it is so.

Unlike the other Japanese manufacturing defendants, which essentially conceded that there was a genuine issue of fact on the question of the payment of rebates (though not of *material* fact), Melco has steadfastly denied paying any rebates at all, and has devoted numerous pages of its briefs to demonstrating the correctness of its position.[303] Even though it concedes that MSI sells Melco CEP's in the United States and that MSI is a 100% owned subsidiary of Melco USA, Inc., which is in turn a 100% owned subsidiary of Melco, Melco has attempted assiduously to disassociate itself from MSI. Plaintiffs rejoin that Melco caused Melco USA, Inc. to create MSI and contend that Melco in fact interposed Melco USA, Inc. to conceal Melco's control and to act as a "shield."[304] Melco, however, denies such control. Indeed, Melco and MSI devote an entire section of their response to plaintiffs' supplemental reply memorandum in opposition to motions for summary judgment, filed September 22, 1980, to an attempted demonstration that there

[303] Melco's briefs in this area have been devoted to both substantive and evidentiary issues, including vigorous attacks upon the admissibility of such questionable submissions as the Gambles Import Corporation "Voluntary Disclosure Statement" (DSS 1166).

[304] In addition to Melco's total ownership of Melco USA, Inc. and that subsidiary's total ownership of MSI, plaintiffs also counter with loans and loan guarantees from Melco to MSI, and numerous documents reflecting the personal and business relationship between the operating officers of MSI and Melco officials with respect to the operation of MSI's business.

is no basis for any of plaintiffs' claims concerning any alleged agency or alter-ego relationship between Melco and MSI.[305]

It appears to us that Melco's "Lone Ranger" position is but another facet of its unceasing effort to resist the personal jurisdiction, venue, and process of this court, which it commenced early in the proceedings. These efforts were rebuffed by our predecessor in the case, Judge A. Leon Higginbotham, Jr., who denied Melco's motion to dismiss the complaint for lack of personal jurisdiction, venue, and adequate service of process. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 262 (E.D.Pa. 1975).[306] We, of course, respect Melco's right to press its resistance to personal jurisdiction, venue, and process, and have, throughout our stewardship in this case, treated those points accordingly. We also understand that the vigor with which Melco has pressed these objections is, at least in part, a function of its feeling that, given Melco's small share of the U.S. CEP market (smaller than any of the other Japanese manufacturing defendants and considerably smaller than most of them), it has been an imposition to require it to expend the staggering counsel fees that defense of this litigation has entailed.[307]

---

[305] Yoshito Yamaguchi, President of MSI, has also filed an affidavit on the nature of a general denial of plaintiffs' allegations against MSI.

[306] Melco unsuccessfully sought mandamus relief from Judge Higginbotham's order. In the absence of appellate review, Melco, of course, preserves the issue. Although we have held Judge Higginbotham's findings on the preliminary issues not binding on the merits, insofar as personal jurisdiction, venue, and service of process are concerned his decision is the "law of case." Additionally, Melco, alone among the defendants, has attacked the subject matter jurisdiction of the court. *See* Opinion (Introduction to Summary Judgment Motions; Subject Matter Jurisdiction), 494 F.Supp. 1161 (E.D.Pa.1980).

[307] Melco is primarily a manufacturer of heavy electrical equipment, automotive electric equipment, elevators, radar, computers, and aerospace equipment. CEPs which are sold in Japan and then exported for resale to the U.S. constitute an extremely small percentage of Melco's total sales (from 1966 to 1976, this percentage never exceeded 1% of Melco's total sales).

Plaintiffs have also asserted that Melco and MC/MIC are linked by the so-called "Mitsubishi Group," a vestige of the zaibatsu, *see* Part VII.C, *supra*, and that they are engaged in the coconspiratorial venture as such. Plaintiffs submit in this regard that the purchase by MSI of MIC's MGA Division is evidence of the connection between Melco and MC and MIC as part of the "Mitsubishi Group." Melco has consistently, throughout this litigation, denied the existence of the "Mitsubishi Group" and has denied any connection with MC or MIC beyond a vendor-vendee relationship.[308]

Notwithstanding the foregoing discussion, we elect not to reach the question of the agency of MSI, the question whether there is a genuine issue of material fact as to Melco's involvement in the rebate scheme, or the question of the Melco-MC/MIC relationship and the "Mitsubishi Group," since at all events these issues of fact cannot be material.[309]

The rebate issue is not material for the same reason as for the other defendants: there is simply no evidence that Melco engaged in any concerted activity with respect to rebates. Neither is there any evidence that Melco discussed or agreed with

---

Moreover, from 1965 to 1973, Melco's share of Japanese television receiver exports to America never exceeded 3.53% of monochrome television receivers and 5.52% of color television receivers. During that period, Melco's sales never achieved even 1% of the total sales of monochrome or color TV receivers on the American market.

[308] Akira Shirado, Manager of Foreign Trade Matters for Melco, has filed an affidavit denying such a relationship between Melco and MIC, as well as making a general denial of conspiratorial activity. Buichi Mochida, Manager, International Contract Administration Department of Melco, has filed a similar affidavit denying conspiratorial activity and denying the existence of any "Mitsubishi Group."

[309] Resolving the questions would require discussion of hundreds of documents which bear on the issues and the treatment of dozens of legal arguments encapsulated in hundreds of pages of briefs. We would have to consider, *inter alia*, the issues of Melco's relationship with MC/MIC, Melco's alleged involvement with the establishment of the ESD Group within MIC, the issue of the "Mitsubishi Group," and a host of evidentiary questions.

anyone to sell television receivers into the United States at unreasonably low prices, or that Melco's pricing of television receivers in the United States or Japan was parallel to any other defendant or any other competitor. There is also no evidence that the pricing of Melco television receivers sold in the United States market was below the competitive price levels for such products in the United States market, and the plaintiffs have not adduced any evidence of sales of television receivers by Melco in the United States below cost. The short of it is that there is no evidence of participation by Melco in the "unitary" conspiracy.

For the same reasons we have indicated *supra* and for those explained in connection with the other defendants, we need not consider the MSI agency or corporate veil-piercing questions or the alleged relationship of Melco and MC/MIC via the "Mitsubishi Group." In the absence of any evidence holding Melco (or MC/MIC, *see* Part VII.Q.9, *infra*) into the conspiracy, and there is none, it is unnecessary to reach the question of the vicarious liability of their subsidiaries or affiliates. We do note that, insofar as independent evidence against MSI (since it creation in 1974) is concerned, plaintiffs have simply adduced no evidence of its conspiratorial involvement.[310]

8. *Sony*

Sony is a defendant only in the NUE case, having settled Zenith's claims during the course of the litigation. That fact, however, does not alter our analysis, the first portion of which will proceed on the same wave length as our analysis of the evidence against the other Japanese manufacturing defendants.[311] The discussion will then shift to an analysis of the factors which differentiate Sony, namely, its well-known position as the highest price seller in the U.S. market, making it an illogical candidate for membership in a low price conspiracy.

Sony was a signatory to Manufacturers' Agreements and a member of the JMEA. However, Sony's participation in the export control arrangements does not help NUE for the reasons explained above. NUE has attempted to connect Sony with the alleged price fixing activities of certain groups in Japan. Not only is there a categorical denial of such activities by Sony's president, Mr. Morita, who has filed an affidavit accompanying the summary judgment motion, but the evidence is uncontradicted that Sony was not a member of most of the allegedly offending sub rosa groups in Japan,[312] nor was it named in the 1966 JFTC proceedings. No Sony diaries were seized by the JFTC and no Sony witnesses testified before or gave protocols to the JFTC. The only allegedly conspiratorial groups to which Sony belonged were the Market Stabilization Council (which Sony joined in 1959), the MD Group, and the TS Group. Our description of the activities of those groups in Part VII.G, *supra*, makes it clear that even if there were evidence of Sony's participation in their allegedly offending activities, that evidence would not give rise to liability. But there is no evidence offered by NUE to link Sony, through actions or statements of any Sony employees who may have attended such meetings, with any supposed conspiratorial activities.

Moreover, in contrast to its case against the other Japanese manufacturing defendants, NUE does not (and cannot) include Sony in its rebate scheme claims because Sony did not sell to private label or OEM customers, but rather only to its own subsidiary, Sonam, which in turn handled Sony's retail

[310] Plaintiffs have alleged that the motions of Melco, MSI, MC, and MIC must be dismissed for discovery abuse. While alleged discovery misconduct will be the subject of a separate phase of these proceedings and monetary sanctions will be awarded if deemed appropriate, the abuse alleged here is not a proper basis for denial of the summary judgment motions.

[311] We shall not attempt here to rescribe the conclusions set forth at length in earlier segments of this opinion as to plaintiffs' lack of evidence of conspiracy, even though some of that discussion pertains to Sony. We incorporate our earlier discussion by reference and address here only those evidentiary matters specially relevant to the Sony defendants.

[312] For example, Sony was not a member of the Tenth Day Group, Palace Group, Okura Group, Palace Preparatory Group, or Twentieth Day Group.

marketing in the United States. Sony thus paid no rebates and, therefore, cannot be implicated in conspiracy claims which posit a predatory low price export conspiracy predicated upon the combination of the check price agreements and the rebate scheme. Moreover, Sonam's prices, the only ones which could affect American television manufacturers, were indisputably much higher than the check prices, and typically higher than the prices of Sonam's American competition, including NUE, mooting plaintiffs' injury claims on still another ground.

The evidence against Sony may fairly be summarized by saying that there is: (1) no evidence that Sony discussed or agreed with anyone to sell television receivers into the United States at unreasonably low prices; (2) no evidence that Sony's pricing of television receivers in the United States or Japan was parallel to that of any other defendant or any other competitor; (3) no evidence that pricing of Sony television receivers sold in the United States market was below the competitive price levels for such products in the United States market, and (4) no evidence of sales of television receivers by Sony in the United States market below any defined level of cost.

At the time we heard Sony's motion for summary judgment, we had not conducted the pretrial evidentiary hearings.[313] In the wake of that argument, believing the membership of Sony in at least some of the "conspiratorial" groups might be sufficient to create a genuine issue of material fact, we reserved decision on the motion. We have now seen that the group membership and the other alleged evidence of Sony's involvement in the conspiracy does not create such an issue. We do not, however, rest on that analysis, but extend our discussion to demonstrate why it is illogical, and therefore improper, to infer that Sony was a member of the "unitary" conspiracy.

As Sony correctly observes, at the heart of the conspiracy complained of by NUE is the claim that all of the Japanese

[313] We held the initial Sony argument separately from the others because of our perception that there were "distinguishing" factors, *see* discussion *infra*.

manufacturing defendants sold television receivers in the United States at depressed dumping levels. Although plaintiffs' claims have undergone considerable mutation during the course of this litigation, one thing has never changed—the allegation that *all* of the Japanese defendants engaged in a *low price* predatory export conspiracy. Moreover, in terms of impact, NUE has alleged that sales of television receivers by "the defendant Japanese Corporations . . . at unfairly low and discriminatory prices," eroded the "niche" of Emerson (NUE's predecessor) as a seller of "low leader merchandise." Against this background, Sony argues that any inference of participation by Sony in this low price conspiracy is completely illogical because, consistent with its well-recognized image, Sony has always sold its products in the United States at high (and profitable) price levels.

Perhaps the most impressive authority which Sony has cited to this effect is Zenith's Board Chairman, John J. Nevin, who, in deposition testimony, acknowledged that Sony's products were often priced above even the higher priced television receivers available from American companies. Sony also cites a television interview by Mr. Nevin, wherein he specifically excluded Sony from his comments about "Japanese dumping," and asserted that Sony products had typically been sold in the American market at prices equal to or above the prices of the higher priced American products. Additionally, Sony invokes the deposition testimony of Joseph Wright, Zenith's current Board Chairman, to the effect that Sony's prices were higher than any of the United States producers, and statements from other Zenith executives to similar effect, including that of Vito Brugliera, Manager of Value Engineering, who testified that Sony TV's were so expensive that Zenith did not feel them to be a competitive threat. Finally, Sony has relied upon statements of NUE officials who have admitted that Sony, unlike the other Japanese manufacturing defendants, was not identified with low leader merchandise. Sony also points out (and NUE admits) that Sonam, the United States subsidiary of Sony, has made a profit in every year since November 1963.

Along with its summary judgment motion, Sony has submitted summaries of newspaper advertisements by retailers in the New York and Philadelphia areas which demonstrate that the retail prices of Sony's television sets were consistently higher than those of Emerson. For example, in February 1967, Sony nine-inch sets were selling in New York for over $139.00, while Emerson 15-inch sets were selling there for $89.84. It is clear from the record that at no time did Emerson regard Sony television receivers as competing with Emerson; rather, Emerson's competition consisted of other lines which, like Emerson, were attempting to carve a niche for themselves at the low end of the television price spectrum.

Additionally, in the years in question, the Sony brand television receivers on the U.S. market were limited almost entirely to very small screen sizes not manufactured by Emerson. Emerson, during the period that it was owned by NUE, did not, like Sony, manufacture television sets of nine inches and less. Joseph McKee, NUE's then Executive Vice President, testified that, "We considered those as toys."

The foregoing facts (and contentions of Sony) are uncontroverted. NUE's only colorable rejoinder is that what is important for purposes of price comparison would be evidence not of retail prices, but of the prices at which Sony sold to its only customer, Sonam. However, even assuming that could be a valid comparison given the parent-subsidiary relationship, plaintiffs have adduced no evidence of low price sales to Sonam which changes the result.[314]

[314] NUE has contended that Sony's pricing at the retail level is "a small part of the story," because "Sony's wholesale level pricing, together with the retail pricing of its products define the profit margin of the dealers who handle Sony television receivers, and Emerson competed with Sony for sales to such dealers and distributors." (NUE brief in opposition to Sony motion for summary judgment at p. 75). However, this assertion by counsel in a brief is not accompanied by any evidence of "wholesale level pricing" comparing Sony and Emerson television sets, and accordingly, Sony's posture as a high price seller remains uncontradicted. Not only are the allegations about Sony's pricing uncontradicted, but Sony's allegations about Emerson's location in the "low leader" end of the market are likewise uncontradicted.

The conclusion we draw from the foregoing is that given the standards for conspiracy proof that we have enunciated in Part VI.D.(4), *supra*, it is illogical to infer Sony's membership in a low price conspiracy. First, it is incontrovertible that Sony's high television prices were in furtherance of its own economic self-interest. Given the fact that Sony was able to command higher prices for its television sets than most other manufacturers, including NUE, it cannot be said to have been acting contrary to its economic self-interest in charging them. Second, because Sony consistently occupied the high price niche, it lacked an economic motive to conspire to drive NUE from its low price niche. It is at odds with common sense to believe that Sony would have participated in a conspiracy to drive Emerson out of business when that company posed no real competitive threat to Sony. Put differently, Sony's conduct is totally consistent with rational independent economic behavior, or at least far more so than with conspiratorial behavior. Under these circumstances, we cannot draw an inference of Sony's (or Sonam's) membership in the "unitary" conspiracy. To do so would be to engage in sheer speculation.[315]

9. *MC and MIC*

Mitsubishi Corporation (MC), the largest trading company in the world, is engaged in importing, exporting, trading, and other mercantile business, with sales in the billions of dollars. MC engages in no manufacturing, but relies exclusively on outside sources of supply. Taking the fiscal year ending March 31, 1979 as an example, MC had total trading transactions of $44 billion, involving 25,000 different product lines. That year approximately 47 pecent of MC's business involved entirely domestic transactions within Japan, 18 percent involved exports from Japan, 25 percent involved imports to Japan, and the remaining 10 percent involved foreign transactions entire-

[315] We will not dignify by extended comment what we will dub plaintiffs' "smorgasbord" theory of conspiracy. Under that view, the ends of the conspiracy were served by the inclusion of both high and low price sellers.

ly outside Japan. Mitsubishi International Corporation (MIC), MC's wholly owned United States subsidiary, was incorporated in New York in 1954. MIC, like MC, is a general trading company with no manufacturing capabilities.

Prior to World War II, MC's predecessor company was a member of the Mitsubishi zaibatsu, controlled by the Iwasaki family through a holding company.[316] The zaibatsu controlled a broad range of banking, trading, shipping, mining, and industrial manufacturing enterprises. Following the war, under edict from the Occupation Administration, the Mitsubishi holding company was liquidated and its former operating companies, including MC's predecessor, became publicly owned companies operating under separate management.

Trading in consumer electronic products has never been a substantial portion of MC or MIC's business. In 1973, MC and MIC's highest volume year for trading consumer electronic products, they had consolidated sales (predominantly sales by MIC) of consumer electronic products totalling $27 million, about 0.12 percent of MC's total trading volume of $22 billion, and about 0.8 percent of its total exports of $3.4 billion. That year sales of television receivers alone amounted to only $15 million, or 0.07 percent of MC's trading volume and 0.5 percent of its exports. Neither were MC or MIC a substantial factor in the industry. In 1973, MIC's highest volume year, MIC distributed but 0.9 percent of the monochrome and color television receiver units sold in the United States and accounted for but 0.5 percent of the U.S. dollar sales of television receivers.

MC and MIC have never manufactured television receivers or consumer electronic products of any kind. Neither MC nor MIC has ever sold or distributed consumer electronic products in Japan. Instead, during the years they traded in such products, MC and MIC purchased them from manufacturers of consumer electronic products for resale outside of Japan. MC

[316] For a description of the pre-war Japanese zaibatsu, *see* Part VII.C, *supra*. The Mitsubishi zaibatsu was one of the most prominent zaibatsus.

and MIC purchased television receivers from such Japanese manufacturers as Melco, General Corporation (General), and Osaka Onkyo. In addition, MIC purchased television receivers from Wells Gardner, an American manufacturer. As for other consumer electronic products, MC and MIC purchased from Shodenshosha (also known as Audio World), Fuji Onkyo, General, Maeden Company, Marvel Company, Melco, Nippon Onkyo, Onkyo Nisshin, Osaka Onkyo, and Sankyo Seiki.

MC and MIC traded in consumer electronic products in two ways. First, beginning in 1963, MC sold consumer electronic products to MIC for resale in the United States under private labels to a number of U.S. mass merchandisers and to a number of original equipment manufacturers, including Emerson (plaintiff NUE's predecessor), Muntz, and Westinghouse. Typically, such sales were negotiated between MIC and its customer, often with the direct involvement of technical representatives of the manufacturer, particularly when the private label product was custom-designed to the purchaser's specifications. In 1974, MIC discontinued the private label segment of its consumer electronic products trading.

In 1970, MIC, until then a private label purchaser, undertook to market brandname consumer electronic products by obtaining the North American rights to Melco's MGA trademark for consumer electronic products. A license agreement between MIC and Melco allowed MIC to market and distribute MGA brand CEP's purchased from a number of firms, including Melco, in the U.S., England, and Japan. The MGA Division of MIC purchased the products at a price negotiated between MIC on the one hand and Melco or other manufacturers on the other hand, and sold them under MIC's schedules of prices and conditions to independent MGA dealers.

MIC separately, and MC on a consolidated basis, incurred consistent losses as a result of trading in MGA brand consumer electronic products. On a consolidated basis, MC and MIC lost a total of $7.7 million between 1980 and 1974. As a result of these sustained and substantial losses during approximately

four years of operation, MIC decided in 1974 to cease selling MGA brand consumer electronic products. In October, 1974, MIC sold the assets of its MGA Division to Melco Sales, Inc. for $18.7 million.

Plaintiffs advance three theories of liability as to MC and MIC. First, they contend that MC and MIC were participating members of the alleged manufacturers' conspiracy. However, the only facts plaintiffs have adduced as to MC and MIC are that (1) MC participated in the JMEA meetings and in meetings of two low-level JMEA committees; (2) MIC was a member of the Japan Light Machinery Information Center in the United States; (3) MC and MIC sold consumer electronic products as to which the manufacturers allegedly rebated; (4) MIC's MGA Division offered advertising allowances; and (5) MIC sold at prices below the check prices. We shall analyze these allegations in terms of both direct and circumstantial evidence. Second, plaintiffs argue that even if MC and MIC did not directly participate in the alleged conspiracy, they should be held liable for it as the "intimate affiliates" and "functional subsidiaries," respectively, of Melco. Third, plaintiffs seem to argue that MIC should be held vicariously liable for the alleged conspiracy because it was an "agent" of Melco. In addition, plaintiffs raise two procedural grounds for denial of MC and MIC's motions: (1) the alleged insufficiency (under Rule 56) of MC and MIC's affidavits; and (2) a claim of discovery misconduct by MC and MIC (as well as by Melco and Melco Sales).

The record plainly affords no support for the direct evidence conspiracy claim. The plaintiffs concede, as they must, that MC was not a member of the Okura Group, the Palace Group, the Palace Preparatory Group, the Tenth Day Group, the MD Group, the TS Group, or any of the other allegedly conspiratorial groups operating sub rosa in Japan. MC was not a member of the Market Stabilization Council. MC was not signatory to any of the Manufacturers' Agreements. Nor was MC a target of any investigation by the JFTC.

Plaintiffs rely upon MC's membership in the JMEA, in the JMEA Transistor Radio Export Examination Committee, and

in the JMEA Television Subdepartment of the Electric Home Appliance Department. However, beyond mere membership, which cannot create a genuine issue of material fact as to conspiratorial activity, plaintiffs have offered no evidence as to the activities of either committees except for the bare allegation that the television subdepartment discussed "trade activity."[317] Although plaintiffs ask us to, we cannot draw negative inferences against MC because of the *absence* of documentary evidence of the committee's activities. MC was also a member of the EIAJ, but an uncontroverted MC affidavit shows that that membership involved products other than CEPs.[318]

---

[317] MC apparently attended the JMEA meetings at which the television and radio export control rules were adopted, and plaintiff asserts that MC "assented" to their adoption. Even if plaintiffs had offered evidence of MC's "assent" (they have not), they could not complain about what are minimum price agreements for the reasons we have explained in Part VI.B, *supra*. With respect to MC's attendance at meetings of the Transistor Radio Export Examination Committee and three departments of the Electric Home Appliance Department of JMEA, we note that plaintiffs have adduced no evidence that MC attended any specific meeting or evidence of what transpired at any meeting. We cannot assume that MC personnel attended specific meetings or that anticompetitive agreements were reached at those meetings, or that MC entered into them, or that MC carried out acts pursuant to them, or that any such acts were directed at and caused antitrust injury to plaintiffs. We note again that plaintiffs might have attempted to establish such matters by discovery, but elected not to do so. Plaintiffs' allegations that MIC is responsible for certain pre- and post-employment conduct of certain employees is patently baseless and requires no further comment. MIC has not admitted membership in the Japan Light Machinery Information Center. Although that would make no difference, see Part VII.G.3, *supra*, the allegation of membership is not borne out by the record.

[318] We have reviewed plaintiffs' objections to the affidavits of MC and MIC. Those four affidavits, which deny all of plaintiffs' allegations, in actuality are unnecessary because of plaintiffs' failure to meet their burden to advance significant probative evidence to controvert defendants' well-pleaded motion. We rely herein upon the non-controversial aspects of the affidavits, noting that, as to those, plaintiffs' objections are unavailing.

Having failed to adduce any probative evidence of MC's participation in conspiratorial activities in Japan, plaintiffs allege that MC and MIC are implicated in conspiratorial activity by virtue of their participation in the rebate scheme.[319] There are several facets to plaintiffs' claims in this regard. First, while plaintiffs do not allege that MC or MIC received rebates, there is an allegation that on one occasion MC and MIC facilitated a Melco rebating transaction. There is also an allegation that MIC itself engaged in rebating through its cooperative advertising program with its dealers. Moreover, plaintiffs seek to draw an inference of conspiratorial activity from their allegation that MIC was aware that certain private label purchases of Melco manufactured television receivers by Gamble Skogmo, Midland, Broadmoor Industries, and AMC were negotiated at prices below check price levels.

Plaintiffs' evidence, even if admissible, is insignificant with respect to either participation or knowledge by either MC or MIC in any kind of "rebate scheme."[320] As we have explained

[319] Plaintiffs also charge that MC and MIC's alleged invoicing at MITI check prices constitutes evidence from which their participation in the alleged manufacturers' conspiracy may be inferred. FPS at 3458-59. This argument is baseless. First, the record is clear that MC and MIC had no role in establishing the check price system. Second, for reasons explained above, neither MC and MIC's adherence to check prices nor to the Five Company Rule (also complained of with respect to MC and MIC) could have injured plaintiffs.

[320] Plaintiffs rely in part on DSS 1231, a telex whose author is unknown, which has no addresses, and with respect to which no discovery was taken. It is unauthenticated and inadmissible as hearsay under the standards established in the Japanese Materials Evidentiary Opinion, notwithstanding its mode of production. The plaintiffs also rely on a double hearsay statement that "Gamble saying our basic price be quoted on basis 10 pct. less from check prices" to prove that MIC "was a party to defendants', particularly Melco's, continual sales below check prices." But even assuming admissibility *arguendo*, the document does not establish that sales below check prices were consummated, or that MIC was a "party" to other defendants' sales, or that such sales were continual. For all that appears, if MC and MIC were "parties" to another defendant's sales of private label products, it was in

above, knowledge of the rebate system was common, but that does not create an inference that MC or MIC knew that the rebates were the result of concerted activity. At all events, neither the evidence set out in n.320 nor any other information advanced by plaintiffs in this voluminous record reflects or is a basis for drawing an inference of participation by MC or MIC in any agreement with respect to rebates.[321]

their capacity as buyers. Moreover, plaintiffs' interpretation of the telex is strained, converting a general reference to a "5 pct. price reduction for 1970" into a specific one, referable to MC and Melco without any discernible basis.

Plaintiffs also charge that MC and MIC "facilitated" a rebate transaction and reference a certain agreement to sell Melco TVs to Amcrest Corporation (AMC), a large retail service company. Plaintiffs purport to explain the transaction at pp. 6869-73 of their FPS. The entire account of the transaction is based on documents; no depositions were taken to explain what really occurred. In any event, while the transaction in question might well have involved a Melco rebate had it been consummated (according to the FPS at 6873 it was ultimately cancelled), plaintiffs' account is at best unclear as to MC and MIC's roles, and we can only speculate.

DSS 1164, also relied upon by plaintiff, relating to alleged rebates to Midland International Corp. in 1969, is equally cryptic, and neither the author nor the recipient of the document was ever deposed. Its admissibility has not been established within the strictures of the Japanese Materials Evidentiary Opinion.

Finally, plaintiffs' allegation about the cooperative advertising program fails because the documents on which plaintiffs rely contain no reference to Melco or to communication between MIC and Melco about the program and because the program clearly did not involve a rebate, but rather a genuine cooperative advertising program of a type that is generally considered to be procompetitive.

[321] Plaintiffs also claim that losses incurred by MIC's MGA Division for 1970-74 were "due to Melco and MIC's arbitrary pricing with the intent to predatorily take over the U.S. CEP market." The losses are conceded, but plaintiffs' ascription of cause is pure speculation. Plaintiffs have offered no evidence that Melco controlled or even influenced MIC's resale price in the U.S. market, nor may predatory intent be inferred from losses by a new entrant in a highly competitive market. There is no evidence of a later price increase to reap monopoly profits. Finally, MIC sold its MGA division, serving its own self-interest, instead of acting contrary to that interest by continuing to sustain losses.

In the wake of this uncontradicted factual background, we must determine whether there is any inference that can reasonably be drawn from the evidence which, with any degree of logic, is suggestive of MC or MIC's participation in the "unitary" conspiracy.

Plaintiffs' theory of the alleged conspiracy is that defendants' monopoly profits from the high price-fixed and closed Japanese market subsidized low price-fixed exports in the United States in order to take over the United States CEP market. Plaintiffs' explanation of the alleged economic motivation for this conspiracy is the desire on the part of Japanese manufacturers to maintain full production in the face of excess capacity without putting downward pressure on Japanese home market prices. However, plaintiffs' conspiracy theory as to MC and MIC cannot meet the conspiracy tests enunciated in Part VI.D., *supra* because it is totally illogical.

First, there is no potential benefit to MC and MIC from a successful conspiracy; hence, they had no motive to participate. Neither MC nor MIC manufactured consumer electronic products in Japan or anywhere else. Nor did they distribute consumer electronic products in the Japanese "home" market. Indeed, for MC and MIC there was no "home market." Accordingly, neither MC nor MIC would have, or for that matter could have, fixed prices in Japan. Similarly, no business interest of MC or of MIC could have been furthered by any alleged protection of the Japanese consumer electronic products market.

Second, because MC and MIC had no production capacity, they could not have had the full production motive plaintiffs' experts ascribe to the manufacturing defendants. Third, participation by MC and MIC was not needed by the manufacturers to achieve any end of the alleged conspiracy. That is because MC and MIC would be totally useless to any conspiracy which "allocate[d] among themselves the absolute volume of production and sale" of CEP's, for they had no production to allocate. Moreover, as trading companies, MC and MIC were in economic terms purchasers of consumer electronic products for resale, not sellers with market power.

Fourth, the "elimination of competition" in Japan could in no way enhance MC and MIC's resale of consumer electronic products in the United States. Because MC and MIC did not participate in the Japanese market, they could derive no "monopoly" profits to subsidize their sales in the United States. Fifth, MC and MIC, as non-manufacturing trading companies, were not competitors of the manufacturer plaintiffs, Zenith and NUE, and thus would have little motive to drive them out of business. Finally, even if successful, the conspiracy as alleged could have conferred little if any competitive benefit on MC or MIC. Any benefits they could have derived from the success of the alleged conspiracy in increasing sales in the United States would have been entirely collateral.

The sum of the foregoing discussion is that plaintiffs have adduced no direct evidence that MC or MIC participated in the alleged manufacturers' conspiracy, and that there is no reasonable inference that can be drawn from the evidence that they joined it, or even that they knew of its existence and were somehow complicitous with it, intending to further the scheme. Neither does the vertical relationship between MC and MIC and Melco, which involved such matters as plant visits,[322] office sharing,[323] and price negotiations, all of which

[322] Plant visits among even horizontal competitors fail to give rise to any inference of conspiracy. *United States v. National Malleable & Steel Castings Co.*, 6 F.2d 40 (6 Cir. 1957), *aff'd per curiam*, 358 U.S. 38, 79 S.Ct. 39, 3 L.Ed.2d 44 (1958). Therefore, visits by a customer to one of its suppliers' plants *a fortiora* cannot imply that the manufacturer informed the customer about a manufacturers' conspiracy.

[323] Plaintiffs have relied upon, but have not clarified, the significance of Melco employees' temporary use of MIC office space in the United States. Apparently, those matters are offered to show that MC and MIC had contacts with Melco which, in turn, was allegedly a member of trade association committees to which MC did not belong. These informal office sharing arrangements provide no evidence that MC or MIC knew of the alleged manufacturers' conspiracy. At most, office sharing represents only opportunities for disclosure, not positive evidence of it. *Hunt v. Mobil Oil Corp.*, 465 F.Supp. 195 (S.D.N.Y. 1978), *aff'd*, 610 F.2d 806 (2d Cir. 1979). Plaintiffs

are invoked by plaintiffs, provide any basis for inferring a conspiracy. Discussions of and agreements as to price and supply relationships among vertically positioned firms simply do not raise any inferences of conspiratorial knowledge by the customer of the anticompetitive purposes of its suppliers.[324]

Plaintiffs' only remaining basis for attempting to hold MC and MIC into the case is a function of plaintiffs' allegations about the relationship between these two firms and Melco. These claims, in turn, stem mainly from the alleged present-day remnants of the historic ties between Melco and MC and MIC, and from plaintiffs' claims about the "Mitsubishi Group." We adverted to this matter in Part VII.Q.7, *supra*. Few points in this case have received more heated discussion. MC and MIC have forcefully, indeed persuasively, argued that the zaibatsu is long dead and that MC and MIC are totally independent from Melco. In their submission, the only current viability of the "Mitsubishi Group" notion is for advertising purposes. Plaintiffs, on the other hand, vigorously assert that the notion of the "Mitsubishi Group" is still a meaningful one. They point to interlocking directors and cooperative activity among the companies, and assert that MC was Melco's "functional subsidiary," with the result that MC and MIC are chargeable for Melco's complicity in the alleged "unitary" conspiracy.[325] However, we need not reach this issue because, since the plaintiffs have no evidence to link Melco to the alleged conspiracy, they cannot hold in MC or MIC on any "functional subsidiary" theory.[326]

have elected not to depose MC and MIC employees regarding the substantive nature of any contacts between MC and Melco as a result of their office sharing arrangements, and thus have failed to offer any evidence relating to such contacts. Moreover, MIC has denied that it learned of any alleged manufacturers' conspiracy as a result of these office sharing contacts (Tadatoshi Kitayama Affidavit at 7-8 and 11, ¶¶ 21 and 27 [Exhibit B]). Plaintiffs have also failed to connect the timing of the office sharing periods to any event significant to the alleged conspiracy.

[324] *Nifty Foods Corp. v. The Great Atlantic & Pacific Tea Company, Inc.*, 614 F.2d 832 (2d Cir. 1980); *Fuchs Sugar & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917, 100 S.Ct. 232, 62 L.Ed.2d 172 (1979); *Pitchford v. Pepi, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed.2d 387 (1976); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F.Supp. 243 (E.D.Pa.1979), *aff'd*, 637 F.2d 105 (3d Cir. 1980). *A fortiori*, such discussions cannot implicate the customer in a broader horizontal conspiracy among manufacturers.

10. *Sears*

Sears is the world's largest retailer. The nature of its operations is a matter of common knowledge and does not require elaboration here.

The plaintiffs charge that Sears, as early as 1963, joined in the conspiracy of the Japanese manufacturing defendants and

[325] We do note, however, that plaintiffs' interlocking directors' claim is incredibly strained. Plaintiffs rely on the presence of one Melco officer on a 43 to 47 person MC board. This approach is not, however, nearly as strained as that contained in DSS 32, initially offered in the *in limine* hearings but then withdrawn. That document was a staff study prepared by the Subcommittee on Reports, Accounting and Management of the U.S. Senate Committee on Governmental Affairs entitled "Interlocking Directorates Among the Major U.S. Corporations." Plaintiffs' proposed use of that study proceeded from its incredibly expansive definition of *indirect* interlocking directorates which is said to occur:

> when each of the two companies has a director on the board of a third—or intermediate—company, or conversely where the third company has a director on the boards of each of the two companies. In such situations, there is also the opportunity for direct communication and shared knowledge between the first and second company, even though they are indirectly, rather than directly, interlocked.

The staff report includes many thousands of pages somewhere amidst which it is apparently indicated that a director of Sears, Roebuck or a director of Motorola served on another board on which a director of Montgomery Ward or J.C. Penney or some other U.S. importer apparently served. The point of the matter, in plaintiffs' aborted submission, was that this "indirect interlock" showed that Sears or Motorola were linked with the other coconspirators.

[326] We incorporate by reference what we said at n. 310, *supra* with respect to plaintiffs' claim that MC and MIC's motions must be denied on the ground of their alleged discovery abuse.

their sales subsidiaries to drive down prices and destroy the U.S. CEP manufacturing industry. Plaintiffs do not charge that Sears joined some different conspiracy, but rather the "unitary" conspiracy which we have described at such length, *supra*. Plaintiffs have made some perfunctory assertions about Sears' involvement in the "Japan-side" of the "unitary" conspiracy, which they have, in essence, abandoned.[327] Their more

[327] Plaintiffs have no evidence of Sears' direct involvement in any activities in Japan, such as participation in export control arrangement or presence at meetings of "conspiratorial groups." In paragraph 17 of plaintiffs' counterclaim joining Sears, an allegation is made (and Sears' reply admits) that certain Sears catalog merchandise is offered for sale to the public in Japan by the Seibu department store chain, and that such merchandise does not include the television sets made in Japan which are offered to Sears' U.S. catalog customers. Paragraph 17 of the Counterclaim alleges, and Sears' Reply denies, that Sears withholds such television sets from sale in Japan in order to avoid disrupting the alleged price fixing conspiracy and cartel maintained there by Japanese television manufacturers.

The FPS contains no evidence that Sears consciously assisted a high price cartel in Japan. Indeed, at page 3445, the FPS acknowledges Sears' attempts to market television sets in Japan, and cites the Nehmer Report which, at page IV-18, discusses the "exclusion of Sears," asserting that, "Sanyo and Toshiba were not allowing any sales of their television receivers through Sears into the Japanese market . . . ." However, the record reveals that what kept Sears' television receivers off the Japanese market was the nature of the merchandise and of the Japanese market. The contract between Sears and Seibu, identified in an affidavit of Mr. Norris, who was in charge of Sears' catalogue sales program with Siebu, provides that the Sears catalog merchandise to be offered for sale by Seibu in Japan is to be limited to ". . . those items displayed in a Sears catalog which SEARS, after consultation with [SEIBU], determines are (2) readily saleable or adaptable for sale in Japan. . . ." It is undisputed that the sets manufactured for Sears in Japan have tuners which will not receive a substantial portion of the television transmission in Japan and require power supplies which would result in the sets probably not receiving any picture at all in Japan, let alone a satisfactory one. Zenith's Mr. Horn, in his deposition, admitted that a Sears set could not in good conscience be recommended for use in Japan, and Zenith conceded through its highest ranking officer, Mr. Nevin, that Sears would need television sets with different electronics for sale in Japan than those it bought for sale in the United States. *See generally* Opinion (1916 Antidumping Act), 494 F.Supp. 1190 at 1204, *et seq*. It is thus undisputed that Sears' television sets were not saleable in Japan. Moreover, Norris explained that direct delivery to customers in Japan of merchandise which Sears purchased there and did not first remove from that country would have caused Sears to lose the exemption from Japanese taxes which its Japanese buying office enjoys and which, in Mr. Norris' judgment, would have more than offset any profits Sears might have earned by such activity.

The short of it is that there are innocent and logically compelling reasons why Sears television sets were never sold by Seibu. Assuming, but by no means conceding, that all the Japanese manufacturers were conspiring in their "home market" as Zenith alleges, it is illogical to suppose that they either sought or received Sears' acquiescence or assistance, for they would have required neither. All they would have needed to do was to refuse to supply Sears with television sets which would operate satisfactorily in Japan.

seriously conceived allegations about Sears' complicity are twofold. The first relates to Sears' alleged involvement in the "rebate scheme" we have described, and the second is that Sears acted anticompetitively by way of its complicity in the acquisition of Warwick by the Sanyo interests.[328]

With respect to the Warwick transaction, which we take up first because it can be disposed of briefly, there is no evidence other than that: (1) Sears attempted to preserve Warwick, engaging in a variety of financing arrangements for its benefit in addition to long-term loans, and (2) Warwick failed in spite of that support. *See* Part VII.N.3, *supra*. Given that Sears had a 25% interest in Warwick, in addition to its millions of dollars worth of outstanding long-term loans which it would stand to lose if the alleged conspiratorial objectives were accomplished, it would have been irrational for Sears to conspire to destroy Warwick.

Turning to the rebating "scheme," Zenith's allegation against Sears has three aspects. The first relates to Sears' purchases of Japanese-manufactured television receivers (from Sanyo and Toshiba) at prices which were below the check prices and which, consonant with plaintiffs' generalized con-

[328] Although plaintiffs have made some generalized allegations about the involvement of Sears in connection with non-TV products, the preclusive FPS contains no cognizable evidence of it.

spiracy claims, were "sufficiently low to obtain the business" and to displace U.S. domestic suppliers. We take this up in conjunction with the second aspect, which lies in the allegations that, to conceal the actual export prices in these transactions, Sears systematically falsified the various invoices, purchase orders, letters of credit, and other formal documents reflecting the price at which the goods were being exported from Japan and imported into the United States by the declaration of erroneous prices, and that the "pattern of false customs declarations" was accompanied by the payment of secret rebates.[329] The third aspect of Zenith's claims about Sears' participation in the rebate scheme lies in plaintiffs' allegations about Sears' participation in legal maneuvers to thwart the U.S. Treasury Department 1921 Antidumping Act investigation.

Zenith contends that Sears' participation in the rebate conspiracy enabled Sears "to regularly sell consumer electronic products manufactured for [it] by its Japanese suppliers at prices far below levels at which Zenith and other manufacturers could compete and far below the fair market value of such products, and to achieve a level of sales far above what it would otherwise have enjoyed, but for its participation in defendants' concerted program." Plaintiffs allege that without the rebates, which reduced the actual price for television receivers below the check price, Sears could not have been competitive in the American market with respect to the sale of Sanyo and Toshiba television receivers and that the rebates afforded Sears the power to aggressively promote the Japanese manufactured television receivers in its retail outlets. The amounts of the

[329] Much stress is placed by Zenith upon the fact that, on February 26, 1980, a federal grand jury in the Central District of California indicted Sears on charges of customs fraud arising out of the "rebate scheme" discussed at such length in this opinion. That case is still pending. Zenith's allegations in this regard are not mere litigation rhetoric; they are tinged with bitterness. Zenith devotes some ten pages of its Supplemental Reply Memorandum in Oppositon to the Motion for Summary Judgment (filed Aug. 11, 1980), to detailing the charges in the indictment and listing the alleged conspirators, most of whom are Sears, Sanyo, and Toshiba merchandising personnel.

rebates were enormous: in 1971, for instance, Sanyo alone rebated to Sears $2.47 million, and for the four years 1969 through 1972, inclusive, the rebate amount was over $7 million. As of the time of the writing of plaintiffs' FPS, Sears' sales of television receivers accounted for over 11% of the United States market. Zenith complains that it was Sanyo and Sears' hope that they would ultimately seize the majority share of the U.S. market.

Description of the rebate scheme as it involves Sears, Sanyo, and Toshiba occupies almost 500 pages of the FPS. The facts are advanced through references to a large number of documents which set forth the *dramatis personae* of the scheme and detail numerous individual sales transactions. We have described in Part VII.L, *supra* the various devices by which rebates were paid by Sanyo and Toshiba to Sears, and need not repeat that description here.

The FPS description details the "double billing" and "over-under" devices also described in Part VII.L and alleged to be the means to conceal the rebates from U.S. Customs. Sears, supported by evidence, vigorously denies the allegations that it concealed the rebates, discounts, and allowances or that it deceived U.S. Customs authorities. The plaintiffs, armed with different evidence, argue vigorously that Sears did indeed practice such deception. Plaintiffs contend that Sears' participation was not just in one-on-one transactions with its principal Japanese suppliers, Sanyo and Toshiba, but rather as part of the conspiracy of all defendants to conceal the actual prices at which CEP's were exported from Japan into the United States. Plaintiffs describe this as a critical and integral component of the conspiracy, asserting it to be one of the principal means by which the conspiracy was implemented.

Even if we assume that the numerous Sears-related documents which plaintiffs have referenced in their FPS and their final summary judgment briefs, many of which were before us

as DSS's at the pretrial evidentiary hearings, are admissible,[330] they are not sufficient by themselves or in combination with other evidence to create a genuine issue of material fact as to the existence of a conspiracy among the various defendants, including Sears, because: (1) no direct evidence in the record reflects knowledge by Sears of the objects and purposes of the alleged "unitary" conspiracy or participation by Sears in that conspiracy;[331] (2) no circumstantial evidence has been called to our attention from which it can be inferred that Sears was a participant in any concerted activity with respect to rebates;[332] and (3) it is clear that the inference that Sears participated in a "unitary" conspiracy to maintain high prices in Japan and low prices in the United States for the purpose of destroying United States manufacturers of consumer electronics products is totally illogical and does not meet *Bogosian/Venzie* standards.

First, Sears had nothing to gain and much to lose from the crippling and destruction of the United States CEP industry. It would clearly be in Sears' economic interest as a buyer to

[330] We observe that, despite challenge, the plaintiffs have failed to lay the foundation for the admission of these documents as business records under the F.R.E. 803(6) standards enunciated in our Japanese Materials Evidentiary Opinion; they thus cannot be admitted against all parties. Many of the documents, however, are doubtless admissible against Sears or against the company employing the author of the documents in the rare case when that company is a defendant.

[331] Part of Zenith's claim against Sears is based on Sears' alleged knowledge that the probable result of the Japanese defendants' pricing policies would be the demise of U.S. CEP manufacturers. However, the principal evidence offered to support this claim, Sears document 4955, a memorandum written by a Mr. Amato, formerly the head of Sears' home entertainment purchasing department (and now deceased), does not do so. The memorandum on its face, and taken in its historical context, is at best highly ambiguous, especially in terms of its identification of the "casualties," who may have been smaller Japanese manufacturers, not U.S. manufacturers. The allegation is not otherwise supported.

[332] We include all the oft-mentioned "Ex. Hall" documents, even assuming their admissibility.

preserve as many competing sellers as possible (including Warwick) for present and future considerations.

Second, because the Japanese manufacturing defendants are sellers and Sears is a buyer, Sears' interests cannot be aligned with those other parties who were its alleged coconspirators. It is always in a buyer's economic self-interest to obtain as low a price as possible. It is only a buyer's rejection of a better offer that is so contrary to his apparent economic self-interest that can justify an inference of conspiracy. We fail to perceive how Sears' acceptance of better offers from its Japanese vendors, especially if it played off one against the other in order to get the better deal, can lead to an inference of conspiratorial conduct.[333]

Third, although plaintiffs complain that Sears (with Sanyo's concurrrence) was striving vastly to improve its market position, thus to achieve some kind of monopoly, the desire for increased market share is a normal desire of any company acting unilaterally in its own self-interest.[334] Given the foregoing facts and analysis, the only drawable inference is that Sears acted at all times in the pursuit of what it perceived to be its own economic self-interest, and totally inconsistently with any notion of conspiratorial activity.[335]

[333] We also note that the Japanese television sets were of undisputably better quality and availability than those which Sears had been procuring for years from Warwick, so that it was in Sears' interest to purchase them from its Japanese rather than its American suppliers. *See* Part VII.N.3, *supra*.

[334] We note that Zenith's president, Mr. Nevin, testified that it was unrealistic to believe that Sears could substantially increase its market share (except "through prayer"). In any event, there are numerous indications, *see* pp. 1232-1233, *supra*, that Zenith had precisely the same intention.

[335] Plaintiffs have pointed to losses incurred by Sanyo, Sears' supplier, and Sears as evidence of conspiratorial activity. We have addressed the matter of Sanyo's "losses" in Part VII.Q.5, *supra*. We do not dwell on Sears' alleged losses because there is no evidence (and no evidence from which it can be inferred) that any losses incurred by Sears in the CEP field were either deliberate or prolonged.

Fourth, our earlier discussion explains why no inference of conspiracy can be drawn from the facts, if true, that there were irregularities in the reporting to U.S. Customs of Sears' purchases from Sanyo and Toshiba, or that Sears was a party to material falsification to Customs or to the withholding of material information from it. Participation in the rebate scheme and even falsification to Customs with the view of preserving the low net price are far more consistent with attempts to obtain the lowest possible price for Japanese CEPs and to avoid detection so as to retain the price advantage than with any predatory low price export conspiracy.

Turning to the remaining facet of plaintiffs' "rebate scheme" claims, the plaintiffs allege that in approximately mid-1970, when it became generally known in the trade that U.S. Customs and the Department of the Treasury (of which Customs is a part) were tending toward a decision to issue a notice of withholding of appraisement in the investigation of alleged dumping of television sets from Japan, Sears, in concert with other importers, took a number of actions "pursuant to the alleged conspiracy" in an attempt to halt the dumping investigation before the government discovered the alleged secret rebates which Sears and others were allegedly conspiring to conceal.[336]

However, the undisputed facts show that, at most, Sears and others with common interests: (1) discussed possible presentations before the U.S. Tariff Commission; (2) consulted jointly with respect to institution of litigation to enjoin the investigation; and (3) acted jointly in an attempt to persuade the Secretary of the Treasury and his subordinates to take certain actions in connection with the TV antidumping investigation. As we explained in Part VI.A.8 above, even if plaintiffs' allegations are accurate, the allegedly offending

[336] Sears notes that, in this respect, the FPS relies largely upon testimony and documents obtained by depositions of non-Sears' witnesses at a time *prior* to Sears' joinder in this litigation. Sears argues that these matters are therefore inadmissible against Sears under F.R.Civ.P. 32(a). In view of our conclusion, we need not address this argument.

allegations are accurate, the allegedly offending activity is protected and cannot be the basis for a finding of conspiracy.[337]

11. *Motorola*

Motorola needs relatively little more introduction than Sears. For many years, Motorola was known as a major U.S. producer of consumer electronic products, including television receivers. In recent years, Motorola has attained prominence in research and development and marketing of semiconductors. Plaintiffs' claims that Motorola is involved in the "unitary" conspiracy emanate from three sources: (1) Motorola's purchase of Japanese television receivers at depressed prices and its participation in the rebate scheme, allegedly with knowledge of the overall conspiracy; (2) Motorola's sale of its consumer electronic products (Quasar) division to Matsushita; and (3) Motorola's activities in connection with certain joint ventures in Japan. We take up these matters *seriatim*.

During the 1960's, Motorola was interested in purchasing CEP's in Japan. It first established an office and then a wholly owned subsidiary, Motorola Serv... Co., Ltd. ("MSCL") there. Zenith has alleged that Motorola then became aware that check prices were established by a "major Six Company conference consisting of presidents and/or vice presidents only."[338] However, assuming that the existence and etiology of

[337] Sears describes all of the meetings discussed in the FPS. For example, the first two meetings—a June 2, 1970 meeting of representatives of Sears, other retail merchants, and certain Japanese manufacturers, and a June 4, 1970 meeting of attorneys for certain members of the National Retail Merchants Association, including Sears—are asserted by Sears to be "innocuous as a matter of law." Sears also refers to a July 2, 1970 meeting of representatives of the National Retail Merchants Association, including the President of Sears, with Treasury Secretary Kennedy, seeking to persuade him to take certain action in the conduct by his Department of the television dumping investigation, as quintessentially the type of activity specifically immunized from antitrust attack by the *Pennington* decision.

[338] Motorola is a defendant only in the *Zenith* case; NUE never stated a claim against Motorola.

the check prices were not common knowledge[339] and that the documents relied upon to prove Motorola's "knowledge" are admissible, there is still no evidence from which it could be inferred that Motorola knew of the nature of the alleged unitary conspiracy.[340] Neither is such knowledge established, as plaintiffs suggest, by the fact that an employee of MSCL, one

---

[339] *See* discussion at p. 1287, *supra*, which suggests that they were. Even Zenith's witnesses testified that the U.S. manufacturers have known about the check prices for years.

[340] DDS 1178 is an internal Motorola memorandum which plaintiffs submit establishes the existence of the overall conspiracy. It does not. Moreover, plaintiffs laid no foundation for the admission of the document as a business record, and it contains multiple hearsay. Neither is Motorola's knowledge of the "unitary comspiracy" established by DSS 1173, produced from Motorola's files, which is entitled "Highlights of Far East Trip, 1964." Zenith has offered the document as a business record, as an admission against Motorola, and under the residual hearsay exceptions as evidence that Motorola participated with the defendants in the conspiracy, or at least that it had knowledge of the conspiracy. What is apparently of greatest interest to plaintiff is a notation in that document that a MITI representative was reported to have pounded hard on the theme that Japanese companies doing business in the United States should not "do to the U.S. TV business what [they] did in portable radios." Zenith is apparently also interested in the general information contained in the document about the condition of the TV manufacturing business in Japan. Supposedly the trip report was prepared by Paul Stancik, Motorola's Director of Purchasing, but his deposition was never taken (although he was once subpoenaed and has always been available). Mr. Haberstich, a Motorola purchasing agent and presumably a key witness, testified at his deposition that he had never seen the document, and that he did not know whether Mr. Stancik went to Japan in 1964, whether Stancik had ever visited MITI, or whether anyone else at Motorola had ever visited MITI. When this document is measured against the standards outlined in the Japanese Materials Evidentiary Opinion, it is inadmissible. However, even if the document were admissible, nothing therein consitutes evidence tending to show that Motorola was aware of the "unitary" conspiracy alleged by the plaintiffs. Even if one assumes that Motorola is charged with knowledge of a radio conspiracy (and there is no such evidence) such an inference cannot be drawn. Plaintiffs' trenchant and repeated reliance on documents of this character is indicative of the problems with their case.

Shigemitsu ("Shiggy") Nakano had "good connections in the highest places."[341]

There is evidence from Motorola's negotiations with Sharp for the purchase by Motorola of Sharp-manufactured television receivers that Motorola was aware of the practice of rebating to circumvent MITI check prices, for that transaction involved a rebate. Problems resulting from the U.S. antidumping investigation developed in connection with payment of that rebate, and there is considerable dispute whether the rebate due from Sharp to Motorola on that transaction was ever paid. There is also dispute as to whether Motorola revealed "all" to the United States Customs Service as it (with supporting documentation) strongly affirms.[342] However, the ultimate point is that, notwithstanding Motorola's awareness and even possible participation in rebating, there is no evidence that Motorola knew of or participated in the "unitary" conspiracy. To infer from knowledge that the Japanese sold at low prices that Motorola had knowledge of a low price conspiracy to drive U.S. manufacturers out of business would be impermissible speculation.

Zenith argues that Motorola's purchase of Japanese CEPs at low (net) prices as the result of a rebate itself creates an inference of Motorola's complicity in the alleged conspiracy. However, as was the case with Sears, it was plainly in Motorola's interest to get the best price it could on Japanese manufac-

---

[341] This reference, typical of plaintiffs' strained arguments, is from DSS 1173.

[342] It is undisputed that Motorola sent a separate form of letter to the local collector of customs explaining the difference between the MITI check price and the actual selling price and requesting that the sets be appraised at the actual selling price. The plaintiffs contend that this was not "telling all." Resolution of this factual dispute is unimportant to the outcome here. Neither is it necessary to discuss the ramifications of the suit which Motorola filed against U.S. Customs in the United States Customs Court articulating Motorola's position that the duty should have been assessed at the price MSCL actually paid, *i.e.*, price less rebate.

tured goods.[343] Moreover, it is undisputed that: (1) in 1967, Zenith and RCA were already selling or planning to sell 14" color television receivers; (2) Motorola did not have a 14" set in its line; and (3) the purchase from Sharp filled that gap, enabling Motorola to respond to the competition while it developed its own domestic production capacity. By 1970, when Motorola was able to manufacture 14" color televisions in its own production facility in the United States, it stopped purchasing from Sharp and never again purchased Japanese television receivers. Thus, because of Motorola's unique situation vis-a-vis the other defendants and alleged coconspirators, it was in Motorola's interest to purchase the television receivers from Sharp. This fact not only controverts Zenith's contention that the purchase of imported television receivers necessarily tended to destroy the domestic industry, but also closes the ring on plaintiffs' attempts to infer a Motorola role in the "unitary" conspiracy from consciously parallel interdependent action. It is plain that plaintiffs cannot pass the *Bogosian/Venzie* test as to Motorola, whose actions were undisputably in its self-interest. Motorola's conduct is inconsistent with conspiracy and points unerringly towards rational independent choice.

Apparently recognizing that there is no circumstantial evidence of Motorola's involvement in the alleged "unitary" conspiracy, Zenith asserts that Motorola became a coconspirator by virtue of the sale of its consumer electronics (Quasar) division to Matsushita.[344] We explained in Part VII.N.2, *supra*,

---

[343] It bears noting in this regard that the purchase from Sharp referred to above was Motorola's only purchase of Japanese color television receivers, rendering Motorola's purchases insignificant in comparison with total television imports from Japan.

[344] Zenith's arguments about Motorola's complicity stem from its allegations about the existence of "reciprocal arrangements" supposedly executed in connection with the sale which, according to Zenith, involved "shared, mutual, cross and corresponding transfers of inventions, technological information, technological know-how, buy and/or sell agreements, or cooperative marketing and sales agreements" for semiconductors and solid state devices, products which are not involved in this litigation. Zenith has

why that sale does not help plaintiffs' case. Zenith's board chairman, Mr. Nevin, has himself conceded that Motorola "abandoned the U.S. television market because [it] could not earn adequate profits in it."

Finally, Zenith asserts that Motorola's involvement in the conspiracy is demonstrated by the ramifications of its joint ventures in Japan, principally that with Alps Electric Company, Ltd., creating Alps-Motorola, Inc. ("AMI") to engage in the manufacture and sale of tape players. Because AMI is the final vehicle through which Zenith seeks to link Motorola to the conspiracy, the uncontradicted facts respecting AMI bear recitation. As will be seen, none of these matters demonstrate a unity of purpose, design, or understanding between Motorola and the alleged conspiracy or constitute any evidence thereof.

First, none of Zenith's general conspiracy allegations pertain even remotely to AMI. Zenith does not offer evidence that any product manufactured by AMI was dumped,[345] that AMI sold anything at high prices in Japan or at low prices in the United States, or that AMI fixed prices or was a party to cartel agreements or check prices. Zenith does not claim that any "check price" was ever established for any AMI product or that AMI ever paid anyone a "secret rebate." Zenith does not claim that AMI attended any of the "conspiratorial meetings" in Japan. Moreover, despite the fact that AMI was a member of the EIAJ and was active in a number of its committees, Zenith has not identified any EIAJ meetings which AMI attended or

---

adduced no facts to support the "reciprocal arrangements" theory. Under oath, both Motorola and MEI have denied such arrangements. Moreover, Motorola's semiconductor sales to MEI have declined significantly. In any event, this allegation, even if it were to be fleshed out, does not create a logical inference of conspiracy. Motorola had no motive to join a conspiracy to destroy American CEP manufacturers in return for prospective semiconductor business with MEI, given that Motorola, as is conceded, already had an active semiconductor product business with the U.S. CEP industry.

[345] Zenith does allege that Alps and Motorola executives met in Japan to discuss a tape equipment dumping complaint.

adduced any evidence about anything AMI did or said in connection with the EIAJ.

Second, AMI, which was dissolved in 1978, manufactured a single type of consumer electronic product—tape equipment—and not television receivers.[346] Third, Motorola's joint venture is thus no different from the hundreds of other joint ventures by American companies in Japan, including those contemplated by Zenith.[347] Fourth, AMI answered four sets of Zenith's interrogatories and denied any and all involvement in the alleged conspiracy or any aspect of it. Zenith has not attempted to contradict any of those sworn assertions, and has not produced any evidence which would render the AMI venture, or any other Motorola joint venture, conspiratorial in nature.[348]

[346] In fact, Zenith was AMI's best CEP customer, the largest U.S. importer of AMI's tape equipment. As the primary importer of AMI products, Zenith is hardly in a position to claim that AMI conspired to flood the United States with artificially low-priced products, because in accord with Zenith's theory, that would make Zenith one of the conspirators!

[347] Zenith considered plans to establish a manufacturing facility in Japan through a joint venture with a Japanese firm. Instead, it opened its own production facility in Taiwan. Moreover, in 1972, Zenith explored the possibility of marketing its television receivers in Japan, and discussed a joint venture with C. Itoh, a large Japanese trading company. Motorola asserts that it is "incongruous" for Zenith to criticize Motorola for its joint venture with AMI in light of the fact that in February, 1977, Zenith entered into a joint venture with defendant Sony under which Zenith would market the U.S. Sony's "Betamax" video cassette recorders. We shall not comment on this allegation.

[348] Motorola was involved in other joint ventures. Its principal venture was an agreement, entered into in 1973, to market U.S. made large-screen color television receivers in Japan through AIWA, a subsidiary of Sony in Japan. Shortly before its U.S. television business was sold to MEI, Motorola terminated the agreement and paid Sony $250,000 in settlement. This aspect of the matter is discussed *supra* in Part VII.N.2. Additionally, Motorola had a 100% owned subsidiary in Japan, Motorola Semi-Conductor Japan, Ltd. (MSJL) and also held a 50% interest in Alps-Motorola Semiconductor, Ltd. (AMSK). MSJL, which was in business between 1968 and mid-1973, sold only semiconductors, primarily manufactured in the United States and exported to Japan. AMSK, formed in 1973 when Alps-Electric purchased a 50% interest in MSJL, made an abortive attempt to manufacture semiconductors in Japan. Neither MSJL nor AMSK sold anything outside Japan, nor exported anything for sale in the United States.

To summarize as to Motorola: (1) Zenith does not claim that Motorola sold anything in the United States at low prices; rather, Zenith would appear to maintain that Motorola was driven out of the CEP business by low prices charged by the alleged conspirators; (2) Zenith does not claim that Motorola sold anything in Japan at high prices; instead, Zenith claims that Motorola was excluded from Japan because the other defendants suspected that Motorola would disrupt the alleged conspiracy; (3) Zenith does not allege that Motorola dumped anything into the United States; (4) Zenith does not claim that Motorola engaged in price discrimination; (5) Zenith does not claim that Motorola participated in the "cartel" agreements; (6) Zenith does not claim that Motorola participated in any conspiratorial groups or associations; (7) Zenith has no evidence of knowing participation by Motorola in any rebate-related predatory low price export conspiracy; and (8) it is plain from Zenith's evidence that it would not be rational to conclude that any of Motorola's reported conduct was the product of the conspiracy alleged instead of an independent business response consistent with its economic self-interest. Plaintiffs thus have no conspiracy claim against Motorola which can survive summary judgment.

12. *The Sales Subsidiaries*

Plaintiffs, in an effort to link the subsidiaries to the parent companies' membership in the conspiracy, have devoted an enormous number of pages of their FPS and their summary judgment briefs to detailing the relationships between the eight principal Japanese defendants and such of their sales subsidiaries as have also been named defendants in this case. Those sales subsidiaries are either sales companies in Japan

(e.g., MET, Hitachi Kaden) or sales companies in America (e.g., MECA, TAI, HSCA, SEC, etc.).

The law is clear that mere corporate affiliation is insufficient to establish conspiracy. *H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Overseas Motors, Inc.* v. *Import Motors, Ltd.*, 375 F.Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 304 (1975); *Sherman* v. *British Leyland Motors, Ltd.*, 601 F.2d 429 (9th Cir. 1979); *DuPont Glore Forgan, Inc.* v. *AT&T*, 437 F.Supp. 1104 (S.D.N.Y.1977), *aff'd mem.*, 578 F.2d 1366 (2d Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 465, 58 L.Ed.2d 431 (1978). Even though affiliated firms are legally capable of conspiring among themselves, the mere fact of affiliation does not relieve plaintiffs of the burden of proving that they conspired. *H&B Equipment Co., Inc.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 803 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841 (N.D.Cal.1979). Indeed, the principle that plaintiffs must prove that affiliates actually conspired applies to wholly-owned parent-subsidiary relationships, *DuPont Glore Forgan, Inc.*, v. *AT&T*, 437 F.Supp. 1104 (S.D.N.Y.1977), *aff'd mem.*, 578 F.2d 1366 (2d Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 465, 58 L.Ed.2d 431 (1978), and to an unincorporated division of a parent company, *H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978).

We have explained that there is no evidence tending to show that any of the subsidiaries were members of the "unitary" conspiracy. Given the legal principles we have just explained, it is clear that the evidence of corporate affiliation does not supply the missing link. We turn then to the question of agency.

The principles relevant to deciding whether a subsidiary is the agent of its parent corporation were recently reviewed by

Judge Caleb Wright in *Japan Petroleum Co. (Nigeria) Ltd.* v. *Ashland Oil Co.*, 456 F.Supp. 831, 840-41 (D.Del.1978):

> Whether an agency relationship exists between a parent corporation and its subsidiary is normally a question of fact. The central factual issue is control, *i.e.*, whether the parent corporation dominates the activities of the subsidiary.
>
> In order to determine whether or not a sufficient degree of control exists to establish an agency relationship, the Court must look to a wide variety of factors, such as stock ownership, officers and directors, financing, responsibility for day-to-day operations, arrangements for payment of salaries and expenses, and origin of subsidiary's business and assets.

(citations and footnote omitted). *See also Walker* v. *Newgent*, 583 F.2d 163, 167 (5th Cir. 1978), *cert. denied*, 441 U.S. 906, 99 S.Ct. 1994, 60 L.Ed.2d 374 (1979); *Pacific Can Co.* v. *Hewes*, 95 F.2d 42 (9th Cir. 1938); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841 (N.D.Cal.1979). As Judge Wright noted, the existence of an agency relationship is a conceptually distinct question from the notion of "piercing the corporate veil." 456 F.Supp. at 839. However, the mere fact that one corporation owns a controlling interest in another does not render the subsidiary the agent of the parent:

> "A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other. . . ." Nor does the fact that a parent and a subsidiary have common officers and directors necessarily indicate an agency relationship.

456 F.Supp. at 841, *quoting* Restatement (Second) of Agency § 14 M (citations omitted).

Just as we have, in the preceding sections, analyzed the evidence against each subsidiary and found it wanting, we have analyzed the evidence against the parents and have found no genuine issue of material fact as to their participation in the alleged conspiracy. Accordingly, given the intricacy, under the

caselaw, of the agency determination, there is no point to lengthening this opinion by a detailed analysis of the web of corporate relationships adduced in the record in order to make it; hence we do not do so.[349]

R. *Preliminary Determination of Sufficiency of Conspiracy Evidence under F.R.E. 104(a)*

As we have noted, one of the purposes of the *in limine* hearings was to enable the making of a preliminary determination pursuant to F.R.E. 104(a) as to the admissibility of coconspirator statements under F.R.E. 801(d)(2)(E). We have explained in Part VI.D.6 the requisites developed by the Third Circuit for admissibility of coconspirator declarations. Under those principles, before a coconspirator statement may be introduced the court must make a factual finding by a preponderance of the evidence *aliunde* (*i.e.*, exclusive of the coconspirator statements) that a conspiracy existed and that both the nondeclarant against whom the statement is offered and the declarant were participants in the conspiracy at the time the statement was made.[350]

Were the tenor of the voluminous record in this case other than we have described, such a preliminary determination would probably require a lengthy opinion in and of itself. However, for the reasons heretofore explained, and summarized in Part VII.S, *infra*, plaintiffs have not even adduced sufficient evidence to create a genuine issue of material fact as to the existence of an unlawful conspiracy among the defendants. *A fortiori*, there is no evidence *aliunde*, by a preponderance of the evidence or otherwise, upon which to found a preliminary determination of the existence of a conspiracy.

---

[349] Our review of the record suggests that, in some cases, we might have found there was sufficient closeness or dominance in the relationship to charge the parent with the acts of the subsidiary. (We do not believe that the principle operates in reverse.)

[350] Coconspirator statements, of course, must also have been made in furtherance of the conspiracy.

We do not, however, rest upon the "*a fortiori*" premise. Rather, having examined the record and having detailed its contents over these many pages, we simply make the factual finding that plaintiffs have not established by a preponderance of independent evidence that any of the defendants entered into an agreement or acted in concert with respect to exports to the United States in any manner which could in any way have injured the plaintiffs.[350A] Put differently, we find that the plain-

---

[350A] In making this finding we have considered the letter of February 4, 1980, from William H. Roberts, Esq., one of plaintiffs' counsel, in response to our request for a listing of the categories of plaintiffs' evidence *aliunde*. That letter listed the following categories, all of which we have addressed herein.

1. Cartel Agreements Entered into by the Japanese Manufacturers of Consumer Electronic Products.

2. The Rules of Japan Machinery Exporters' Association Which Implemented the Cartel Agreement.

3. The Activities of the Defendants in Various Groups and Associations.

4. The Activities of Defendants in the Japan Light Machinery Information Center, New York, New York.

5. The Evidence Before the Fair Trade Commission of Japan, Case No. 6, 1966, Against Sanyo and Five Others.

6. Defendants' Agreement to Allocate the United States Market by Establishing the Five Company Rule and the Registration of Trademarks.

7. Schemes to Fraudulently Conceal Evidence of Their Collusive Conduct.

8. Findings of the Fair Trade Commission of Japan in 1957 Against the "Market Stabilization Council" and its Participants.

9. Findings of the United States Treasury Department and of the United States International Trade Commission.

10. The Inference to Be Drawn from Parallel, Interdependent Rebating Schemes in Which Defendants and Their Co-conspirators Participated.

11. The Inferences to be Drawn from Activities and Meetings of Groups and Associations at Which Complete, Regular Information Exchanges Took Place.

12. The Inferences to Be Drawn from Evidence of Knowledge of Defendants' Concerning Export Systems, Including Rebating Schemes of Other Defendants and Co-Conspirators

the plaintiffs have not established by a preponderance of independent evidence that any of the defendants engaged in the "unitary" conspiracy alleged by plaintiffs (or, for that matter, either the home market or export facets thereof). For these reasons also, the proffered coconspirator statements are inadmissible.

S. *Summary of Conclusions as to Plaintiffs' Sherman Act § 1 and Wilson Tariff Act Case as to Television Receivers*

1. *Introduction*

At the appropriate juncture in each of the subparts of this Part VII, in which we have examined plaintiffs' Sherman Act § 1 and Wilson Tariff Act case as to television receivers we have moved from a review of the details of the voluminous evidence in the summary judgment record to a statement of our conclusions as to the legal sufficiency of that evidence, measured against our earlier discussion of the applicable legal principles. Because of the great length of the evidentiary review, we believe it important to summarize in one place the salient conclusions we have reached on the question whether admissible evidence sufficient to create a genuine issue of material fact supports plaintiffs' theory that the defendants and their coconspirators entered into a "unitary" conspiracy consisting of an artifically high price conspiracy in Japan de-

---

13. The Inferences to Be Drawn from Similar Conduct by Defendants in Selling Consumer Electronic Products in the United States at Prices Substantially Lower than Prices in Japan and at Below Cost.

14. The Inference to Be Drawn from Uniform and Consistent Loss of Money by Japanese Manufacturers' United States Subsidiaries.

15. The Inference from Jointly-Expressed Intent by Defendants and Their Co-conspirators.

16. The Sealing Off of the Japanese Home Market from Foreign Competition.

17. The Pattern of Take-overs and Acquisitions.

18. Defendants' Discriminatory Pricing of Consumer Electronic Products to Customers in the United States.

signed to fund a predatory export raid on the U.S. CEP market calculated to destroy and take over that market.

We confess to some misgivings about such a summary, for its is impossible to convey in a brief description any sense: (1) of the scope of the factual record; (2) of the many-faceted analysis of that record which has led to our ultimate conclusions; or (3) of the innumerable legal points which have impacted on those ultimate conclusions. We also are concerned that such a summary could be used as a surrogate for the opinion itself. That is an unfortunate and misleading possibility, since the opinion was crafted as an integral whole. Moreover, we are reluctant to extend this already lengthy opinion by repeating conclusions previously stated. However, because we believe that the importance of such a summary still outweighs its disadvantages, we hereby offer it.

2. *The Export Control Arrangements*

We begin with the export control arrangements, embodied in the MITI-related Manufacturers' Agreements and the JMEA Rules. These agreements were the cornerstone of plaintiffs' original formulation of their case—the "heart" of the alleged conspiracy. Even though the plaintiffs have ceased to place significant reliance on these arrangements themselves, except in conjunction with the "rebate scheme," the "cartel agreements" (as the plaintiffs call the Manufacturers' Agreements), as embellished by the JMEA Rules, remain plaintiffs' veritable Rosetta Stone—their quintessential evidence of defendants' opportunity and intention to conspire, providing the key to the decipherment of defendants' actions, which, in all their "protean" forms, thereby take on a conspiratorial hue. We address here the two challenged facets of the export control arrangements: the Manufacturers' Agreements, which set prices below which the signatory Japanese Manufacturers, including defendants, could not sell in the United States, and the JMEA Five Company Rule, which purportedly limited the number of U.S. customers to which JMEA members could sell, and which plaintiffs contend constitutes an illegal customer allocation.

The Manufacturers' Agreements fix minimum or "check" prices. Even if the arrangements had in fact worked as intended, they could have served only to keep prices elevated. As competitors of defendants, plaintiffs could only be benefited by minimum prices. Although a consumer forced to pay higher prices than a free market would bring (or the Justice Department on behalf of the public) might maintain an action against manufacturers who adhered to a minimum price agreement on a price fixing theory, plaintiffs as competing manufacturers, are unable to demonstrate any casual relationship between the alleged antitrust violation (in this instance the minimum prices) and their alleged injury. Hence they suffer no antitrust injury from such arrangements and lack standing to attack them.

Plaintiffs' argument that they possess standing to attack the Manufacturers' Agreements because of the allegedly low or depressed level at which the minimum prices were set is without merit. No matter at what level the prices were set, the parties to the agreements remained free to sell at any price which equalled or exceeded the minimum price. The agreements could have had no impact on prices except in those instances when the signatories, if left to exercise independent judgment, would have charged prices lower than the minima. In such instances, the agreements would have had the effect of raising prices. Since nothing in the agreements had the effect of lowering prices, no matter at what level the minimum prices were set, plaintiffs' contention that the minimum prices were "unduly" low is of no significance. (There is, however, no evidence that they were "unduly" low.)

The final problem with plaintiffs' attack upon the Manufacturers' Agreements is the fact that in the later stages of this case they jettisoned this argument, bottoming their case instead on the contention that the agreements were in fact disregarded by virtue of the rebate scheme. Plaintiffs' case is thus transormed into a claim that defendants agreed to violate the price fixing agreement by engaging in a scheme of secret rebates in varying amounts. However, such an agreement, if it

existed, would be in intent and purpose the same as an agreement to compete, for unless there was collusion in the rebate scheme an agreement to violate a price fixing agreement by returning to the the competitive status quo can only enhance competition.

Plaintiffs also claim injury as a result of the so-called "Five Company Rule" promulgated by the MJEA which, on its face purported to restrict each Japanese exporter to five U.S. customers at a given time. Plaintiffs contend that the rule constituted a horizontal market division illegal under § 1 of the Sherman Act. There are two problems with this contention.

First, the incontrovertible evidence is that the Five Company Rule did not in theory or in practice limit Japanese exporters to five customers. Nothing in the rule prohibited members of the JMEA from registering their U.S. subsidiaries as export customers, and nothing in the rule prohibited those subsidiaries from reselling products in the United States free of the Five Company Rule. Moreover, trading companies could also be listed as customers. Most Japanese manufacturing defendants followed the practice of listing a U.S. subsidiary, a trading company, or both among their customers. Some of the Japanese manufacturing defendants had in fact more than five customers at any given time.

Second, even if the Five Company Rule had worked as intended, it could alone only have had the effect of keeping prices elevated. As with minimum prices, such an effect would redound to the benefit of plaintiffs, negating the possibility of antitrust injury. Although plaintiffs have argued that the supposed customer allocation could have enabled the Japanese defendants to "concentrate" on given customers, they have offered neither logical nor factual support for that contention. *See* discussion at n. 72 and p. 1213, *supra*. Nor have plaintiffs explained how, in the competitive United States market, the defendants could compete with United States firms but not with one another.

As we have noted above, the export control arrangements are viewed by plaintiffs as a brooding omnipresence. However, even if the Manufacturers' Agreements and associated JMEA Rules are viewed in a conspiratorial light, the law is clear that a different conspiracy, *i.e.*, one to fix prices by concerted rebate action at less than check price level, cannot be inferred therefrom. Nor is mere opportunity to conspire a basis for inferring conspiratorial activity. We discuss the "intention" reflected by the Manufacturers' Agreements *infra*.

3. *The Alleged Japanese Home Market "War-Chesting" High Price Conspiracy*

Evidentiary analysis of the home market aspect of the conspiracy will, for purposes of convenience, be divided into three facets: pricing policy profits, and data exchange, which we take up *seriatim*. The bulk of the evidentiary foundation for plaintiffs' claims in this area comes either from documents seized by the JFTC in conjunction with the "Six Company Case" or from documents produced in discovery relating to groups and associations in Japan, primarily committees of the EIAJ. None of these materials contain direct evidence of conspiracy. Nor are any of the materials a proper basis for the drawing of inferences that any of the defendants in fact engaged in a high price home market conspiracy designed to fund a predatory export raid upon the American CEP manufacturing industry.

The evidence shows that the Japanese manufacturing defendants met sub rosa during the two-year period from 1964 to 1966, when the Japanese CEP market was over-saturated and retail prices were rapidly declining, with many accompanying business failures of retailers. There is evidence that the conferees discussed "bottom" prices. The evidence is, however, uncontradicted in the following respects: (1) the "bottom" price was not the actual retail selling price, but rather the suggested retail price; (2) there was no relationship between the "bottom" price and the actual selling price because of a plethora of rebates (and because of retailer discretion); (3) the manufacturers were free to proceed with whatever "bottom" price they

wished; (4) the "bottom" price was at all events not a high price, but rather as low a price as the manufacturers could bear without letting their retail market disintegrate, *i.e.*, one consistent with protecting retail margins; and (5) the "bottom" price was sufficiently low to be logically inconsistent with plaintiffs' "war-chesting" theory.

The evidence shows that prices in Japan for both monochrome and color TV steadily declined over the period during which defendants were supposedly engaged in the high price home market conspiracy, and there is no evidence that prices rose again. There is no evidence of what plaintiffs contend to be the normal or competitive price levels in Japan for the period. There is no viable contention that a "bottom" price, as we have described it, is an artificially *high* price. In sum, there is no evidence that defendants sold at artificially high prices in Japan.

There is also no evidence which would support a claim of "war-chesting". There is evidence that the conferees in the various Six Company Case sub rosa groups discussed the fixing of wholesale and retail margins along the distribution chain. However, the uncontradicted evidence is that the trend was to *increase* the margins so as to protect the retailers from collapse. This of course would have the effect of *decreasing* the manufacturers' profit, the opposite of what plaintiffs posit in support of their war-chesting theory. Moreover, there is no evidence that the Japanese manufacturing defendants achieved high profits in connection with their CEP sales in Japan. The only evidence on the point is that the profits earned were relatively low. Thus, the data in the record on prices and profits is totally unsupportive of plaintiffs' "war-chesting" theory.

There is also evidence of domestic data exchange among the Japanese manufacturing defendants. The bulk of the data exchange evidence can be found in documents generated by EIAJ committees, although some of it was generated under the aegis of sub rosa groups. The EIAJ compiled and disseminated a

large volume of statistical information, much of which was technical information, primarily of the product safety and standarization variety. Such exchange does not give rise to an antitrust violation, either alone or in combination with other factors. There is evidence of dissemination of aggregate information related to past production, sales, and shipment figures for various products and regions, present inventory figures, and projected demand forecasts. The evidence contains a suggestion that the conferees "voted" on future production in a manner which, in plaintiffs' submission, is consistent with an agreement to limit production and fuel a high price home market conspiracy (but which is also consistent with the statements of K. Matsushita introduced by plaintiffs that what was needed was an end to market "oversaturation"). Finally, there is evidence that individual production, sales, shipment, and inventory figures of the defendant companies (presumably those from which the aggregates were compiled) found their way into the files of other companies.

The documents upon which the data dissemination claim is predicated, most of which refer to data exchange in connection with committee meetings, do not reveal who said what to whom, or which company representatives were present and/or voted on any of the proposals, or whether any of the proposals were ever implemented. Plaintiffs' data dissemination evidence is random, unfocused, and, because of plaintiffs' litigation strategy which we have described at pp. 1200-1202, *supra*, essentially unexplained. Beyond these factors, this evidence is insufficient to give rise to an inference of conspiracy for several reasons.

First the dissemination of aggregate production and inventory statistics unidentified as to company or transaction (a fair characterization of most of plaintiffs' evidence in this area) cannot support an inference of agreement violative of Sherman § 1. Second, exchange of individual production and inventory data cannot sustain such an inference in the absence of some evidence that the information was used in aid of collusive pricing activity, or of some purpose or effect to stifle competi-

tion in the manner charged by plaintiffs, and there is none. The evidence in this area is much more akin to *Maple Flooring* than to *Container Corp.*, *see generally* Part VI.A.5, *supra*. Third, even assuming evidence of production limitation, there is no nexus between that evidence and the high price "war-chesting" conspiracy posited by plaintiffs, because: (1) a predatory export raid could only be funded by high prices and high profit in the domestic market, of which there is no evidence; (2) there is uncontradicted evidence that the defendants pursued a policy of increasing the margins of wholesalers and retailers to protect the distribution system at the expense of high profitability; and (3) plaintiffs' data dissemination evidence is, as we have noted, helter skelter, unfocused, and too ephemeral to supply the missing links.

In sum, the plaintiffs have adduced no evidence to support their home market high price "war-chesting" conspiracy claims.[351]

4. *The Alleged Export Conspiracy: The "Japan-side" Evidence*

Plaintiffs have made it clear that they neither have nor will have any testimony supporting their contentions that the defendants engaged in an artificially low price export conspiracy, and they have based their case primarily on documents. For the nine years of this case prior to the pretrial evidentiary hearings, plaintiffs claimed that direct evidence of defendants' coordinated predatory export pricing could be found in the Six Company Case materials and certain other documents produced in discovery reflecting activities in Japan. Virtually all of this material was excluded in the Japanese Materials Evidentiary Opinion. However, even if the Six Company Case material and the other documents relied upon were admissible,

---

[351] Obviously, in the absence of the "unitary" conspiracy claim, we would not be considering allegations of conduct in Japan affecting only the Japanese market. *See generally* Opinion (Subject Matter Jurisdiction), 494 F.Supp. 1161 (E.D.Pa. 1980).

they are too cryptic and amorphous to support an export price-fixing claim. Giving the plaintiffs the benefit of all the inferences, the documents cannot be read as evidence that the defendants fixed or even exchanged information concerning export prices.

Plaintiffs have devoted tremendous energies to demonstrating that executives of the defendants were members of a large number of conventional trade associations and of trade groups which met sub rosa, and that the groups met regularly to discuss matters of common interest. Plaintiffs have enumerated the names of the committees in a manner which evokes, at least to plaintiffs, the possibility of conspiracy. These facts, however, cannot give rise to an inference that the defendants acted in concert. Moreover, plaintiffs' repeated protestations that the conferees at the meetings of the various groups and associations in Japan "weren't just whistling Dixie," and that it "belies reality" to believe that all of these meetings were not conspiratorial in nature, do not create an inference of a price-fixing conspiracy either.[352]

Plaintiffs offer evidence of the dissemination of export-related data as evidence of conspiratorial activity, but it misses the mark.[353] The only evidence of dissemination of export *price*

[352] Plaintiffs have also offered a number of basic background matters: (1) an explanation that the Japanese CEP industry has been built on borrowed (mostly U.S.) technology (Part VII.B); (2) a description of various patent licensing arrangements entered into by the Japanese manufacturing defendants with U.S. firms (Part VII.B); and (3) an exegesis of the factors which have all but closed the Japanese domestic CEP market to foreign competition, supposedly making it possible for the Japanese manufacturing defendants to carry out the home market aspect of the the "unitary" conspiracy (Part VII.C). None of these factors are even remotely conspiratorial. Plaintiffs also rely upon the "combined economic power of the defendants and their cartel" (VII.E), but that "puts the rabbit in the hat." The fact that defendants are large firms, with huge assets, high sales, and great economic power is no basis for inferring a conspiracy.

[353] For the most part the documents to which we now refer were not submitted for our consideration at the pretrial evidentiary hearings. We observe that they suffer the same flaws as the evidence excluded at those hearings, but we have nonetheless assumed their admissibility.

data is that of certain average past prices. There is no evidence of exchange of detailed, individually identifiable, actual price data. There is much less evidence of the dissemination of data with respect to production, sales, shipments, and inventory than in the case of the Japanese domestic market. Moreover, while the documents suggest that there was dissemination, primarily through EIAJ committees, of data in these areas, it was essentially aggregate export data not broken down as to export to the U.S. Export demand forecasts were also made, and there are vagrant references in the documents to "voting" on export shipments of stereos and TV's.

Even assuming admissibility, that evidence does not help plaintiffs' case. Just as in the case of alleged domestic data dissemination, we have no idea who said or did what at any of the subject meetings; who was voting on what; or whether any plans or policies referenced in the "minutes" in these meetings produced by plaintiffs were ever implemented, and, if so, by whom. Because of plaintiffs' litigation strategy, there is no explanation of the export-related data dissemination documents, which are even more helter-skelter, random, and unfocused than the domestic documents. Because there is no breakdown as to company and no individual detail, and because the only statistics identifiable as export production, sales, shipment, and inventory statistics[354] are essentially aggregates, they are of no value in ascribing liability to any defendant. Any conclusion that there was a conspiracy is thus based upon speculation, not upon logical inference.

None of the aforedescribed exchange of information is of the kind that violates the Sherman Act. We concluded in Part VI.A.5 that cases which have found Sherman Act violations on account of data dissemination have either involved an exchange of detailed, individually identifiable, actual price data, a concentrated industry, and a purpose or effect to restrain

[354] Many of the documents represented in the FPS as referring to export shipments refer in actuality to domestic shipments.

competition, or some other evidence of an actual agreement to restrain trade. The plaintiffs have offered no evidence of any of these matters here. Indeed, the result would not change even if there were evidence of exchange of individual company detail on non-price matters, for, as we have explained, this kind of data exchange will not violate the Sherman Act, at least in the absence of evidence of anticompetitive purpose or effect, of which there is none.

Moreover, plaintiffs have shown no nexus between the alleged export data exchanged and the "unitary" conspiracy. Several points bear mention in this regard. First, an agreement to adjust "export" production levels might under some circumstances be helpful in keeping prices high but such an agreement is not consistent with the main thrust of plaintiffs' export conspiracy theory, for it is illogical to assume that a group of companies which sought to flood the American market with CEP's at artificially *low* prices would agree to limit production. Second, plaintiffs have adduced no theory to explain how the kind of data dissemination alleged would be helpful to participants in a low price export conspiracy in the open competitive U.S. CEP market in which the conspirators, as new entrants, had no power to affect either output or prices.[155] The record shows that Zenith and RCA had nearly 50% of the U.S. market and that there was competition among a large number of manufacturers. Under these circumstances, the analytical possibilities of a nexus between plaintiffs' evidence and the concerted predatory pricing conspiracy are nil. Third, the scenario portrayed by plaintiffs, even assuming that there were evidence to support it, cannot be a viable part of their "unitary" conspiracy theory in the absence of evidence, direct or circumstantial, of concerted pricing activity, and there is none.

[155] Plaintiffs' premise that the defendants had allocated the U.S. market via the Five Company Rule and that they were acting in concert in the U.S. market only against the U.S. CEP manufacturers and not against each other is fatally flawed for lack of supportive evidence. *See* discussion at n. 72 and p. 1213, *supra*.

5. *Plaintiffs' Argument Based Upon Alleged International Price Discrimination*

As a means of proving conspiracy by circumstantial evidence, the plaintiffs have offered comparisons of the prices which defendants charged in the United States and Japanese markets for allegedly comparable products. We ruled most of these materials inadmissible in our Expert Testimony Opinion. However, even assuming admissibility of some or all of these comparisons, evidence of price differentials between the U.S. and Japanese markets does not reflect consciously parallel interdependent business behavior, and hence is not probative of the conspiracy alleged in the complaint. Even if plaintiffs have shown sufficient evidence of consciously parallel conduct to raise a genuine issue of material fact precluding the grant of summary judgment on the parallelism and consciousness issues, they have failed to raise a genuine issue of material fact as to interdependence, or even to articulate a rational explanation of their theory of interdependence of defendants' allegedly parallel pricing. In the absence of such a genuine issue of material fact, their circumstantial evidence case collapses.

The plaintiffs have adduced no evidence of uniformity in the prices of the defendants, which were at, above, and below the check price, and which were at the highest price level in the U.S. (Sony) as well as at lower levels. The cornerstone of plaintiffs' theory is that the defendants, acting in concert, charged whatever prices were necessary "to get the sale." They have adduced no evidence that there was any formal agreement to price at whatever price was necessary to get the business, but contend that this pricing policy is evident from the record and that it constitutes parallel conduct from which conspiracy can be inferred.[156] However, "pricing to get the sale" fails to set forth a logical theory of interdependence;

[156] Plaintiffs also say that there were artificially low prices, but it appears that what makes the price artificially low is the mere fact that it will get the sale.

instead it describes normal competitive behavior. Under the *Bogosian/Venzie* principles explained in Part VI.D.4, *supra*, an inference of conspiracy from parallel business behavior is not permissible as a matter of law unless the plaintiffs can show that the defendants' allegedly parallel behavior was interdependent, *i.e.*, that it was inconsistent with the defendants' own economic interests.

It is not against, but rather in, one's self interest to price "to get the sale." Companies do not need to conspire to sell at a price necessary to get the sale; indeed, when competitors make their investment, marketing, and pricing decisions, they necessarily assume that the competition will price to get the business. While the result of such practices may be depression of prices in the market, it is the kind of price depressing effect which flows from normal competitive pricing behavior and is precisely that which the Sherman Act is intended to secure, not condemn.

There are other reasons for plaintiffs' inability to delineate a theory of interdependence of price differentials. While the Japanese defendants are well-established in Japan, during the pertinent times they were new entrants in the U.S. market, with unknown brand names and no goodwill or business reputations in the United States. Thus the defendants individually faced similar circumstances as new entrants in the U.S. market and could therefore be expected unilaterally to adopt similar pricing strategies to attract customers and gain consumer acceptance in this country. Such a reasonable response to the common business problems presented by the U.S. CEP market for foreign entrants does not support an inference of conspiracy.

Plaintiffs have also failed to reckon with the difference in market conditions (or, in terms of economic theory, in the level of or elasticity of the demand curve) between the American and Japanese markets. Charging lower prices in the United States than they charge for similar CEP's in Japan would in no way undermine the unilateral character of defendants' conduct. Price differences between two markets where competitive

conditions and income and spending patterns and products differ are to be expected and do not support an inference that the lower price is the result of an agreement.

Although the plaintiffs have alleged that defendants deliberately sustained losses in the U.S. in the hope of taking over the U.S. CEP market and charging "monopoly" prices at a later date, there is no evidence to support that theory. Although plaintiffs have alleged that four of the defendants sold their products in the United States at prices below their costs, we ruled the only evidence offered to support that contention inadmissible in our Expert Testimony Opinion. Not only is there no evidence of any sustained losses, but a company's long-range independent economic interests may require it to operate at a loss for several years in order to become established in a new market. Additionally, there is no evidence that the defendants, after having "penetrated" the U.S. market, ever raised their prices to recoup their losses or ever earned monopoly profits. The notion that this might still happen also makes no sense, for the defendants, new entrants with still relatively small market shares, could not rationally hope to recoup their alleged losses in the United States in view of the dominant market positions held by RCA and Zenith and the ability of the European manufacturers, other far eastern companies, and major American firms swiftly to increase their United States CEP sales if higher monopoly prices were ever charged. We note in this regard that there is no evidence of high entry costs or barriers in the CEP manufacturing and distribution industry.

In sum, plaintiffs' attempts to infer a conspiracy from "international price discrimination" founders on evidentiary grounds and fails completely as a matter of logical inference.

6. *The Alleged Collusive Predatory Export Rebate Scheme; "Benchmark" or "Reference" Prices*

Plaintiffs allege that the export facet of the "unitary" conspiracy was implemented through a "rebate scheme": that the rebates paid by the Japanese exporters to U.S. customers to

evade the MITI check price were an integral part of the depressed pricing conspiracy, and that the rebates were a function of concerted activity as demonstrated by the consciously parallel interdependent action of the defendants in paying them. There is a vast record relating to plaintiffs' claims of a collusive predatory export rebate scheme, but the most important points which have been established (and these are without contradiction) are the following.

From the early 1960's on there was a broad pattern of rebating by Japanese CEP exporters to American original equipment manufacturer and private label customers designed to evade the MITI-related check-price regulations.[357] Related to that evasion was a practice of reporting to U.S. Customs a price higher than the actual export price. While this resulted in the payment of higher initial duties, in plaintiffs' submission it constituted customs fraud (by allegedly evading even higher potential dumping duties under the 1921 Antidumping Act) and facilitated the antitrust violations complained of here. Although plaintiffs' case seems to depend heavily on the notion that the "rebate scheme" was clandestine, the existence of these practices in the CEP industry and many other industries had been widely known in the United States for a number of years.

There is no evidence of parallel rebating practices. The pattern of rebating was variegated, with at least 25 different rebating techniques considered or employed by various of the defendants.[358] The evidence shows that the prices at which various CEP's were sold under the different rebate schemes were very different, that the amounts of rebates given by individual defendants differed, and hence that the net prices

[357] We have found it unnecessary to decide whether the Manufacturers' Agreements, which establish the check prices, were compelled by the Japanese government, or whether the sovereign compulsion, act of state, or international comity doctrines are bases for non-liability.

[358] Concomitantly, a number of techniques were employed to conceal the rebates from U.S. Customs.

charged by the individual defendants were significantly different. Despite plaintiffs' contentions to the contrary, there is also no evidence that defendants had knowledge of each other's rebates except insofar as they might have learned of them from an American customer using another Japanese defendant's prices as a vehicle to extract a better bargain.[359] Not only is there no evidence that the Japanese exporters disclosed their rebate schemes to one another, but there is evidence that they sought to keep their rebates secret from the others.

There is no direct evidence in this record that there was any discussion among the defendants concerning coordination of export prices at any level, much less at dumping levels, or any evidence from which such a conclusion could be inferred. The plaintiffs contend the check price was a "benchmark" or "reference" price from which the ultimate or actual price was determined. However, that contention has no substance in the total absence of evidence (or even of any credible theory) of any relationship between such benchmark or reference price and the ultimate actual price. As we have seen, the actual prices (and the rebates) were "all over the lot," and it is illogical to infer joint conduct from disparate behavior.

As we have pointed out, plaintiffs maintain that the defendants, via the rebate scheme, were acting in concert to charge "whatever prices were necessary to get the sale." It may be that defendants were pricing "to get the sale," as demonstrated by their sales at, above, and below the check price, and by the documents which show them to have competed for the business of such American buyers as Sears Roebuck, J. C. Penney, Montgomery Ward, and Midland. The notion of pricing "to get the sale," however, while it may describe parallel business behavior, does not describe the consciously parallel interdependent business behavior which is necessary for an inference of conspiracy, for reasons we have already ex-

[359] There is significant evidence of the use of this stratagem by American importers.

plained. It is not against, but rather in one's self interest to rebate if so doing obtains the sale, and it would be in the self-interest of American buyers (such as defendant Sears) to buy CEP's at the lowest possible price. It is not evidence of participation in a conspiracy to do so.

Plaintiffs have adduced evidence from which it could be inferred that many of the Japanese defendants and their alleged U.S. importer coconspirators kept the rebates secret, not disclosing them to United States Customs. They have, however, adduced no evidence that defendants *agreed* to conceal the rebates or to defraud Customs. Moreover, there is uncontradicted evidence that a number of defendants did disclose rebates to Customs, which nonetheless preferred to ignore the disclosures so as to collect the higher duty. In any event, such non-disclosure, even if established, would not point to conspiracy, and hence would not advance plaintiffs' case, because it would be in the self-interest of the concealing party to avoid detection.[360] While such a practice might violate the customs laws, it does not offend the antitrust laws. The caselaw is clear that covert practices, including even illegal rebates, to obtain business are consistent with, rather than contrary to, the purposes of the antitrust laws.

There is evidence that the executives of a number of defendants and their counsel met with private label customers to whom they had paid rebates to discuss the United States Treasury Department antidumping investigation. They discussed the anatomy and potential consequences of the investigation and appropriate strategies for defending against it, and they met with U.S. government officials in an attempt to deflect the investigation. However, such meetings constitute protected activity. In any event, joint response to common

[360] The same proposition applies to alleged concealment from MITI, although the only document offered to establish that proposition, the celebrated Japan Victor document, was excluded in the Japanese Materials Evidentiary Opinion.

problems by similarly situated powers in an industry cannot form a basis for antitrust complaint.

In sum, there is no evidence, direct or circumstantial, to support any of plaintiffs' theories of the existence of a collusive predatory export rebate scheme.

7. *The Supposed Connection Between the Alleged Domestic and Export Conspiracies*

Although there is no evidence of either the home market or export aspect of plaintiffs' "unitary" conspiracy theory, plaintiffs have sought to establish their existence, or at least their relationship, by so-called "connection" documents. The term "connection," as used by the parties, refers variously to: (1) a relationship betwen home market and export prices; (2) a relationship between home market and export sales and profits; (3) a relationship between "domestic" and "export" groups; and (4) efforts to conceal the rebate scheme. We described plaintiffs' so-called "connection" documents at great length in Part VII.H, *supra*. Most of these documents are inadmissible, but to the extent that they may be received in evidence, they do not establish any "connection" between the domestic and export prices or markets.

Even assuming arguendo the existence of a high price "warchesting" home market conspiracy, that is no basis, under the case law, for inferring therefrom the existence of an export conspiracy. Additionally, on the facts of this case, such an inference would be at odds with logic. It is an undisputed fact that during the period of the alleged conspiracy several of the manufacturing defendants with the greatest proportion of exports to the United States (Sharp, Sanyo, and Sony) had comparatively small shares of the CEP market in Japan. Conversely, a number of the alleged conspirators with the largest CEP sales in Japan (most notably Melco) had relatively small shares of the export market to the United States. Therefore, most of the alleged "subsidies" from the "high price" market in Japan would have been received by those conspirators who,

under plaintiffs' conspiracy theory, would have needed them least.

The proposition that firms like Sanyo and Sharp would have agreed to enter into a "conspiracy" in which they were to incur sustained losses in the United States, while their coconspirators with proportionately fewer U.S. exports were receiving the greatest share of the "high price" market in Japan, is also illogical, at least in the absence of evidence of reciprocal arrangements. Another of the innumerable flaws in plaintiffs' conspiracy case is their failure to offer even the barest evidence of an arrangement by the conspirators to divide the supposed spoils of (or share the losses from) the predatory export raid or to police their arrangements. This lacuna is magnified upon recollection that the Japanese manufacturing defendants are supposedly joined in the conspiracy by many, if not most, of the other CEP manufacturers in Japan. At all events, plaintiffs' amorphous claim of connection between the domestic and export conspiracies is totally unsupported by direct or circumstantial evidence.

8. *Plaintiffs' "Intent" Documents*

Among the documents most highly touted by plaintiffs have been the Rationales to the various Manufacturers' Agreements and certain statements made by Japanese executives which plaintiffs interpret as evincing a predatory intent to destroy the U.S. CEP industry. These documents prove no such intent.

The Rationales, when read in their proper context, can be deemed to reflect only the concerted intention of the signatories to the Agreements that export prices not fall too low. Such an intention cannot injure Zenith. The rationales are also too general, and are susceptible to too many other inferences, to support plaintiffs' proposed use.

The executives' statements, in general terms, evince the intention of Japanese manufacturers to increase their exports and to succeed in the U.S. market. Leaving aside the question

whether public statements are a likely place to find evidence of conspiracy, we note that such statements are entirely consistent with an intent to compete. The competitive system contemplates that firms will seek to increase their market share by selling quality merchandise at low prices. If one begins with the presumption of conspiracy, it is easy to interpret such statements as: (1) the CEP industry is "Japan's heritage"; (2) "further efforts should be required to retain the U.S. market"; and (3) "militarily we can never defeat the United States, but economically we can become number one in the world," as evidence of conspiracy, but that is not a legally permissible inference. Indeed, it has been demonstrated that statements of intention to be "number one" have also been made by Zenith executives. Striving to be "number one" does not, without more, violate the Sherman Act, and the statements of "intent" upon which the plaintiffs rely (all of which are amorphous or general) are just not evidence of conspiratorial intent or behavior.

9. *Plaintiff's Evidence Concerning the Depletion and Destruction of the U.S. CEP Industry*

Plaintiffs have offered a plethora of statistics demonstrating the increase in Japanese imports into the United States, the decline in production of U.S. television receivers, the decline in "retail price points" in the U.S., and the deterioration of the U.S. television receiver manufacturing industry, all allegedly as the result of the defendants' activities. Plaintiffs seek to draw therefrom an inference of conspiratorial behavior. However, as we have explained in Part VII.M, such evidence is not probative of conspiracy. It is plain that the depletion of the U.S. CEP industry is as consistent with a number of other inferences, such as efficient foreign competition or inefficient U.S. management, as it is with the inference that the industry was harmed by a conspiracy among these particular defendants. In the total absence of any evidence of collusion, or of any evidence of anticompetitive activity on the part of defendants from which collusion could be inferred, it is impossible as a matter of law to infer the conspiracy alleged by plaintiffs from

deterioration of the U.S. CEP industry. Such an "inference" would be mere speculation.[360a]

10. *Plaintiffs' Evidence Concerning "Defendants' Systematic Price Discrimination in the U.S."*

Plaintiffs assert that systematic price discrimination in the U.S. was an integral part of defendants' conspiratorial plan to destroy their U.S. competition. The record contains very little evidence of such price discrimination. But even if there were cognizable evidence of price discrimination, it could not help the plaintiffs, for there is no logical connection between such price discrimination and the alleged "unitary" conspiracy. First, there is no evidence of collusion in connection with alleged price discrimination. The documents rescribed in plaintiffs' FPS on the point show widely disparate patterns, and we have been cited to no authority supporting the proposition that disparate conduct gives rise to evidence of conspiracy. Second, even assuming parallel conduct, plaintiffs' primary allegation of parallel conduct—that defendants regularly charged substantially lower prices to their large preferred customers and chain stores than to other regular dealers for identical models of their CEP's—tends to demonstrate rational independent decision-making in one's own self-interest, rather than conspiracy. Finally, there is an absence of focused evidence of sales to other types of customers below the prices set forth in defendants' answers to plaintiffs' interrogatories 45 and 46(c). The random nature of the evidence totally precludes any contention that the defendants' "price-discrimination in the U.S." is evidence of the "unitary" conspiracy.

[360a] Plaintiffs' reliance on *United States* v. *Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), in this regard is totally misplaced.

11. *Plaintiffs' Claims Concerning Defendants' Acquisition of U.S. Manufacturers and Their Establishment of Manufacturing Facilities in the U.S.*

Plaintiffs have asserted that an important facet of the conspiracy was the "takeover and elimination by the defendants and their coconspirators of the United States manufacturers through a pattern of unlawful acquisitions, mergers, joint ventures, and the establishment of manufacturing facilities in the United States." These grandiose claims stem from evidence of but four corporate acquisitions and the establishment of eight manufacturing factilities in the United States (and three of the manufacturing facilities were acquired as a result of the corporate acquisitions). Not only is the plaintiffs' evidence thus limited, but they have adduced no evidence of collusion in connection with these matters. Moreover, the evidence in this area points only to the self-interest of the acquiring companies, acting to improve their individual efficiency or market positions.

Although plaintiffs have assailed the background of the Matsushita acquisition of the Quasar Division of Motorola, there is no evidence that any of the allegedly complicitous parties, including Sony and its subsidiary, AIWA, acted in a manner contrary to their individual self-interests. The attempt to ascribe worldwide conspiratorial overtones to the acquisition of Magnavox by Philips fails by reason of the lack of evidence that Philips was a coconspirator or that the "Philips—Matsushita cooperation agreements" had even the remotest bearing on the conspiracy alleged by plaintiffs. And Sears' role in the continuation of the financially distressed Warwick as a viable entity, by way of the Sanyo acquisition, was plainly in its self-interest given its heavy financial investment in Warwick, which was thereby protected.

There is simply no evidence to support plaintiffs' claims that any of the acquisitions, or the establishment by any defendants of manufacturing facilities in the United States, were related to the "unitary" conspiracy.

12. *Evidence of the Participation of Individual Defendants in the Conspiracy*

We shall not attempt to summarize here our lengthy canvass of the evidence as to each defendant. Instead we note only that there is no evidence, discrete as to any of the 24 defendants, of their participation in the alleged conspiracy. Moreover, as to certain of the defendants there are reasons in addition to those noted earlier in this summary making it illogical to infer that at least certain of the defendants participated in the supposed predatory low price export conspiracy (*e.g.*, Sony, because of its well-known position as the highest-priced seller in the U.S. market; and MC, MIC, Sears, and Motorola because of their normal desire, as *purchasers* of CEP's, to get the lowest possible price). There is also no evidence linking the sales subsidiaries of the various defendants to the conspiracy.[361]

13. *Admissibility of Coconspirator Declarations*

We have made pursuant to F.R.E. 104(a) a preliminary determination as to the admissibility of coconspirator statements under F.R.E. 801(d)(2)(E). That determination is in the nature of a factual finding that plaintiffs have not established by a preponderance of independent evidence that any of the defendants entered into an agreement or acted in concert with respect to exports to the United States in any manner which could in any way have injured the plaintiffs. Put differently, we have found that plaintiffs have not established, by the requisite degree of proof, that any of the defendants engaged in the export facet of the "unitary" conspiracy alleged by plaintiffs (or in the home market facet, either). Given this finding under the applicable Third Circuit standards, no coconspirator declarations may be admitted.

[361] In view of the fact that the parent corporations have themselves not been linked to the conspiracy. We have found it unnecessary to engage in an analysis of plaintiffs' evidence as to the relationships between parents and subsidiaries in support of their "functional alter ego" and agency approaches.

14. *Conclusion*

Notwithstanding their mountain of "evidence," plaintiffs have not yet stepped off home plate in their effort to establish the existence of the "unitary" conspiracy, much less come forward with the "significant probative evidence" of the conspiracy. *First National Bank of Arizona* v. *Cities Service Co.*, *supra*. We have given plaintiffs the benefit of all inferences to which they are entitled and have analyzed the many facets of plaintiffs' conspiracy allegations, but have found each wanting. We have looked for direct evidence, and we have looked for circumstantial evidence from parallel business behavior and from all the potential sources, but we have found none. We have looked for evidence of when this conspiracy began and when the various parties entered it, but again we have found none. That is, we suppose, because there is no evidence of agreement or of concerted action.

As we have engaged in this analysis we have not been unmindful of plaintiffs' warning, bottomed on *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, against "fragmentation" of their case. *Continental Ore* does not, of course, prevent us from analyzing the plaintiffs' conspiracy allegations, and it is clear that by merely intoning the magic words "unitary conspiracy" or "totality of the evidence" antitrust plaintiffs cannot foreclose critical analysis. Notwithstanding these principles, in addition to analyzing the discrete aspects of plaintiffs' case, we have looked at the totality of the evidence. We have avoided "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore*, *supra*. In so doing we have searched for instances where one piece of evidence might inform other evidence. However, this approach has not helped the plaintiffs, for none of their evidence is probative, much less significantly probative.

Nor can plaintiffs claim any synergistic result. The comments of the Ninth Circuit in *California Computer Products*,

Inc. v. *International Business Machines Corp.*, 613 F.2d 727, 746 (9th Cir. 1979), are apposite here:

> But there can be no synergistic result . . . from a number of acts none of which show causal antitrust injury to Cal-Comp.

Nothing plus nothing times nothing still equals nothing. Summary judgment will be granted for the defendants on plaintiffs' Sherman Act § 1 and Wilson Tariff Claims concerning television receivers.

VIII. *Plaintiffs' Evidence With Respect to Non-Television Products*

This case has long been widely known as the "Japanese TV Case," and for good reason. Television receivers are the only products addressed in NUE's complaint, and they are the heart and soul of Zenith's complaint. However, Zenith has also put before us claims concerning a number of other CEP's: radios, tape equipment, phonographs, stereo and audio instruments, and certain components. We shall take up the evidence in the record with respect to each of these products *seriatim*.[362] We note preliminarily that Zenith's non-TV product claims do not proceed from any predicate that a predatory export invasion of the U.S. market was funded by a high price home market "war-chesting" conspiracy.

A. *Radios*

Both Zenith and NUE have alleged that defendants' "unitary" conspiracy began with the commencement of radio exports to the United States from Japan. According to plaintiffs, these exports represented the first "phase" of defendants' joint "stage-by-stage" strategy for taking over the United States CEP industry through "depressed pricing" or "artificially low prices." Notwithstanding the breadth of its claims, Zenith's

[362] We will take up tape equipment, phonographs, stereo and audio instruments under the general heading "Tape and Stereo Products."

"evidence" about radios stems from four sources: (1) two MITI-related export control arrangements, which affected the export of certain transistor radios; (2) the existence and alleged activities of certain "export" committees within the EIAJ and the JMEA; (3) the alleged radio-related activities of certain of the sub rosa Japanese domestic groups and associations which we have already described; and (4) inferences sought to be drawn from defendants' low prices on the U.S. market and their sharply increasing market share.

The two export control arrangements which Zenith cites in support of its radio claims are: (1) those we shall refer to as the radio export regulations, which via various extensions were in effect from July 1, 1958 through December 31, 1972; and (2) those we shall refer to as the consumer electronics export regulations, which were in effect from June 8, 1973 to August 31, 1973. These regulations are of the same basic character as those referred to in Part VII.F.1, *supra*, and our discussion there is applicable here. At various times, the regulations imposed minimum prices, maximum quantity, and customer limitation restrictions on exports of certain kinds of radios to the United States. Additionally, they required radio exporters to register their trademarks and the names of their export customers, established penalties for violation of their restrictions, and created the Radio Export Examination Committee for certain administrative purposes.[363] The bulk of Zenith's FPS regarding radios is part rescription and part summarization and paraphrasing of the main provisions of the agreements, though there are scattered references to allegedly improper data dissemination.

Aided by the affidavit of Hideo Miyake, Managing Director of Matsushita Electric Trading Company, Ltd. (MET), the Matsushita defendants and others submit that, as with the similar television agreements, the export regulations upon

[363] As with the TV agreements, different agreements with different provisions were in effect for varying periods of time, but all were similar in tenor.

which Zenith relies were established at the express direction of MITI pursuant to the EIT law, were instruments of foreign trade policy of the Japanese government, and as such are not subject to scrutiny under United States law. Moreover, defendants allege, since the minimum price regulations could only have had the effect of keeping prices on radios exported to the United States higher than would otherwise prevail, they are fundamentally inconsistent with Zenith's claim of a "low" price export conspiracy, and could not have caused Zenith any injury. For reasons which have been explained *supra*, we shall not herein reach the act of state, sovereign compulsion, and international comity issues implicated by defendants' contentions about the role of MITI. And for reasons stated in Parts VI.B. and VII.F, we agree with defendants' contentions as to Zenith's inability to claim injury from the minimum price agreements or export quotas.[364]

Aside from the text of the Manufacturers' Agreements themselves, the only other evidence which Zenith advances in its FPS concerning them are materials which indicate that the JMEA performed certain tasks with respect to the arrangements, such as administering certain aspects and preparing draft regulations under the aegis of MITI.[365] These facts do not change the result.

As to the EIAJ, as is the case with television receivers, Zenith presents a list of the various EIAJ (radio) committees and argues that it "conveys a sense of the variety of matters which receive joint attention by the defendants" during their EIAJ committee meetings. Three of the committees appear to have had involvement with radios: the Radio Export Committee, the Radio Business Committee, and the Radio Technical

[364] Plaintiffs invoke the "Rationales" to the agreements as evidence of conspiratorial intent. The text of the Rationales essentially tracks that of the TV agreements, and we have explained at Part VII.I. above why the Rationales do not provide any evidence of conspiracy.

[365] The JMEA committees dissolved when the export control arrangements terminated.

Committee of the EIAJ's Kansai Chapter.[366] Again, however, Zenith attempts to have us draw conspiratorial inferences from the mere names of the committees, from the mere fact that they met, and from the suggestion that the participants "weren't just whistling Dixie" at these meetings (and that defendants have the burden of showing that they were not conspiring). Again, this approach must fail.

It appears from the supporting documents that the principal subjects of discussion at the allegedly offending committee meetings were the check prices and export quotas for radios, along with matters of implementation of the Manufacturers' Agreements. As we have said, those matters do not result in antitrust injury to Zenith. Just as with their TV claims, plaintiffs make broad conclusory statements about conspiratorial activities, such as price fixing, which are not borne out by the documents. However, upon review of the actual documentation, which plaintiffs have not stressed, it appears that plaintiffs' case with respect to radios (and tape and stereo products as well) depends upon evidence of data dissemination which is similar in character to that adduced with respect to television receivers. The documents come from a variety of sources, but mostly from EIAJ committees and sub rosa groups. The principal difference between these and the TV documents is that there is far less "documentation" of the non-TV case. In evidentiary terms, however, the documents are qualitatively no different from those discussed in Parts VII.G.2(b) and (c).[367]

[366] The Kansai Chapter was composed of representaive companies with headquarters in the Osaka area of Japan.

[367] The "evidence" upon which Zenith relies in connection with the radio claims consists of defendants' own interrogatory answers, which do not reveal conspiratorial conduct, unidentified and unauthenticated "minutes" of meetings produced by the EIAJ and various defendants, for which, despite evidentiary challenge, foundation was not laid and statistical documents which suffer from similar flaws. Most of the documents are probably inadmissible.

Indeed, we could rescribe here much of what we wrote in section VII.G.2.(b) and (c), but that would be charitable to plaintiffs' radio claims, for the data dissemination evidence referenced in the FPS with respect to radios is far more random than that advanced in plaintiffs' TV case, and is afflicted with the same problems. Plaintiffs make no cohesive presentation, and the evidence would not support one, which justifies a conclusion that there is significant evidence of data dissemination such as would violate the Sherman Act.

Some of the documents contain references to or statistics about radio exports, but those references are not limited to the United States, including instead exports throughout the world. Such references are not probative of plaintiffs' claims. In none of the charts and statistics disseminated through the EIAJ committees or the MD Group is there any evidence of exchange of identifiable price data. As with the TV documents, we have no idea from the radio documents who said what to whom or which company representatives were present and/or voted on any of the proposals, nor do we know whether any of the proposals were implemented, nor the extent of detail exchanged. There has been no deposition taken of anyone present at any such meeting. Plaintiffs attempt to interpret the documents to suit themselves, but they really do not tell us anything. We add that the plaintiffs' age-old argument that the groups and associations provided a "forum for discussion" of the levels of radio production for the Japanese market is unavailing in the absence of any evidence as to conspiratorial activity. *See* Part VI.A.4, *supra*.

In their FPS, plaintiffs seek to draw an inference of a low price export conspiracy from: (1) the fact that the Japanese manufacturing defendants sold at such "low" prices in the U.S.; and (2) the high share of the U.S. market which they ultimately acquired.[368] These arguments track similar claims

[368] Plaintiffs offer statistics as to the increase in radio sales of the defendants and the decline of Zenith's radio business.

that plaintiffs have made with respect to television receivers, which we described in Parts VII.K and M, *supra*. We incorporate by reference what we said therein, and conclude that no inference of conspiracy can be drawn from evidence that defendants charged low prices in the U.S. (actually, plaintiffs have not really advanced a case of "international price discrimination" in radio) or from plaintiffs' evidence concerning the "depletion and destruction" of the U.S. radio industry.

In sum, as was the case with television receivers, Zenith has adduced no evidence, direct or circumstantial, tending to show any agreement among the defendants to sell radios in the U.S. at unreasonably low prices; neither has it adduced evidence of parallel radio pricing. There is no evidence that radios exported by the Japanese defendants were sold in the U.S. below competitive price levels, or below defendants' costs.

During the course of the final summary judgment argument, plaintiffs' lead counsel, Edwin P. Rome, conceded that plaintiffs had "much less" evidence with respect to non-TV products than for TV products. Without commenting here upon the strength of plaintiffs' TV claims, we observe that Mr. Rome made an understatement. He did not supply any details whatever with respect to the radio claims at the final summary judgment argument, and radio claims do not occupy more than a handful of pages in the 1,000 plus pages of plaintiffs' two final summary judgment briefs. In short, Zenith has offered no significant probative evidence, and there is no genuine issue of material fact, with respect to the radio claims. Accordingly, summary judgment must be granted for the defendants with respect to all claims regarding radio products.

B. *Tape and Stereo Products*

Zenith's claims with respect to tape and stereo products are even weaker and more amorphous than its radio claims, and the FPS contains even less data as to the tape and stereo products claims. Zenith has not even formulated a claim for

damages to its tape and stereo busines attributable to the alleged conspiracy. Zenith's evidence respecting its tape and stereo claims consists of: (1) the export control arrangements, which for the most part did not even have price provisions; (2) the names and dates of meetings of a few trade association committees; (3) the suggestion that a few of those committees may have discussed export-related subjects based, apparently, upon random reference to the exchange of information concerning tape and stereo products; and (4) the inference Zenith seeks to draw from the increase in sales of defendants' products in the U.S. and the decline of the U.S. industry.

Zenith relies on two MITI-related export control arrangements. The first is the consumer electronics export regulation which also applied to radios, but which, as respects tape and stereo products, was in effect for only eight months in 1973, and which did not contain minimum price provisions (although it did contain export quotas). The second was the "Regulations Providing for the Terms to be Observed by Members of the Association with respect to the Export of Tape Recorders," in effect from May, 1965 through March, 1967. The principal provisions of these regulations were customer and trademark registration requirements similar to those contained in the radio export regulations. They did not contain price or quantitative restrictions or customer limitation provisions—the provisions upon which Zenith places such heavy reliance with respect to television receivers.

None of these regulations support Zenith's low price export conspiracy claims. As we have noted, they contain no price provisions. Controlling exports to the United States by requiring exporters to register their trademarks and the names of their U.S. customers (in the case of the tape recorder export regulations) and by export quotas (in the case of the consumer electronics export regulations) could not have injured Zenith, because the only possible effect of such controls would have been to limit exports to the United States. As a competitor,

Zenith could not have been hurt thereby. *See* discussion at Parts VI.B. and VII.F, *supra.*[369]

Zenith also offers a potpourri of other materials in support of its tape and stereo claims. It invokes defendants' interrogatory answers to acknowledge the existence of certain EIAJ committees which have names suggesting an interest in tape and/or stereo products. However, a review of the documents themselves referable to those committees reveals that they are not probative of a low price export conspiracy. As in the case of JMEA committees, the conferees primarily discussed the MITI-related export regulations. The documents also reflect discussion of matters such as export inspection, compliance with the quality control provisions of the tape recorder export regulations, discussion of export trends, etc., but, for reasons explained several times, *supra*, none of these matters are circumstantial evidence of the "unitary" conspiracy.

The minutes of the EIAJ Stereo Advertising Committee, the Stereo Summit Committee of the EIAJ, and the Audio Technical Committee of the Kansai Chapter of the EIAJ contain no export references at all. The materials produced by defendants with respect to these committees reflect discussion of such matters as: the definition and use of words employed by various manufacturers or dealers in stereo advertisements; voluntary restraint on advertisements; discussion of the regular matrix system and standardization of the RM method of technology; a report of a study by the Four Channel Stereo Research Committee; changes in the degree of stereo signals; reports on safety, etc. Applying the legal standards discussed above, none of these matters give rise to the conspiratorial inference sought by plaintiffs.

There are random references suggesting exchange of production, shipment, and inventory statistics and demand fore-

[369] Plaintiffs invoke the Rationales to the agreements as evidence of conspiratorial intent. The text of the Rationales essentially tracks that of the TV agreements, and we have explained in Part VII.I, *supra* why the Rationales do not provide any evidence of conspiracy.

casts with respect to tape and stereo equipment in a number of MD Group and EIAJ documents, including those generated by the Kansai Chapter. Zenith's submissions in this regard come from documents not proffered as DSS's during the pretrial evidentiary hearings. All of them suffer from precisely the same flaws as the materials excluded in the Japanese Materials Evidentiary Opinion, and plaintiffs have done nothing to validate them. However, even if they were admissible, they would not help Zenith, because they contain no indication of discussions relating to exports to the United States or to pricing in any market. They contain no identifiable price detail and no individual company statistics about anything. What we said about data dissemination in our discussion of plaintiffs' radio claims applies here.[370] The documents are not suggestive in any wise of the existence of a conspiracy. The random allusions to "voting" do not even begin to approach, either quantitatively or qualitatively, what we found was inadequate in the case of TV receivers, and certainly do not approach the level of "significant probative evidence" of conspiracy.

As was the case with radios, plaintiffs advance impressive statistics as to the increase in sales of Japanese tape and stereo products in the U.S. and the contemporaneous decline in U.S. industry. They also suggest that the defendants sold at low prices in the U.S. We have already explained that such evidence, even if properly presented, does not give rise to an inference of conspiracy. *See* Parts VII.M. and VII.K, *supra*.

Again with respect to tape and stereo products, plaintiffs have adduced no evidence of an agreement among the defendants to sell at unreasonably low prices in the U.S., no evidence of parallel pricing in the U.S., no evidence of pricing below competitive levels, and no evidence of pricing below cost. Zenith has not been serious in advancing its tape and stereo claims, at least not serious enough to produce any significant

---

[370] We also incorporate by reference our earlier discussions of data dissemination, Parts VI.A.5 and VII.G.2(b) and (c).

probative evidence to support them. Summary judgment must be granted with respect thereto.

C. *Components; The Alleged Matsushita-Philips Component Complex and International "Industrial Cooperation" System*

Zenith's claims with respect to components are even weaker, if that is possible, than its claims with respect to other non-TV products. Initially, consistent with its other claims, Zenith alleges an agreement among Japanese component manufacturers to export components to the United States at artificially depressed pricing levels. On the other hand—and this appears to be the main thrust of its components theory—Zenith asserts that two of the participants in the alleged low price conspiracy, MEI and N.V. Philips Gloeilampenfabrieken (Philips), had an arrangement pursuant to which defendant MEC, their joint venture engaged in component manufacturing, sold components to Zenith at discriminatorily *high* prices—at least at 15% higher than the special discount at which they were sold to MEI. This is of course inconsistent with the tenor of plaintiffs' main case. Also invoking certain agreements and meetings between MEI and Philips to "cooperate" in various matters, plaintiffs submit that the MEI-Philips arrangements are part of the overall conspiracy.[371]

The inconsistency of Zenith's theories is highlighted when we consider that, in connection with components, Zenith is not a seller but a purchaser. The only components that Zenith sold in any significant quantity during the period relevant to this litigation were monochrome and color picture tubes. Zenith no longer has any viable claims as a seller of components, i.e., as a competitor of defendants. Its dumping claims with respect to components, which were the only claims asserted as a competing seller, were dismissed some time ago for failure to provide

---

[371] We have already discussed, at p. 1259 and n.280, *supra*, some weaknesses of plaintiffs' claims about the "cooperation system."

dumping comparisons.[372] Moreover, Zenith makes no Robinson-Patman Act claims as a seller of components.[373] However, we nonetheless turn to an examination of the evidence affecting Zenith's components claims, starting with its conventional (depressed pricing) theory.

Zenith originally claimed that nine categories of components were relevant to the case:

(1) Capacitors;

(2) Coils, deflection yokes, and transformers;

(3) Resistors, varistors, and thermistors;

(4) Speakers;

(5) Voltage triplers;

(6) Electron discharge devices, including cathode ray tubes, diodes, and receiving tubes;

(7) Semiconductor products, including diodes, transistors, and integrated circuits;

(8) Tuners for VHF and UHF television channels; and

[372] In our opinion addressed to plaintiffs' dumping claims, in which we granted summary judgment in favor of the defendants on grounds of noncomparability of products, we left open a narrow category of battery operated phonographs, tape and cassette recorders, and radios which do not receive FM transmission. 494 F.Supp. at 1242. But plaintiffs have not demonstrated in their FPS the existence anywhere in the record of any evidence that would tend to show that any of the requisites of the 1916 Antidumping Act have been met, nor of any evidence that would create a genuine issue of material fact with respect to any conspiracy claims concerning such products. Alternatively, since these matters are not even mentioned by plaintiffs in any of their voluminous post-antidumping opinion briefs, in oral argument, or in any other submission, we consider those claims abandoned and will grant summary judgment with respect thereto.

[373] At least no such claims were stated in the preclusive FPS.

(9) Tape decks.[374]

Zenith does not mention a number of these components in the FPS at all (*e.g.*, deflection yokes, varistors, thermistors, and voltage triplers), and it mentions others only in passing.[375]

Aside from the MEI-Philips connection, Zenith's components claims are bottomed upon a number of committee names and meetings, a few documents, and sales figures showing an increase in the sale of Japanese manufacured components in the U.S. The principal evidence upon which the plaintiffs apparently rely is the MITI-related Electronic Tube Manufacturers' Agreement which was in effect from December 27, 1972 through August 31, 1973. But as in the case of other Manufacturers' Agreements, the export quotas imposed under this agreement could only have had the effect of reducing the impact of Japanese competition upon U.S. components manufacturers whose cause Zenith advocates here. Because Zenith can show no antitrust injury caused by these agreements, it has no standing to attack them.

Zenith also relies upon the existence of a number of EIAJ committees having names suggesting an interest in components. In fact, the great majority of Zenith's FPS references to components are nothing more than the name of a trade association committee, with no further discussion. We have already seen the fallacy of that approach. The matters allegedly discussed during various committee meetings lend no support to plaintiffs' claims. According to the documents referenced in

[374] PTO 61 (Aug. 3, 1976) at 2. Each of these broad generic categories contains an endless variety of discrete electronic devices, many of which, as we understand it, have only industrial uses and are not usable in television, radio, stereo, or tape products. In its FPS references to these categories of components, Zenith makes no attempt to specify the particular device to which it is referring or to exclude components which have only industrial uses.

[375] For example, Braun tubes are mentioned twice (FPS at 4193, 11245) and one of the references is to Braun tubes exported to the United Kingdom; capacitors and diodes are mentioned only once each (FPS at 4074, 4331).

the FPS, assuming their admissibility,[376] the meeting agendas dealt heavily with technical matters, product liability and safety, and research. For reasons oft-discussed above, they do not support plaintiffs' conspiracy claims.

The data dissemination references sprinkled over this vast record, with cryptic allusions to "voting," do not even begin to approach, either quantitatively or qualitatively, what we found was inadequate in the case of television receivers, and certainly do not approach the level of "significant probative evidence" of conspiracy. To the extent that Zenith alleges a low price export conspiracy with respect to components, it fails, for it has offered no significant evidence, direct or circumstantial, of agreement.

We turn to the other facet of plaintiffs' components claims. Zenith devotes numerous pages of its FPS to a description of the MEI-Philips agreements. Because MEC offered a 15% discount to MEI, Zenith complains that MEC sold components to Zenith at discriminatorily *high prices!* Zenith does not explain how this high price conspiracy can be a part of the low price conspiracy or how the two fit together. Neither does Zenith explain why it would allow itself to be charged discriminatorily high prices by MEC when it apparently had available to it alternative sources, i.e., components sold at the artificially low prices about which Zenith also complains. To the extent that Zenith complains that it was forced to buy its components at low Japanese prices because other U.S. component manufacturers were driven out of business, it can hardly complain. In any event, it has sustained no more injury than it has from the fixing of minimum price levels; hence it lacks standing.

Plaintiffs partially ground their components[376A] claims on the alleged "Matsushita-Philips component complex" and international "industrial cooperation" system. Plaintiffs use these labels to describe a series of agreements between MEI and Philips which were designed primarily to effect wide-ranging technical exchange and patent licensing in the components field. Auxiliary to these understandings was a network of agreements providing for trading relationships between the two companies and for discounts on sale of certain products. There were certain provisions which plaintiffs describe as "customer allocation" provisions, pursuant to which MEI agreed not to compete with certain large Philips customers. Finally, there was an agreement to the effect that Philips and Matsushita management would discuss matters of general interest, including worldwide economic trends.

[376] The components documents also present problems of admissibility similar to those of the documents mentioned earlier and in the Japanese Materials Evidentiary Opinion.

[376A] Plaintiffs have asserted a Robinson-Patman Act claim against MEC alleging price discrimination in the sale of components, which we have disposed of at n. 395, *infra*.

Apparently, the MEI-Philips agreements are introduced to support plaintiffs' contentions that the conspiracy was of worldwide scope. However, as a review of the documents demonstrates, the industrial cooperation understandings were of a most general nature. We have referred to some of the documents offered by plaintiffs in support of their contentions in Part VII.N.5, *supra*. These documents do nothing more than evince the friendship between Philips and MEI and speak amorphously about maintaining a positive longterm relationship.[377]

The short of it is that none of plaintiffs' evidence about the MEI-Philips relationship helps its case. The heart of that relationship was the MEC components joint venture, whose activities cannot help Zenith for the reasons explained above. There is no evidence that Philips was involved in the "unitary" con-

[377] For example, plaintiffs rely upon documents such as MIH 029201 through 029210 which purport to be "minutes" of high level meetings involving the highest executives of Philips and MEI. But these "minutes" constitute only general (though wide-ranging) discussion of world and U.S. market conditions and do not begin to suggest conspiratorial activity of the kind suggested by plaintiffs, either alone or in conjunction with other evidence.

spiracy, or in any other conspiracy.[378] None of the MEI-Philips agreements tend to prove such complicity. Plaintiffs have offered no significant probative evidence supporting any of their components claims, and summary judgment must be granted as to those claims.

IX. *Plaintiffs' Sherman § 2 Claims—Legal Principles and Application*

A. *Introduction; The "Individual Monopolization" Claims*

In addition to their Sherman § 1 claims, plaintiffs have also charged defendants with violations of Section 2 of the Sherman Act, 15 U.S.C. § 2.[379] Plaintiffs allege that defendants have monopolized, attempted to monopolize, and combined or conspired to monopolize the manufacture, sale, and distribution of consumer electronic products, or parts thereof, in violation of Section 2. Defendants have all, at one time or another, moved for summary judgment with respect to plaintiffs' Sherman § 2 claims. We listed the Sherman § 2 motions for discrete consideration and heard argument on April 15, 1980. During the course of the argument it became obvious that there was confusion as to the nature of plaintiffs' Sherman § 2 claims. That confusion, the resolution of which fortunately resulted in sharpening of the issues, may be explained as follows.

[378] We have already explained, in Part VII.Q.2, *supra*, that there is no evidence of involvement by MEI in the alleged conspiracy. We have also explained, *see* n. 30, *supra*, that plaintiffs cannot proceed on a theory of a "wheel" type conspiracy.

[379] Section 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the rade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

Defendants commenced their argument by positing that they were each being charged with "individual" monopolization and attempted monopolization, *i.e.*, monopolization separate from plaintiffs' claims of monopolization by combination or conspiracy. They promptly pointed out that monopoly power (or at least a dangerous probability of acquiring such power) is an essential requisite of a Section 2 violation, and that, on the facts of record, as matter of law, no one defendant alone even came close to having sufficient market share to have violated Section 2 either through monopolization or attempted monopolization. Plaintiffs responded that they were *not* asserting such "individual monopolization" claims. *See* PTO 238 at 129-31; that they had never made such claims; and that defendants had misread their complaints.[380] Instead, said plaintiffs, their theory of Sherman § 2 liability was bottomed on *American Tobacco* v. *United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946), which they read as holding that if, in the aggregate, *i.e.*, "by combination," the defendants monopolized or attempted to monopolize, each defendant would be individually liable for monopolization or attempted monopolization.

We need not decide whether plaintiffs ever asserted individual claims of monopolization and then withdrew them, as defendants contend, or whether such claims were never asserted at all, as plaintiffs maintain. It is sufficient to say that the parties reached the understanding at the hearing that these claims were not a part of plaintiffs' case. We will consider, therefore, whether under the *American Tobacco* "aggregate" theory, and under the evidence, there is a genuine issue of material fact as to plaintiffs' monopolization claims. We will

[380] Moreover, in their April 9, 1980 "Memorandum in Opposition to Certain Defendants' Motions for Partial Summary Judgment on Issues of Monopolization and Attempted Monopolization," plaintiffs had stated, "There are no *separate* counts . . . which address monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, which do not address defendants' conspiracy to monopolize."

also consider, in like fashion, plaintiffs' claims of attempted monopolization and conspiracy to monopolize.

B. *Monopolization by Combination: Attempted Monopolization by Combination; Conspiracy to Monopolize*

Plaintiffs' theory that each individual defendant can be charged with monopolization by combination under § 2 of the Sherman Act (as opposed to conspiracy to monopolize) would appear to be justified by the language of the Act and by the Supreme Court's decision in *American Tobacco, supra*. Although the question before the Supreme Court in *American Tobacco* was whether "actual exclusion of competitors is necessary to the crime of monopolization . . . under § 2 of the Sherman Act," 328 U.S. at 809, 66 S.Ct. at 1139, the Court's opinion supports plaintiffs' contention that when a group of firms by combination acquires or maintains the power to exclude competitors and has the intent and purpose to exercise that power, each member of the group is guilty of (or liable for) monopolization. There is no small amount of semantic confusion in the area, and it is important to distinguish such a cause of action (which we style as monopolization by combination) from claims of "conspiracy to monopolize" and "shared" or "joint" monopoly.

Conspiracy to monopolize is a separate offense under § 2. As defined by Professor Sullivan, a conspiracy to monopolize requires "proof of a concerted action deliberately entered into with the specific intent to accomplish the unlawful result of achieving a monopoly"; and (2) proof of "at least one overt act in furtherance of the conspiracy." Proof of such a conspiracy does not require successful accumulation of monopoly power. In other words, conspiracy to monopolize essentially applies the law of criminal conspiracy to the monopolization context. *See* L. Sullivan, *supra*, at 132-33.

"Shared" monopoly, on the other hand, describes an oligopolistic market in which a relatively small number of firms collectively holds significant market power (though no single firm possesses sufficient market power to exclude competitors), but where there is no evidence of collusive behavior. The Sherman Act does not forbid such a market condition, absent evidence that the firms "combined or conspired" to achieve their monopoly power. *See generally* P. Areeda and D. Turner III *Antitrust Law* ¶ 840 et seq.

In contrast, plaintiffs' *American Tobacco* theory of monopolization by combination, which we have accorded vitality, posits, as we have said, that when the defendants in the aggregate have monopolized the relevant market, each individual defendant may be held liable for monopolization even though its individual market share would not otherwise support such a claim. Given the discrete character of a conspiracy, a count of conspiracy to monopolize may be pursued in addition to a monopolization count.[381] However, even though under *American Tobacco* a group of defendants may be held liable for monopolization when, acting in concert, they have monopolized the relevant market, that case made it plain that there must be evidence of concerted action to support such a

[381] Professor Sullivan points out that "there is a substantial area of potential overlap between the offenses of conspiracy to restrain trade, conspiracy to monopolize, and monopolization and attempt to monopolize." L. Sullivan, *supra*, at 133. We would add to the list of potentially overlapping offenses "monopolization by combination."

Professors Areeda and Turner point out that the § 2 prohibition against conspiracies to monopolize may be redundant, given § 1, in civil litigation:

> Sherman Act § 2 also condemns those who "combine or conspire . . . to monopolize." The prohibition is curious, because, given § 1, it seems entirely redundant. Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1. To be sure, not all § 1 violations would constitute conspiracies to monopolize. But the key point is this: every combination or conspiracy that offends antitrust policy can easily be held to be an unreasonable restraint of trade, without the need for considering the additional complexities that flow from using the § 2 monopoly concept. There is therefore no need whatever to try to define the content of the § 2 conspiracy.

P. Areeda and D. Turner, *supra*, at 358.

monopolization by combination claim.[382] Thus, while in theory monopolization by a group of firms and conspiracy to monopolize may be separate violations of the Act, in practice they must be supported by similar evidence. Moreover there is no indication either in the Act or in the case law that there is any difference between the type of evidence which will support an inference of an agreement to monopolize and that which will support an inference of collusion under § 1.[383]

In *Edward J. Sweeney & Sons* v. *Texaco, Inc.*, 637 F.2d 105 (3rd Cir. 1980), the defendant Texaco, Inc. was charged with violations of both § 1 (conspiracy in restraint of trade) and § 2 (conspiracy to monopolize). On appeal, the appellants' § 1 claims failed because sufficient proof of concerted action was not offered. The appellants' § 2 claims alleging conspiracy to

---

[382] As the Supreme Court stated in *American Tobacco*, referring to § 2 requirements. "[t]he trial court described this combination or conspiracy as an 'essential element' and an 'indispensable ingredient' of the offenses charged. It is, therefore, only in conjunction with such a combination or conspiracy that these cases will constitute a precedent." 328 U.S. at 798, 66 S.Ct. at 1133-1134. In other words, a finding of monopolization as charged in *American Tobacco* requires a finding of agreement among the defendants. In that case the same circumstantial evidence of agreement supported both the § 1 conspiracy and the § 2 "combination."

[383] Plaintiffs, in their Memorandum in Reply to Motions for Summary Judgment of Certain Defendants, Matsushita Defendants and Sears, Roebuck and Co., dated April 2, 1979, suggest at p. 90 that a "violation may be shown even though no restraint under Section 1 has been effected." However, leaving aside the question of attempt, which violates § 2 but perhaps not § 1, we find it difficult to conceive of a combination to monopolize which would not also be a combination in restraint of trade. *See* n. 381, *supra*. The cases cited by plaintiffs do not support their proposition. In *American Tobacco*, a restraint violative of § 1 was indeed present and was the same agreement which violated § 2. The footnote to which plaintiffs refer us in *United States* v. *Griffith*, 334 U.S. 100, 107 n. 9, 68 S.Ct. 941, 945 n. 9, 92 L.Ed. 1236 (1948), merely points out that a firm can run afoul of the "conspiracy to monopolize" provision of § 2 even if it has not acquired monopoly power. And the cited pages of *United States* v. *Columbia Steel*, 334 U.S. 495, 531-32, 68 S.Ct. 1107, 1126, 92 L.Ed. 1533 (1948) address *attempted* monopolization, which we agree might not necessarily violate § 1.

monopolize failed because of the failure to establish the conspiracy under § 1. *Id.* at 118. Similarly, Von Kalinowski notes that there is no indication that the words "combine" and "conspire" as used in Section 2 of the Sherman Act are distinguishable from a "combination" or "conspiracy" under Section 1 of the Act. Von Kalinowski, 16A *Business Organizations*, Antitrust Laws & Trade Reg. § 9.02 (1979). *See also* the comments of Professors Areeda and Turner, quoted in note 381, *supra*.

The combination which in plaintiffs' submission supports their *American Tobacco* theory of monopolization is the same conspiracy—the "unitary" conspiracy—which they claim violated § 1 of the Sherman Act. Nowhere in this most voluminous of records or in the torrent of words which has poured forth in seemingly endless colloquy over the past three years has any other theory been suggested. As we have already discussed at length above, the evidence which plaintiffs have offered to prove a Section 1 violation is insufficient to raise a genuine issue of fact as to the existence of any agreement—more particularly, of a low-price export conspiracy. Therefore, taking all plaintiffs' evidence, direct or circumstantial, there is insufficient evidence to create a factual issue as to the existence of a combination or conspiracy necessary to support a violation of § 2 under *American Tobacco*. For this reason, summary judgment must be granted for the defendants on plaintiffs' § 2 claim for monopolization.

Having disposed of plaintiffs' claim of actual monopolization, disposition of the claim of attempted monopolization follows as of course. Under *American Tobacco*, an attempt to monopolize by combination requires the same type of concerted action and unity of purpose as required in a claim of actual monopolization. As we have held, the plaintiffs have not offered sufficient proof of such concerted action to withstand the defendants' motions for summary judgment. Similarly, plaintiffs' claim of a conspiracy to monopolize must also fail for lack of proof of the conspiratorial element which it failed to prove under Section 1. *See Sweeney*, *supra*.

C. *The Question of Defendants' Aggregate U.S. Market Share of Television Receivers*

Defendants have argued with great force that their aggregate U.S. market share of television receivers is as a matter of law not large enough to justify continuance of the plaintiffs' Sherman Act § 2 claims beyond the summary judgment stage. Although we have held that plaintiffs' Sherman Act § 2 monopolization claims cannot survive summary judgment because of the total lack of evidence of agreement, and choose to rest our grant of summary judgment on plaintiffs' Sherman § 2 claims on that ground alone, we elect to extend the opinion by summarizing and commenting upon the factual record relative to the defendants' market share and the law relative to monopoly power. We do so because, in view of the potential importance of the point and the likelihood of appeal, it will be helpful for the Court of Appeals to have an overview of the record (and an identification of the problems) in this area in the event it should wish to reach this question which we do not.

Under the case law, market share is the prime indicator of monopoly power, although market share alone may not be dispositive. It is not clear, however, what degree of market power, either individual or aggregate, is necessary to indicate monopoly power. In *American Tobacco* an aggregate 68% of the domestic cigarette market was a sufficient share to show such power. 328 U.S. at 796, 66 S.Ct. at 1133. The Fifth Circuit has noted that "something more than 50% of the market is a prerequisite to a finding of monopoly power," *Cliff Food Stores* v. *Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969). In *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945), the Second Circuit held that 90% of the market was a monopoly, but commented that "it is doubtful whether sixty or sixty-four per cent would be enough." The Eighth Circuit has pointed out that, of "nine cases condemning monopolies under § 2 of the Act, the percentage of market share ranges from 70 per cent in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 167 68 S.Ct. 915, 934, 92 L.Ed. 1260 (1948), to 100 per cent in *United States* v. *Pullman Co.*, [330 U.S. 806, 67 S.Ct.

1078, 91 L.Ed. 1263 (1947)]", *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961, 89 S.Ct. 2096, 23 L.Ed.2d 748 (1969). *See also Standard Oil Co.* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911) (90%); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) (87%).

In order to establish the existence of market power, plaintiffs must first prove that a particular product constitutes a relevant market or submarket by showing that it is "not considered reasonably interchangeable with other . . . [products] . . . by a significantly large number of consumers." *Edward J. Sweeney & Sons, supra*, 637 F.2d at 117.[384] In their supplemental FPS at 11247-51, plaintiffs have set out five separate product markets: (1) television receivers, (2) components, (3) phonographs, stereo, and audio instruments, (4) tape equipment, and (5) radios.[385] There is, however, no indication in the preclusive FPS of the means by which plaintiffs intend to prove that these are relevant product markets, nor have plaintiffs indicated an intention to prove any submarkets.[386]

---

[384] There must be evidence, for example, of "industry or public recognition of the submarket as a separate economic entity, the products' peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id., quoting Brown Shoe, supra*, 370 U.S. at 325, 82 S.Ct. at 1524.

[385] The FPS does not make clear whether these product markets are defined for purposes of Sherman 1, Sherman 2, or both. Without any clear guidance from plaintiffs, we must assume the markets are defined for both purposes. Another indication of potential product markets is found in Count IV of the Zenith complaint, which sets out six categories of CEP's which defendants ship to the United States. These six categories, not defined as relevant product markets, include all the products listed in the text, with the additional breakdown of television receivers into monochrome and color.

[386] For example, although the FPS posits that one relevant product market is "all television receivers," plaintiffs have provided figures separately for monochrome and color receivers, as well as by screen size. Thus, were we to reach the market share issue, it would be necessary to determine whether television receivers of different screen sizes are different product markets or submarkets.

In terms of percentages of total unit sales of monochrome television receivers to U.S. dealers, defendants shipped 19.8% in 1967, 24.2% in 1968, 31.8% in 1969, and 36.2% in 1970. Trendex figures[387] show that defendants' market share in monochrome receivers was:

1969	21.8%
1970	23.8%
1971	32.8%
1972	34.0%
1973	33.1%
1974	36.5%
1975	44.0%
1976	43.1%
1977	49.2%

Defendants' market share for color television receivers was:

1969	12.2%
1970	16.3%
1971	22.6%
1972	21.5%
1973	23.6%
1974	24.5%
1975	42.5%
1976	42.1%
1977	44.2%

According to the Trendex figures then, the defendants' aggregate market share for television receivers never exceeded 50%, and for most years in question was far less.[388] It is

[387] Plaintiffs asset that the Trendix figures are understated because they only reflect sales of the defendants' own brand names, ignoring OEM and private label purchases.

[388] Plaintiffs also include figures for other product markets, although there are a number of problems raised by their figures. First, plaintiffs allege that radio imports in dollars from Japan represented at least 67% of the U.S. radio market in 1976. Plaintiffs have also broken down the defendants' market share in certain segments of the radio market. For example, they claim that

thus doubtful that the plaintiffs' evidence of defendants' U.S. market share of television receivers and of certain other CEP's in certain markets (*see* n.388, *supra*), even if aggregated according to plaintiffs' theory of monopolization by combination, is sufficient to meet the legal standards for proof of monopolization under § 2 of the Sherman Act, at least for most years in question. Were we to extend our analysis by sorting out the facts of record in this area, it is clear that we would have to grant summary judgment as to many of the plaintiffs' *American Tobacco* monopolization claims on the ground that the defendants do not have sufficient market share to make out such a case or on the ground that whatever the ultimate facts, plaintiffs have not adduced sufficient specific evidence to cre-

Japanese imports represented 54% of the U.S. total sales in units of table radios from 1970 to 1976. They have not, however, attempted to prove that table radios are a relevant submarket. Citing the Nehmer Report, the plaintiffs conclude that the "cartel members' " share of the U.S. radio market was approximately 55% by 1970, excluding shipments from their offshore manufacturing facilities. This is probably the best indication of what plaintiffs assert to be defendants' market share as to radios.

Plaintiffs list within an "audio products" market a wide variety of items, including but not limited to phonographs, turntables, changers, and loudspeakers. We are supplied with market share data for some of these individual items, but not for all, nor for the (putative) relevant product market as a whole. For example, phonographs from Japan are claimed to have accounted for 90% of all phonograph imports into the U.S. during 1968-1972. Total imports accounted for 65% of the U.S. phonograph market. Therefore, we can assume that plaintiffs believe that Japanese phonographs constituted something less than 65% of the U.S. market. Plaintiffs also provide us with excerpts from the Nehmer Report which show that Japanese imports of loudspeakers and amplifiers constituted an average of 36% of the U.S. market (in quantity) in loudspeakers from 1973 to 1976. Japanese amplifiers also held 36% of the U.S. amplifier market from 1972 to 1976. Additionally, plaintiffs' statistics purport to show that the defendants held 77.4% in 1968, 89.0% in 1970, and 87.1% in 1972 of the U.S. tape recorder market in terms of unit sales. While the Nehmer Report asserts that Japanese imports accounted for more than half of all audio products imported into the United States between 1967 and 1977, we are not told what share of the total U.S. audio market was captured by Japanese manufacturers, let alone by those who have been named as defendants.

ate a genuine issue of material fact. However, because it would take quite some time to cover all of this territory, and because, by virtue of the conclusion reached in the previous section, it is not necessary, we shall not do so. We hope that we have sufficiently charted the terrain for the reviewing court, should it wish to venture therein.

X. *Zenith's Robinson-Patman Case—Legal Principles and Application*

A. *Introduction*

Zenith has asserted claims against certain of the defendants for price discrimination among U.S. purchasers of defendants' products allegedly in violation of the Robinson-Patman Act.[389] Although the Robinson-Patman Act, unlike Section 1 of the Sherman Act, does not contain its own conspiracy provision, and plaintiffs do not allege a conspiracy to violate the Robinson-Patman Act as a separate antitrust offense, Zenith also argues that all other defendants are vicariously liable for the violations under *Pinkerton* v. *United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), because of their participation in the alleged conspiracy. For the reasons set forth in Part VI.D.5, *supra*, as informed by the discussion herein, we need not, hence do not, reach the *Pinkerton* issue.[390] We address in this section defendants' motions for summary judgment on Zenith's Robinson-Patman claims.

[389] Zenith contends that the following defendants (individually as opposed to vicariously) have violated the Robinson-Patman Act: Matsushita Electronics Corporation of America (MECA); Matsushita Electronics Corporation (MEC); Mitsubishi International Corporation (MIC); MELCO Sales, Inc.; Toshiba America, Inc. (TAI); Hitachi Sales Corporation of America (HSCA); Sanyo Electric, Inc. (INCO); and Sharp Electronics Corporation (SEC). NUE has not asserted any Robinson-Patman Act claims.

[390] In addition to *Pinkerton*, Zenith relies on a number of decisions, such as *FTC* v. *Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), which, in its submission, have imposed liability under the Robinson-Patman Act upon all coconspirators for what Zenith calls "a combination and conspiracy among sellers in which overt acts of price discrimination exist." We

The Robinson-Patman Act outlaws certain discriminations in price between purchasers of commodities sold for use or resale in the United States.[391] The Supreme Court has warned

do not reach those legal issues related to vicarious liability for the same reasons that we do not reach the *Pinkerton* issues, *i.e.*, there is no genuine issue of material fact as to the alleged conspiracy. As a consequence of that ruling, Zenith's theory asserting vicarious liability for Robinson-Patman Act violations is unsupportable. This reason is sufficient by itself to require that summary judgment be granted for the following defendants, against whom no individual Robinson-Patman Act violations are alleged: Mitsubishi Electric Corporation; Mitsubishi Corporation; Sanyo Electric Company, Ltd.; Sanyo Electric Trading Company Ltd.; Sanyo Manufacturing Corp.; Hitachi, Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; Sears Roebuck & Co.; Motorola, Inc.; Matsushita Electric Industrial Company; Matsushita Electric Trading Company, Ltd.; Quasar Electronics Corp.; Toshiba Corporation; and Sharp Corporation. In addition, for the reasons stated in the text, *infra*, Zenith's claims against these defendants also fail for lack of standing and for absence of proof of competitive injury.

[391] The Robinson-Patman Act provides in pertinent part:

> It shall be unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .

15 U.S.C. § 13(a). Both Zenith and NUE originally also sought to maintain claims under the Robinson-Patman Act for price discrimination between the U.S. and Japanese markets. Judge A. Leon Higginbotham, Jr., our predecessor in this case, ruled, however, that the Robinson-Patman Act has no application unless both "legs" of the alleged price discrimination involve commodities sold for use or resale within the United States. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 244 (E.D.Pa. 1975). Price discrimination between two different national markets is governed instead by the Antidumping Act of 1916, which was intended to supplement § 2 of the Clayton Act, the statutory predecessor of the Robinson-Patman Act, by extending the reach of U.S. price discrimination law to foreign commerce. *See Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F.Supp. 1190, 1213-23 (E.D. Pa. 1980), *appeal pending*, No. 80-2080 (3d Cir.).

against overbroad interpretations of the Robinson-Patman Act which "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80, 99 S.Ct. 925, 933, 59 L.Ed. 153 (1979), *quoting Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63, 73 S.Ct. 1017, 1019, 97 L.Ed. 1454 (1953).

In order to make out a claim under the Act, a plaintiff must show that a defendant has made two contemporaneous sales of commodities of like grade and quality to two different customers at different prices, and must also show that the effect of the price discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition." 15 U.S.C. § 13(a).[392] Although the standard is thus one of "incipiency," *see infra*, an effect on competition which is insubstantial or *de minimis* does not satisfy the statutory requirement. *See, e.g., American Oil Co.* v. *FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954, 84 S.Ct. 1631, 12 L.Ed.2d 498 (1964); *Willow Run Garden Shop, Inc.* v. *Mr. Christmas, Inc.*, 1973-2 Trade Cases ¶ 74,86 (D.N.J. 1973), *rev'd on other grounds*, (3d Cir. Aug. 5, 1974) (disposition noted at 500 F.2d 1401). *See generally* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962); L. Sullivan, *Handbook of Law of Antitrust* § 218 (1978).[393]

[392] The statute provides a defense for price differences which are "justified" because of cost differences resulting from changing conditions affecting marketability, or which are necessary to meet competition.

[393] Some courts have held that a primary-line plaintiff (*see* n. 395 *infra*) must show sales at a price below some measure of cost in order to establish injury to competition. *E.g., Pacific Eng. & Prod. Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977); *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). In addition to their contentions about standing and

The parties sharply dispute whether these statutory requirements are satisfied by Zenith's proffers.[394] However, we need not reach most of the points raised by the parties because of the consequences which flow from Zenith's overall approach to its Robinson-Patman Act claim. As will be seen *infra*, Zenith's formulation of its Robinson-Patman claim is inextricably bound up with its conspiracy allegations. Since Zenith's standing to assert a claim under the Robinson-Patman Act and its proof of substantial injury to competition are entirely dependent upon its allegation that the defendants

evidence of injury, discussed *infra*, various of the defendants have argued that without evidence of sales below cost Zenith cannot show competitive injury. We do not reach this question.

[394] Defendants contend that Zenith has failed to provide proof of certain jurisdictional elements required by the words of the statute. Various defendants claim, for example, that Zenith has not come forth with sufficient evidence of at least two different purchasers. They argue that Zenith does not have evidence of actual sales prices, as opposed to list prices, and that only actual sales prices will support a Robinson-Patman Act claim. They contend that the instances of price discrimination in plaintiff's FPS are in any event *de minimis* and could not support a finding of substantial incipient injury to competition. The Matsushita defendants claim in addition that Zenith has failed to show that the commodities were sold for use or resale within the United States. We have examined these contentions and have found that in most, although not in all, instances they are well founded. However, there is no point in adding to this lengthy opinion an extensive analysis of a plethora of financial detail when there is an alternative—and simpler—mode of resolution.

Finally, various defendants have moved for dismissal of Zenith's Robinson-Patman Act claims under F.R.Civ. P. 16 and/or 37 on the ground that Zenith refused to supply detailed information about its Robinson-Patman Act claims in answer to interrogatories or in that surrogate for incomplete discovery, the FPS, in violation of Pretrial Orders 136, 142, and 154. In view of our conclusion set forth in the text, *infra*, that there is no genuine issue of material fact with respect to the Robinson-Patman Act claims, we need not reach the Rule 37 issue. We add in this regard only that the defendants' complaints about plaintiff's failure to develop their Robinson-Patman Act claims seem justified. MC and MIC observe, for example, that Zenith's entire factual narrative addressing its Robinson-Patman Act claims against MC and MIC consists of a single paragraph in its FPS (at 7606).

engaged in a low-price export conspiracy, its failure to support these allegations by evidence sufficient to create a genuine issue of material fact means that its Robinson-Patman claims must also fail.[395]

[395] Our discussion in this section will be confined to Zenith's primary-line Robinson-Patman claims, *i.e.*, those asserting injury to Zenith as a competitor, as opposed to its secondary-line claims, *i.e.*, those asserting injury as a purchaser. Zenith makes some assertions of secondary-line injury with respect to MEC's alleged discrimination in the sale of components which we have mentioned in Part VIII.C, *supra*. However, for the reasons which follow, there is no genuine issue of material fact with respect to that claim either. First, Count V of Zenith's complaint alleges price discrimination only among "*United States purchasers*," but neither MEI nor Philips, the supposed favored purchasers, are U.S. purchasers. Second, the Act requires proof that the sales on *both* sides of the alleged discrimination were for "use, consumption or resale within the United States." *See Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 402 F.Supp. 244 (E.D.Pa. 1975) (Higginbotham, J.). Zenith has made no such showing. Zenith alleges that MEC discriminated in price between, on one hand, a *U.S. purchaser* (Zenith) and, on the other, a *Japanese "purchaser"* (MEI) and a *European "purchaser"* (Philips), and makes no attempt to show that the components allegedly "sold" to either MEI or Philips at purportedly discriminatory prices were sold for "use, consumption or resale within the United States." Thus, Zenith has failed to satisfy a fundamental jurisdictional prerequisite for its secondary-line claim. Third, Zenith has failed to set forth any evidence that MEC made actual, contemporaneous sales of products of "like grade and quality" to Zenith and MEI and/or Philips. With respect to its own purported purchases, Zenith relies upon aggregate yearly purchase statistics which do not identify individual sales transactions or even the components purchases. Moreover, Zenith does not identify actual purchases of specific components by MEI or Philips contemporaneous with purchases of components of "like grade and quality" by Zenith. Fourth, Zenith has not offered evidence of any discrimination in the actual prices at which MEC allegedly "sold" its components to Zenith, on one hand, and MEI and Philips, on the other. Zenith has advanced no evidence of the actual prices at which MEI, Philips, or even Zenith itself purchased the components involved in the alleged discriminations. Finally, Zenith does not offer any evidence that the alleged discriminations by MEC had the requisite anticompetitive effect. In this case, a showing of such effects would require proof that the alleged discrimintions in component prices injured or threatened competition among manufacturers of the finished products into which the components were incorporated. Zenith has not even identified the relevant finished products or the components involved.

B. *Zenith's Standing to Assert Claims Under the Robinson-Patman Act*

The principles of antitrust standing under § 4 and § 16 of the Clayton Act, 15 U.S.C. § 15 and § 26, which we discussed in Part VI.B, *supra*, govern claims under the Robinson-Patman Act as well as under other antitrust statutes. *See Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969); *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), *cert. granted.*, ___ U.S. ___, 101 S.Ct. 70, 66 L.Ed.2d 20 (1980); *Freedman* v. *Philadelphia Terminals Auction Co.*, 301 F.2d 830, 833 (3d Cir.), *cert. denied*, 371 U.S. 829, 83 S.Ct. 40, 9 L.Ed.2d 67 (1962). Zenith has steadfastly refused to attempt to show that it suffered injury specifically because of the price discriminations alleged against the defendants or to assess what the dollar amount of damages attributable to the price discrimination might be. During argument addressed to defendants' motions for summary judgment on the Robinson-Patman claims, Zenith's counsel stated:

> We have submitted damage calculations in great, great detail. I do not think it is our responsibility, your Honor, nor are we obliged to try to segregate out the damage and say this represents damage flowing from one kind of overt act and another kind from a different kind of overt act. That would again be the atomization, the fragmentation which is not permitted.

PTO 252 at 109 (May 26, 1980). And in its answer to Interrogatory No. 27 of the Matsushita Defendants (filed May 25, 1979), Zenith responded that it was "impossible to attribute any specific portion of damages . . . to MEI's 'primary line' price discrimination alone."

The damages section of the FPS makes no attempt to attribute any loss to Zenith by reason of alleged Robinson-Patman Act violations, whether because of declining sales or for any other reason. Furthermore, the sections of the FPS charting the various price discriminations alleged make no attempt to show that Zenith was competing with any of the defendants for

sales to any of the customers who were paying the lower price for comparable merchandise at any given time. Thus, Zenith has failed to provide any nexus between the alleged price discrepancies in the FPS and any injuries Zenith may have suffered. Indeed, the only example cited in plaintiffs' Robinson-Patman brief of sales lost by Zenith to a defendant is of sales to a customer who paid the defendant the *higher* of the disparate prices. *See PTO* 252 at 55-57. In its Supplemental Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment relating to Robinson-Patman Claims, filed after argument of the Robinson-Patman Motions, Zenith's only mention of injury to itself is as follows:

> Injury to Zenith in its business and property under Section 4 of the Clayton Act, 15 U.S.C. § 16 [sic] (1973), in this case is clear. Defendants' combination and conspiracy and price discrimination in furtherance thereof directly affected and injured other competitors. Many competitors, such as NUE, were driven out of business.

Id. at 39 n.12.

Because Zenith has insisted throughout this litigation on attributing all of its injury to the unitary conspiracy and the overt acts in furtherance thereof, it has never attempted to sketch even the barest outline of a theory of how its injury was caused by the alleged Robinson-Patman violations. Instead, it has rested on the claim that since it alleges a "unitary conspiracy," within which each Robinson-Patman violation is an "overt act," it is not obliged to show that it was injured specifically by those alleged violations. Zenith has, in colloquial terms, "put all its eggs in one basket"—the "unitary" conspiracy basket.

While Zenith's approach might (or might not) have supported its standing to sue for alleged Robinson-Patman violations if it in fact had proof of a low-price export conspiracy, its approach is plainly insufficient in the absence of such a conspiracy. In the instant opinion, we award summary judgment to the defendants on the ground that the plaintiffs have not come forward with sufficient probative evidence of such a

conspiracy to create a genuine issue of material fact. Because Zenith has utterly failed to make even the most minimal showing of injury from the Robinson-Patman violations, apart from its conspiracy allegations, it has no standing under § 4 or § 16 of the Clayton Act to maintain an action to recover treble damages for those alleged violations, in the absence of a genuine issue of material fact as to the existence of a low-price export conspiracy.[396]

---

[396] Plaintiffs' dumping claims are now before the Court of Appeals under 28 U.S.C. § 1292(b). In view of the analysis in the text, it may be that the individual dumping claims (because dumping is international price discrimination, *see* n. 391, *supra*), are also flawed for failure to provide sufficient nexus between the price discrimination of a given defendant and injury to Zenith. The problem is illustrated by the following colloquy during the deposition of Zenith's former President, John Nevin, on July 31, 1979:

> Q: [By Mr. Gartland, counsel for Sharp] Is there any attempt that has been made by Zenith or will be made by Zenith to calculate the damages caused by what Zenith contends to be individual dumping by individual defendants?
>
> A: [By Mr. Nevin] No there has not been.
>
> Q: Do you intend to make any such calculation?
>
> A: I wouldn't see any reason for us to make such a calculation.
>
> Q: Well, I am not trying to pin you to what the law of conspiracy is or anything like that, Mr. Nevin, or what the law of dumping is.
>
> Isn't it conceivable that as a naked proposition that Sharp, U.S.A. alone could be charged with dumping and held responsible to a competitor that was injured?
>
> A: It is conceivable that Sharp, U.S.A. could be, yes.
>
> Q: Do you know whether or not Zenith has charged Sharp as an individual company with individual dumping of its own and attempted to calculate the damages sustained by Zenith by reason thereof?
>
> A: Well, I think I have to answer both questions no. To the best of my knowledge, we have not charged Sharp with anything as an individual company. Our charges have been addressed to a group of companies, and to the best of my knowledge, we have made no attempt to say that absent Sharp's activity the rest of this damage would or would not have occurred or to assign the responsibility.
>
> Q: I am not—
>
> THE WITNESS: Is that accurate?
>
> MR. CURTIS: Yes.

C. *Zenith's Failure to Show Substantial Incipient Injury to Competition*

In addition to its failure to make an adequate showing to support its standing to seek relief for the alleged Robinson-Patman violations, Zenith has failed to adduce evidence sufficient to create a genuine issue of material fact as to a crucial requirement of the Robinson-Patman Act: proof of substantial incipient injury to competition. The statute prohibits only those price discriminations the effect of which "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition." 15 U.S.C. § 13(a). It does not require proof of actual injury to competition, but only of an incipient injury to competition. *E.g.*, *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948). However, a Robinson-Patman plaintiff must adduce *some* causal nexus between the alleged price discrimination and injury to competition, whether actual or incipient.

> If the discrimination complained of does not, cannot and will not have the defined effect of injury to or substantial lessening of competition, or tendency to create a monopoly, the Act has not been violated. . . . This is implicit in the very language employed by the Act. Any other construction would turn the Act into a price control law contrary to its manifest purpose.

Whitaker Cable Corp. v. *FTC*, 239 F.2d 253, 256 (7th Cir. 1956), *cert. denied*, 353 U.S. 938, 77 S.Ct. 813, 1 L.Ed.2d 761 (1957). *See generally Rowe*, *supra*, at 132-39. Indeed, to read the requirement of injury to competition out of the Robinson-

---

Q: I am just trying to ascertain whether Zenith has a separate claim different from and separate from the claim against all the other defendants for joint activities.

A: No sir. The answer to your question is no. There is no Zenith claim that has ever been brought to my attention that would be directed separately at Sharp.

Q: Is this likewise true of the other defendants individually?

A: Yes, sir.

Patman Act, or to construe the requirement too broadly, would be unfaithful both to the very language of the Act and to the Supreme Court's warning in *Great A & P*, *supra*, against interpretations of the Robinson-Patman Act which contribute to "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 440 U.S. at 80, 99 S.Ct. at 933, *quoting Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63, 73 S.Ct. 1017, 1019, 97 L.Ed 1454 (1953).

Zenith has never articulated with any degree of clarity its theory of how the alleged price discriminations caused any actual or incipient injury to competition. To the extent that any such theory can be gleaned from Zenith's briefs and oral argument opposing the defendants' motions for summary judgment on Zenith's Robinson-Patman Act claims, that theory is wholly dependent on the existence of sufficient evidence of a low-price export conspiracy. At argument on the Robinson-Patman motions, for example, Zenith's counsel, Mr. Rome, waxed eloquent on the alleged injury to U.S. consumer electronics manufacturers from the alleged "unitary" conspiracy:

> Moreover, undisputed on the record of the case before you, Your Honor, is that a number of U.S. manufacturers in the consumer electronic field have gone out of business, have been destroyed. NUE itself is an example before the Court, and I contend, Your Honor, that from that fact flows necessarily the conclusion that the actions of the defendants have tended to create a monopoly. . . .
>
> . . . . .
>
> . . . We are saying that the departure, the forced compelled departure of a number of U.S. manufacturers from the field demonstrates a tendency on the part of the defendants' conduct to produce a monopoly.
>
> Now, additionally, Your Honor, we are talking about a situation in which, I repeat, there is a unitary conspiracy alleged by Zenith, one manifestation of which is price discrimination.

PTO 252 at 91-92 (May 26, 1980).[397] Thus Zenith's theory of the injury to competition caused by the alleged price discrimination is based entirely on its allegation that such price discrimination was part of a conspiracy and that the conspiracy tended to create a monopoly. Zenith has pointed to *no* anticompetitive consequences of the price differentials themselves, apart from their alleged role in the alleged unitary conspiracy.

Zenith has attempted to remedy this deficiency in its Robinson-Patman claims by quoting the following language from *Perkins* v. *Standard Oil Co.*, *supra*, 395 U.S. at 648, 89 S.Ct. at 1874: "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." However, Zenith has neglected to identify the evidence in this record that would "support an inference of causation" with respect to its Robinson-Patman Act claims. Neither in its briefs, at oral argument, nor in the FPS has Zenith cited any evidence that would show how or why the alleged price discriminations themselves, apart from any conspiracy, constituted any threat to competition. In the absence of sufficient evidence of the allelged conspiracy to survive the instant summary judgment motions, Zenith has no viable theory of how the alleged price differentials caused any injury to competition.

D. *Conclusion*

To summar..., Zenith's Robinson-Patman Act claims are inextricably intertwined with its conspiracy claims. In the absence of sufficient evidence of the alleged "unitary" conspiracy, Zenith has shown no injury, hence no standing to

[397] *See also* Memorandum of Zenith Radio Corporation in Opposition to Certain Defendants' Motions for Partial Summary Judgment Relating to Robinson-Patman Act Claims at 15-19; Supplemental Memorandum of Zenith Radio Corporation in Opposition to Certain Defendants' Motions for Summary Judgment Relating to Robinson-Patman Act Claims at 9.

assert a claim under the Robinson-Patman Act, either for treble damages under § 4 of the Clayton Act or for injunctive relief under § 16 of the Clayton Act. Furthermore, in the absence of such evidence, Zenith has not even the whisper of a theory of injury to competition caused by the alleged price differentials. Finally, as against most of the defendants, Zenith's Robinson-Patman Act claims are premised on a theory of vicarious coconspirator liability which Zenith has failed to support with sufficient evidence of conspiracy. Thus, even if one assumes that Zenith's Robinson-Patman Act claims are otherwise adequately supported to survive the summary judgment motions—a matter of some doubt but which is not decided in this opinion—Zenith has no standing to assert them, has made no showing of injury to competition, and has not provided factual support for its theory of vicarious liability. Accordingly those claims must be dismissed.

XI. *Zenith's Clayton § 7 Case—Legal Principles and Application*

Zenith has also asserted claims against certain of the defendants on the basis of alleged violations of § 7 of the Clayton Act, 15 U.S.C. § 18.[398] These claims are based on the acquisition by MEI of Motorola's television business, along with its "Quassar" trademark, in 1974, and on the acquisition in 1976 by Sanyo Manufacturing Corp. of Warwick Electronics, Inc., a major supplier of private-label television receivers to Sears, Roebuck & Co.[399] As in the case of the Robinson-Patman Act claims discussed in the preceding section, Zenith alleges direct violations against some of the defendants, while contending in addition that the alleged violations of Clayton § 7 are overt acts

[398] NUE has asserted no claims under § 7 of the Clayton Act.

[399] Zenith contends that the following defendants have directly violated § 7 of the Clayton Act: Matsushita Electric Industrial Co., Ltd. (MEI), Matsushita Electronics Corp. (MEC), Matsushita Electric Trading Co., Ltd. (MET), Matsushita Electronics Corp. of America (MECA), Motorola, Inc., Quasar Electronics Corp., Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Manufacturing Corp., and Sears, Roebuck & Co.-

in furtherance of the "unitary" conspiracy, and that all defendants are accordingly vicariously liable under the *Pinkerton* doctrine discussed at Part VI.D.5, *supra*.[400] We address in this section defendants' motions for summary judgment on Zenith's Clayton Act § 7 claims, and reach a conclusion almost identical to that reached with regard to the Robinson-Patman Act claims: because Zenith's Clayton § 7 claims are inextricably bound up with their allegations of a "unitary" conspiracy, and because their standing to assert a Clayton § 7 case is dependent upon proof of that conspiracy, the Clayton § 7 claims must fail as a direct result of plaintiffs' inability to support their conspiracy allegations.

As pleaded in Count III of their complaint and counterclaim, Zenith's § 7 claims presented the additional wrinkle of two smaller conspiracies within the overall conspiracy, for, of the ten companies just named, only MEI and Sanyo, as acquiring companies, were charged with actual violations. The other companies against whom Clayton § 7 counts were specifically instituted (the MEI and Sanyo subsidiaries, Sears, and Motorola) were charged with having "conspired with each other and among themselves and with other defendants named in this complaint" to violate § 7. Zenith Complaint ¶ 61; Zenith Counterclaim ¶ 42. This allegation is distinct from the more general allegation bringing in all defendants under the *Pinkerton* theory. *See* Zenith Complaint ¶ 64; Zenith Counterclaim ¶ 45; Part VI.D.5, *supra*. However, upon a challenge by the defendants named as part of the "internal" conspiracy asserting that there is no such action as a "conspiracy" to violate § 7, Zenith foreswore any attempt to maintain such a claim, adhering solely to its *Pinkerton* theory. Zenith's Memorandum in Opposition to Defendant's Motions for Summary Judgment Relating to the § 7 Clayton Act Claims at 46. Thus, the separate allegations were apparently for no purpose.

We note in addition that we do not understand Zenith to suggest that the acquired companies or the selling companies could be held liable on any conspiracy theory other than on the "unitary" conspiracy theory. Indeed, given the plain words of the statute and the consistent interpretation by the courts that only the acquiring companies can be held liable under § 7, they could not so contend. *See e.g., Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484, 488 (5th Cir. 1967).

[400] For the reasons set forth in that Part VI.D.5 and elaborated upon in the course of our discussion of the Robinson-Patman Act Claims, we do not reach the *Pinkerton* issue. Similarly, we need not consider *Booth Bottling Co.* v. *Beverages International, Inc.*, 361 F.Supp. 340 (E.D.Pa. 1973), which Zenith cites in support of its conspiracy theory of Clayton § 7 liability.

Section 7 of the Clayton Act prohibits acquisitions, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce and in any section of the country.[401] As explained by the Supreme Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962), the Congress that enacted § 7 was primarily concerned with "a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315, 82 S.Ct. at 1518. Accordingly, to stem that rising tide Congress provided "authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." *Id.* at 317, 82 S.Ct. at 1519-1520. Congress rejected the application of standards developed under the Sherman Act in cases arising under the Clayton Act, but did not set forth any specific standards for defining the relevant market or the substantiality of the effect on competition. It did, however, make clear that a merger must be "functionally viewed, in the context of a particular industry," *id.* at 321-22, 82 S.Ct. at 1521-1523. Moreover,

[401] During the time period covered in this litigation, Section 7 provided in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18.

Section 7 was amended in the Antitrust Procedural Improvements Act of 1980, P.L. No. 96-349, 49 U.S.L.W. 117. Section 6(a) of the Act extends the reach of the anti-merger provisions beyond corporations to apply now to "persons"; moreover, the jurisdictional reach is extended not just to entities engaged in commerce, but to those involved in "any activity affecting commerce" as well.

Congress' concern is with competition, not individual competitors, *id.* at 320, 82 S.Ct. at 1521, and with probabilities, not certainties. *Id.* at 323, 82 S.Ct. at 1522-1523.

To make out a § 7 case, a plaintiff must establish the relevant product and geographic markets, neither of which is at issue in this case, and must demonstrate the requisite tendency substantially to lessen competition or create a monopoly. *See United States* v. *General Dynamics Corp.*, 415 U.S. 486, 94 S.Ct. 1186, 39 L.Ed.2d 39 L.Ed.2d 530 (1974); *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); *Brown Shoe, supra.* As an affirmative defense, a defendant may assert that the acquired company was a failing company, and was therefore not a competitive force. *See United States* v. *Greater Buffalo Press, Inc.*, 402 U.S. 549, 91 S.Ct. 1692, 29 L.Ed.2d 170 (1971); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969); *International Shoe Co.* v. *FTC*, 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431 (1930).[402]

We suspect that defendants may well be correct (1) that Zenith has not raised a genuine issue of material fact as to the substantial lessening of competition and (2) that Warwick was indubitably a failing company. *See* Part VII.N.3, *supra*. However, we shall not perform the substantive Clayton § 7 analysis because: (1) amidst the welter of evidence and contentions, the parties have not sufficiently sharpened these issues; (2) there is much confusion about the meaning of the "no alternative purchaser" requirement and its applicability to this case;[403] (3) the required functional market analysis is so complex (and the

[402] To sustain the failing company defense, a defendant must also show not only that the acquired company was failing, but also that there was no alternative purchaser that would lessen the anti-competitive effect. *See Citizen Publishing Co., supra.*

[403] Much of the confusion stems from the opacity of the Supreme Court's opinion in *Citizen Publishing.*

parties so sharply differ in their interpretations of the relevant law); and (4) we have an alternative ground for dismissal of Zenith's Clayton § 7 claims. We turn then to the alternative ground, the issue of standing.

The principles of standing under § 4 and § 16 of the Clayton Act, which we have enunciated in Part VI.B, *supra*, are fully applicable to actions seeking redress for violations of § 7 of the Clayton Act. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Notwithstanding the clear import of these principles, in argument on the defendants' motions for summary judgment on Zenith's § 7 claims, Zenith's counsel took the same position on proof of injury as he did with respect to the Robinson-Patman claims:

> Sir, on the point of damage, just as we contend there may not under Continental Ore be a fragmentation of the conspiracy concept, there may not be a fragmentation of the damage concept. This is again a not unusual point advanced by defendants trying to break down into atomized constituent parts what is necessarily to be viewed as one.
>
> And under those circumstances, despite the comments of my friends, we have not undertaken to do that, nor have we in our submission, Your Honor, with great respect, an obligation to try to allocate particular damages to particular counts of the Complaint. The ultimate point that we make is that all of these facts represent one ball of wax which constituted violations of different statutes, and it would be to fall into the trap that my friends seek constantly to lay if we were obligated to do the contrary, sir.

PTO 255 at 142-43 (June 2, 1980).

Similiarly, in its answer to defendants' interrogatories addressed to Count III,[404] Set No. 1, Interrogatory No. 1(e), which requested the dollar amount of damages flowing from the acquisitions, Zenith responded:

> The acquisition described in Count III was arranged and consummated pursuant to the combination and conspiracy

[404] Count III asserts plaintiffs' Clayton § 7 claims.

to restrain and to monopolize domestic and foreign commerce in consumer electronic products in the manner alleged in the Complaint. Defendants' interrogatories disregard the Complaint allegations in an improper effort to separate the acquisition from the combination and conspiracy and to require plaintiff to assign a special damage amount to the acquisition without regard to defendants' other conspiratorial activities.

Moreover, in that section of its brief addressed to the effect on competition of the contested acquisitions, Zenith warns of the effect of all Japanese defendants lumped together, stating:

> Zenith contends that the market must be viewed in light of the allegations of the Complaint. Moreover, in the absence of any factual record submitted by the defendants, the Court must view the defendants and their coconspirators as they are, i.e. as a single entity in the U.S. market. This being so, even the acquisition by the cartel and its partners in crime of a more modest share of the market would be illegal.

Zenith's Brief in Opposition to Defendants' Motions for Summary Judgment Relating to the Clayton § 7 Claims at 79.

Thus, as with the Robinson-Patman Act Claims, Zenith has steadfastly refused to formulate any theory that would show its injury traceable to the alleged violations of § 7 of the Clayton Act. Instead, Zenith has again put all of its eggs into the "unitary" conspiracy basket. Absent proof of the alleged "unitary" conspiracy Zenith has made no showing of injury stemming from the contested acquisitions sufficient to give it standing under either § 4 or § 16 of the Clayton Act in order to separately press its Clayton § 7 claims. Because we have held that plaintiffs have not adduced sufficient evidence of conspiracy to give rise to a material issue of fact on that issue, summary judgment must be granted as to the § 7 claims as well.[405]

[405] Because we have determined that there is no material factual issue with regard to plaintiffs' conspiracy claims, Zenith's theory asserting liability against those defendants that have not been charged with direct § 7 liability is unsupportable. That reason alone justifies dismissal of the § 7 claims against the Toshiba defendants, the Hitachi defendants, the Sharp defendants, MELCO, MELCO Sales, MC, MIC and Sanyo Electric, Inc.

XII. *Conclusion*

Can this opinion, running close to ____ pages, be succinctly characterized? If it can, it is by rescribing what we said at the outset: despite the fact that plaintiffs have pled a conspiracy case, they have produced no significant probative evidence that any *of* the defendants entered into an *agreement* or acted in concert with respect to exports to the United States that in any manner could have injured the plaintiffs.[406] The plaintiffs have filed Preliminary Pretrial Memoranda of some 410 pages, a Final Pretrial Statement of some 17,000 pages keyed to some quarter of a million documents, and thousands of pages of briefs in opposition to the defendants' summary judgment motions. Extracting from the millions of documents copied and inspected in nine years of discovery whatever could be construed as suspicious, the plaintiffs have (figuratively) buried us in an avalanche of paper. However, to repeat, they still have not shown any significant probative evidence of an agreement.

For that reason and for the hundreds of others spread out in this opinion, summary judgment will be granted for defendants as to all of plaintiffs' conspiracy claims (Sherman Act § 1, Sherman Act § 2, Wilson Tariff Act), and as to all claims predicated upon vicarious liability of conconspirators. Because there is also no basis to sustain plaintiffs' Clayton Act § 7 and Robinson Patman Act claims,[407] summary judgment will be granted for defendants on those claims as well.[408]

[406] We have also found no evidence supporting the home market facet of the "unitary" conspiracy.

[407] As we have explained, these claims are, in the context of this case, primarily conspiracy based.

[408] The decision to grant summary judgment, reached after the painstaking, independent review of the evidence and the law described in the parallel series (evidentiary and summary judgment) of opinions which we have filed since March, 1980, may come to the parties as no surprise. Pursuant to a

What plaintiffs have brought, it turns out after a decade, is not a real but an "ersatz" antitrust case. What plaintiffs have

Consent Order dated November 18, 1977 (the very first Order we signed after transfer of this case to our docket), in order to enable U.S. Justice Department consideration of potential antitrust violations, plaintiffs were permitted: (1) to show the Justice Department any of defendants' documents produced in this litigation that they desired; (2) to comment upon them; and (3) to explain to the Department the full import of what they believed they had uncovered. In other words, plaintiffs' counsel were permitted to, and did, cull their "best case" against defendants from the documents and present it to the Justice Department. However, after a review of the documents and presentations, the Justice Department announced that it had found *no evidence* of any violation of law. The April 12, 1978 statement of Assistant Attorney General John H. Shenefield, Chief of the Antitrust Division, describing the Department's finding to the Committee on the Judiciary of the U.S. Senate went as follows:

> Shortly after I assumed my duties, about a year ago, representatives of Zenith and National Union Electric (NUE) Corporations came to me and complained that several Japanese color television receiver manufacturers were engaged in a concerted program to fix prices and predatorily destroy the American TV industry. I was aware that my predecessor, Don Baker, in a letter to Senator Kennedy, had communicated his decision not to conduct any investigation of these charges at that time.
>
> The complainants assured me that if the Antitrust Division reviewed the pretrial discovery in the private antitrust litigation they had begun in the Eastern District of Pennsylvania 8 years before, we would conclude that a full investigation and probably prosecution of these Japanese enterprises was warranted.
>
> Given the seriousness of the charges and the assurance that the evidence to back them up was accessible, I agreed to take a fresh look—to have the Antitrust Division undertake a preliminary investigation to determine if there was any reasonable basis for proceeding with a full investigation through compulsory process.
>
> . . . .
>
> For the past six months, we have inspected approximately 35,000 pages of documents, fully 5,000 untranslated from the original Japanese. More than half of these were shown to us by Zenith and NUE. *We are assured that we have seen the best evidence the complainants have so far gathered.* About 10,000 of these documents were made available for inspection by third parties in the litigation; and we reviewed approximately 4,000 documents shown to us by Japanese defendants. We have committed substantial resources to this matter. The professional time alone has exceeded 200 full person work days. This investigation has been conducted with the cooperation of both plaintiffs and defendants in the Pennsylvania litigation and without any pressure from or intervention by any other agency of the United States

waged is not just litigation, but also what Judge Patrick Higginbotham has referred to as "economic war."[409] The defendants have fought back in kind, and one facet of the marketplace battle over the sale of television receivers has been fought in the legal arena under the aegis of this court.

In plaintiffs' submission, they are entitled to damages in the billions of dollars. In defendants' view, what the principal plaintiff (Zenith) seeks is a "price umbrella" to insulate it from

> government or any official or representative of the Japanese government.
>
> *I recently concluded a detailed review of the evidence examined. I have agreed with the investigative staff's unanimous conclusion that it does not provide any reasonable basis for conducting a full-scale Antitrust Division investigation of predatory activity by the Japanese color TV industry. In short, we found no evidence of on-going concerted activity by Japanese enterprises aimed at the United States market.*
>
> As you are, I am aware of the check price agreements of an earlier period. However, we have no evidence that these agreements continued beyond 1973. In addition, *we found no evidence that*, even in earlier periods, *any concerted activity was intended to or did serve a predatory purpose.* In any event, at the present time, an orderly marketing agreement is in place, an effect of which will be to reduce the percentage of Japanese color TV sales in the United States in 1978 to approximately 16% of the U.S. market.
>
> *Most importantly, in view of the charges made by Zenith and NUE, we found no evidence of concerted predatory conduct intended to destroy and supplant the U.S. color TV industry, either at an earlier period or at the present time.* Given this finding after careful investigation, I find no basis for proceeding further.
>
> I understand that pre-trial discovery in the Pennsylvania litigation is not complete. It may be that at a trial, the plaintiffs will persuade a factfinder that there has been a violation of the antitrust laws but at this point, based on all the available evidence, we have no basis to justify commencement of a full scale investigation. (emphasis added)

We note Mr. Shenefield's conclusion only in passing, for our inquiry into plaintiffs' case in connection with the summary judgment motions has been, as is demonstrated in the preceding segments of this opinion, in the pretrial evidentiary trilogy, in the summary judgment opinions preceding them, and in the transcripts of the countless pretrial conferences, far more sustained and much greater in scope and depth.

[409] Summary of Proceedings of Panel on Improvements in Pretrial and Trial Procedures in Civil Antitrust Cases, printed as Appendix C to American Bar Association Section of Antitrust Law Monograph III, "Expediting Trials and Pretrials of Antitrust Cases," at 103 (1979).

foreign competition and to protect its already high U.S. market share. We understand Zenith's concern about the inroads by the defendants and other Japanese CEP manufacturers in the U.S. market, and its striving to maximize its profits and preserve its workers' jobs. But its proper remedy in this regard is not in the antitrust court, but in the Congress, in the U.S. International Trade Commission, and in the office of the President's Trade Negotiator. Unlike the courts, these agencies are in position to balance the needs of Zenith and the other U.S manufacturers of CEP's (and of the American labor force) with the beneficial effects of competition and free trade in CEP's upon the U.S. consumer and the U.S. economy, and to grant appropriate and meaningful relief.

We make no normative judgments on these points. Rather, we hold that, notwithstanding plaintiffs' unlimited opportunity during the final summary judgment argument (and in their voluminous briefs) to extract evidence from the towering document pile that might create a genuine issue of material fact, they have come forward with no significant probative evidence that defendants' penetration of the U.S. television receiver market is the result of an antitrust conspiracy.[410] Accordingly, summary judgment must be granted so as to put an end to this ten-year-old case which, notwithstanding all its sound and fury and the generation of tens of millions of documents and staggering legal fees, has produced nothing, we repeat, nothing which justifies our permitting it to go forward into a trial which will last a year or more, with countless untold further burdens and expense upon the parties, their counsel, and the court system.

Since plaintiffs' 1916 Antidumping Act claims have already been dismissed, 494 F.Supp. 1190 (E.D.Pa.1980), *appeal*

[410] As we have demonstrated in Part VIII, plaintiffs have not advanced a serious case with respect to non-TV products.

pending, No. 80-2080 (3d Cir.),[411] the Order accompanying this opinion will result in the dismissal of all of plaintiffs' claims in this litigation. All that will remain of this case (subject, of course, to review by the Court of Appeals) are the counterclaims interposed by a number of defendants, the trial of which we plan to defer, pursuant to our contemporaneous Certification under Rule 54(b), until the Court of Appeals has had an opportunity to review the grant of summary judgment.

[411] The antidumping opinion dismissed all but a few minor aspects of plaintiffs' 1916 Antidumping Act claims. The remainder of these claims are dismissed herein. *See* n.372, *supra*.

83-2004

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

**Appendix To
Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit
(668a-1214a)**

IRA M. MILLSTEIN
A. PAUL VICTOR
WEIL GOTSHAL & MANGES
New York, N.Y.
Counsel for the
Matsushita Petitioners

CARL W. SCHWARZ
METZGER, SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the
Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.
Counsel for the
MELCO Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, N.Y.
Counsel for the
Mitsubishi Petitioners

DONALD J. ZOELLER
Counsel of Record
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
(212) 510-7000
Counsel for the
Toshiba Petitioners

PETER J. GARTLAND
WENDER, MURASE & WHITE
New York, N.Y.
Counsel for the
Sharp Petitioners

KEVIN R. KEATING
WHITMAN & RANSOM
New York, N.Y.
Counsel for the
Sanyo Petitioners

June 7, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

549 pp

APPENDIX TABLE OF CONTENTS

Appendix Table of Contents, Continued

ZENITH RADIO CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Defendants.

NATIONAL UNION ELECTRIC CORPORATION,
Plaintiff,
v.
MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Defendants.

In re JAPANESE ELECTRONIC PRODUCTS
ANTITRUST LITIGATION.

Civ. A. Nos. 74-2451, 74-3247.
MDL 189.

United States District Court,
E. D. Pennsylvania.

Aug. 7, 1980.

Blank, Rome, Comisky & McCauley, by Edwin P. Rome, William H. Roberts, John Hardin Young, Arnold I. Kalman, Kathleen H. Larkin, Norman E. Greenspan, Lawrence S. Bauman, Philadelphia, Pa., for Zenith Radio Corporation and National Union Electric Corporation, plaintiffs.

Philip J. Curtis, John Borst, Jr., Glenview, Ill., for Zenith Radio Corporation, plaintiff.

Mudge, Rose, Guthrie & Alexander by Donald J. Zoeller, John P. Hederman, Thomas P. Lynch, Howard C. Crystal, Robert A. Jaffe, Shelly B. O'Neill, Mark K. Neville, Jr., New York City, Drinker, Biddle & Reath by Patrick T. Ryan, Philadelphia, Pa., for Tokyo Shibaura Elec. Co., Ltd. and Toshiba America, Inc., defendants; defense coordinating counsel.

Duane, Morris & Heckscher by Henry T. Reath, Terry R. Broderick, Philadelphia, Pa., Crummy, Del Deo, Dolan & Purcell by John T. Dolan, Arnold B. Calmann, Newark, N.J., Baker & McKenzie By Hoken S. Seki, Thomas E. Johnson, Chicago, Ill., for Mitsubishi Electric Corporation.

Reid & Priest by Charles F. Schirmeister, Robert J. Lynch, New York City, L. Peter Farkas, Washington, D.C., for Mitsubishi Corporation and Mitsubishi International Corporation, defendants.

Weil, Gotshal & Manges by Ira M. Millstein, A. Paul Victor, Joel B. Harris, Kevin P. Hughes, Robert K. Hood, H. Adam Prussin, Jeffrey L. Kessler, Stuart Peim, Lenore Liberman, Gayle E. Hanlon, Alan Rothstein, Makoto Matsuo, New York City, Morgan, Lewis & Bockius by Raymond T. Cullen, Philadelphia, Pa., for Matsushita Elec. Indus. Co., Inc., Matsushita Elec. Corp. of America, Matsushita Electronics Corp., Matsushita Elec. Trading Co., and Quasar Electronics Corp., defendants.

Metzger, Shadyac & Schwarz by Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Stephen P. Murphy, William B. T. Mock, Jr.; Tanaka, Walders & Ritger by Lawrence R. Walders, B. Jenkins Middleton, Washington, D.C., Pepper, Hamilton & Scheetz by Robert Conrad, Philadelphia, Pa., for Hitachi, Ltd., Hitachi Sales Corporation of America, and Hitachi Kaden Hanbai Kabushiki Kaisha, defendants.

Wender, Murase & White by Peter J. Gartland, Gene Yukio Matsuo, Peter A. Dankin, Lance Gotthoffer, New York City, for Sharp Corporation and Sharp Electronics Corporation, defendants.

Whitman & Ransom by Patrick H. Sullivan, Dugald C. Brown, Kevin R. Keating, Michael S. Press, New York City, Pepper, Hamilton & Scheetz by Charles J. Bloom, Philadelphia, Pa., for Sanyo Elec., Inc., Sanyo Elec. Co., Ltd., and Sanyo Elec. Trading Co., Ltd., defendants.

Arnstein, Gluck, Weitzenfeld & Minow by Louis A. Lehr, Jr., Stanley M. Lipnick, John L. Ropiequet, Chicago, Ill., for Sears, Roebuck & Co., defendant.

Rosenman, Colin, Freund, Lewis & Cohen by Asa D. Sokolow, Renee J. Roberts, Marc Rowin, Kaye, Scholer, Fierman, Hays & Handler by Joshua F. Greenberg, New York City, Wolf, Block, Schorr & Solis-Cohen by Franklin Poul, Philadelphia, Pa., for Sony Corp. and Sony Corp. of America, defendants.

Kirkland & Ellis by Thomas P. Coffey, E. Houston Harsha, Karl F. Nygren, Chicago, Ill., for Motorola, Inc., defendant.

OPINION

(Admissibility of Public Records and Reports)

Pretrial Order No. 283

EDWARD R. BECKER, District Judge.

TABLE OF CONTENTS

I. *Preliminary Statement*

This is the first of several opinions that will address the myriad issues raised during the course of a lengthy pretrial evidentiary hearing in this antitrust case, the anatomy and scope of which have been described elsewhere.[1] The hearing, which commenced on June 16, 1980, and terminated on July 18, 1980, has had a two-fold purpose. First, it has enabled us to

[1] *See* Opinion (Introduction to Summary Judgment Motions; Subject Matter Jurisdiction), *Zenith Radio Corp., et al., v. Matsushita Electric Industrial Co., Ltd. et al.*, 494 F.Supp. 1161 at 1164-67 (E.D. Pa. 1980.)

rule upon the admissibility of a number of documents that play a critical role in plaintiffs' case so that we will know whether to consider them in ruling upon defendants' motions for summary judgment, particularly their motions addressed to plaintiffs' conspiracy claims.[2] Second, the hearings were *in limine*, and

[2] All defendants filed motions seeking summary judgment on one or more claims. Some are joint motions; others are motions by individual defendants, some of which are joined by other defendants; some motions are addressed to discrete legal issues; others are omnibus motions addressed to several issues. We have already (1) denied a motion seeking summary judgment for lack of subject matter jurisdiction, *see* note 1, *supra;* (2) granted in major part defendants' motion for summary judgment on those claims arising under § 801 of the Revenue Act of 1916, better known as the 1916 Antidumping Act, 15 U.S.C. § 72, *see* Opinion and Order (1916 Antidumping Act), *Zenith Radio Corp., et al.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, 494 F.Supp. 1190 (E.D. Pa. 1980); (3) denied a motion for summary judgment brought by certain defendants against plaintiff Zenith Radio Corp. on the ground that Zenith was not directly injured and was therefore barred from recovery under the doctrine of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), *see* Opinion and Order (Indirect Injury-*Illinois Brick), Zenith Radio Corp., et al.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, 494 F.Supp. 1246 (E.D. Pa. 1980); (4) denied a motion asserting that plaintiff National Union Electric Corp. lacked standing to sue under the doctrine of *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R. Co.*, 417 U.S. 703, 94 S.Ct. 2578, 41 L.Ed.2d 418 (1974), *see* Opinion and Order (Antitrust Standing-*Bangor Punta), National Union Electric Corp.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, 498 F.Supp. 991, (1980); (5) denied a motion by defendant Sears, Roebuck & Co. for summary judgment based on statute of limitations grounds, *see* Pretrial Order 263, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, M.D.L. No. 189 (May 23, 1980); and (6) denied a motion by Sharp Electronics Corp. claiming that Zenith's claims under the 1916 Antidumping Act are barred by the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953), *see* Memorandum and Order, (1953 Treaty of Friendship, Commerce and Navigation with Japan), *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co., Ltd., et al.* 494 F.Supp. 1263 (E.D. Pa. 1980). A motion asserting insufficiency of evidence of the monopolization and attempted monopolization claims against individual defendants under § 2 of the Sherman Act (the so-called "individual monopolization claims") has in major part dissolved, although some of the same arguments will be reasserted in connection with defendants' omnibus conspiracy motion, to the extent that they relate to collective Sherman Act § 2 violations. An individual motion by Sony Corporation advancing its

have provided the forum for a pretrial ruling on the question whether plaintiffs have come forward with a fair preponderance of independent evidence ("evidence *aliunde*") of the existence of a conspiracy among the various defendants to enable them to proceed with their conspiracy claims. *See United States* v. *Bey*, 437 F.2d 188 (3rd Cir. 1971) and its progeny, cited in *United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980).

As we commenced these hearings, we realized that both of these undertakings, which for the most part overlap, were formidable. As appears from plaintiffs' 17,000 page final pretrial statement (FPS),[3] plaintiffs' case is erected primarily upon

---

allegedly unique position as a high price, rather than a low price, seller of television sets has, following argument, been deferred to be considered with the other conspiracy motions, on the ground that there is too much overlap among defendants to make separate consideration for Sony feasible. We have heard argument on a motion asserting insufficiency of the evidence of price discrimination under the Robinson-Patman Act and on motions addressed to the claims under § 7 of the Clayton Act, and intend to dispose of those motions shortly. Finally, later this month we shall hear argument on defendants' series of motions addressed to plaintiffs' conspiracy claims, which allege, *inter alia:*

(a) that there is a lack of evidence of conspiracy;

(b) that the evidence of consciously interdependent parallel behavior, required to prove conspiracy, is insufficient;

(c) that the "check-price agreements," which plaintiffs contend are central to defendants' conspiracy, were mandated by the Japanese Ministry of International Trade and Industry (MITI) and hence cannot be condemned by the United States antitrust laws under the act of state and sovereign compulsion doctrines, and principles of international comity; and,

(d) that in order to prove predatory intent for purposes of their claims of monopolization, dumping, and Robinson-Patman violations, plaintiffs must advance evidence of pricing below marginal cost, or its surrogate average variable cost (the standard advanced by Professors Areeda and Turner) and that failure to come forth with such evidence requires the grant of summary judgment on such claims.

[3] Pretrial Order 154, reprinted at 478 F.Supp. 946, 949-50 (E.D.Pa. 1979), required plaintiffs to set forth in their Final Pretrial Statement, with preclusionary effect, every fact "including subsidiary and supporting facts,

documents. Both the FPS and the list of evidence *aliunde* which plaintiffs have filed pursuant to Pretrial Order No. 154, as refined by Pretrial Order Nos. 22, 227, and 232, list approximately 250,000 documents, the originals of many of which are in Japanese.[4] Obviously, no one could read 250,000 documents within a reasonable time, even if all the Japanese language documents had been translated into English, which they have not.

Even prior to the commencement of the hearings, however, and with the concurrence of counsel for the plaintiffs and defendants, we concluded that a reading of only a small portion of these documents was necessary. A substantial number are transactional or other documents which are of the same or similar form or genre; hence, a sample is sufficient for consideration and omnibus ruling. Many of the documents are in the nature of general background material. Many of the documents relate to the issue of damages, which is not now before us. And many of the documents are, for other reasons, unrelated or of peripheral relevance to either the summary judgment motions or the *in limine* conspiracy determination. As we imperfectly, though correctly, perceived prior to the hearings, and as is now

---

that they intend to prove at trial, keyed to specific witnesses, documents, and depositions, together with a specific enumeration by the plaintiffs of the facts (evidence *aliunde*) by which they intend to prove each defendant's complicity in the alleged conspiracy." As noted in our opinion on subject matter jurisdiction, *see* n.1, *supra*, the final pretrial statements were also intended to act in large part as surrogates for incomplete discovery.

[4] No one has counted the number of documents listed, and 250,000 (apparently 250,000 document pages) is only an estimate. Some 100,000 pages of documents are filed in the central document depository, located in our jury room. Certain defendants have moved to strike plaintiffs' list of evidence *aliunde* on the ground that it flouts the spirit, if not the letter, of our requirement that plaintiffs set forth a list of the documents upon which they rely as evidence linking each defendant to the conspiracy alleged. In defendants' view plaintiffs' list is useless in that it is essentially a summary of plaintiffs' entire Final Pretrial Statement, incorporating "hundreds of thousands" of documents, which are not described in any way and are identified only by number. We have not yet ruled on defendants' motion to strike. It may well be mooted by the *modus procedendi* followed in connection with the evidentiary hearings.

eminently clear in the wake thereof, notwithstanding the avalanche of paper under which this case has become buried over the course of a decade, there are a not insubstantial but discrete number of critically important documents that are central to the case and upon which, in not inconsiderable measure, it must stand or fall. These are the documents upon which we have focused during these hearings.

The important documents fall into a number of broad categories as follows:

1. Documents, including certain findings, promulgated by the U.S. Treasury Department and U.S. Tariff Commission in connection with proceedings under the 1921 Antidumping Act.

2. Documents, including certain findings, promulgated by the U.S. Tariff Commission and its successor, the U.S. International Trade Commission (I.T.C.) as well as the Secretary of Labor under §§ 301(b)(1) and (c)(1) and (2) of the Trade Expansion Act of 1962 and §§ 201(b) and 221 of the Trade Act of 1974.

3. Certain purported findings and related documents of the Japanese Fair Trade Commission (JFTC) arising out of proceedings in two cases before the JFTC, one, in 1957, brought against the Home Electric Appliance Market Stabilization Council, some of whose members are defendants in this action,[5] alleging industry-wide price-fixing, and the second, brought in 1967, alleging retail price maintenance against defendant Matsushita Electric Industries Co., Ltd.

4. The findings of Judge A. Leon Higginbotham, Jr., our predecessor in this case, regarding personal jurisdiction and venue, found at 402 F.Supp. 262 (1975).[6]

[5] Parties to this action who were also members of the Market Stabilization Council are Matsushita Electric Industrial Co., Ltd., Hitachi, Ltd., Mitsubishi Electric Corp. and Sanyo Electric Co., Ltd. Toshiba Shoji Co., Ltd., a non-party subsidiary of defendant, Tokyo Shibaura Electric Co., Ltd. was also a member.

[6] The "judicial history" of this case, *i.e.*, the sequence of assigned judges, is explained in Opinion (Introduction to Summary Judgment Motions: Subject Matter Jurisdiction), *Zenith Radio Corp. et al. v. Matsushita Electric Industrial Co., Ltd., et al.*, 494 F.Supp. 1161, 1164 n. 5 (E.D. Pa. 1980).

5. Statistical data from the statistical office of the United Nations and a report of the Organization for Economic Cooperation and Development.

6. Diaries of officials of several of the Japanese defendants, alleged to contain evidence of the conspiracy referenced in plaintiffs' complaint, which were seized in 1966 and utilized in the course of JFTC Case No. 6 of 1966 (the so-called "Six Company Case"). That case was an investigation and proceedings against six of the defendants, Sanyo Electric Corp., Tokyo Shibaura Electric Corp. (Toshiba), Hayakawa Electrical Industry Corp. (now Sharp Corporation), Hitachi Industry Corp., Matsushita Electric Industry Corp. (MEI), and Mitsubishi Electric Corp. (MELCO). The six companies were charged with a conspiracy to fix prices and to engage in a variety of activities in violation of the Japanese Anti-Monopoly Law. The eight diaries in dispute have been attributed to a Mr. Yajima, an employee of Toshiba (3 diaries); Messrs. Yamamoto (2 diaries) and Yamada, both employees of Hitachi; a Mr. Okuma, an employee of MELCO; and Mr. Tokizane, an employee of MEI. Also included in this category are a number of internal company memoranda also seized by the JFTC.

7. Transcripts of testimony and of protocols by witnesses in the Six-Company case. A protocol is a written statement outlining the substance of oral discussions between a JFTC staff member and a witness, which the witness signs to indicate that the contents comport with his statement.

8. Various agreements and rules of certain Japanese manufacturers' associations relating to export practices.

9. Various documents alleged to be minutes or memoranda of meetings of committees of certain manufacturers' associations.

10. A purported internal memorandum of the Japan Victor Company, 51% of which is owned by MEI, allegedly reflecting the decision made by the Electronic Industries Association of Japan (EIAJ) to conceal from the Japanese Ministry of Inter-

national Trade and Industry (MITI) the discrepancy between domestic and export prices and suggesting changes in accounting methods by which such concealment could be accomplished.

11. Various memoranda, letters, telexes, and transactional documents produced by the defendants in discovery and involving the Japanese manufacturers, their trading companies, their American sales subsidiaries and various U.S. customers, which, in plaintiffs' submission, show a pattern of "under the table" or concealed rebates that reduced the price of Japanese TVs to American customers below the so-called check price that was reported to U.S. Customs, and which also reveal a "cover-up" of what plaintiffs describe as a predatory export scheme.

12. A potpourri of other documents, produced for the most part from defendants' files during discovery.

13. Voluminous reports setting forth the opinions (with supporting data) of plaintiffs' experts.

This opinion will consider the admissibility of the matters set forth in the first five categories enumerated above. We took these matters up together in the hearings and decide them together because all involve, or are alleged to involve, the admissibility of public records and reports under Rule 803(8) of the Federal Rules of Evidence (F.R.E.). Consistent, however, with the *modus procedendi* of the evidentiary hearings, we shall consider all provisions of the F.R.E. bearing upon admissibility of a given piece of evidence, including those dealing with relevancy. The rulings which we announce herein relate to plaintiffs' claims against the defendants. We do not discuss and do not purport to decide whether all or any of these documents may be used by plaintiffs or by defendants in connection with defendants' counterclaims, since it is conceivable that some of these documents may be offered for a nonhearsay purpose to establish facts relevant to these counterclaims and the defense thereof.

Before proceeding further, it is important to say a word or two about the appropriateness of the course of pretrial evidentiary determinations we are following.

The Manual for Complex Litigation, in § 1.80, counsels the early resolution of preliminary legal questions. As outlined at p. 1136, *supra*, we view these hearings against the background of two primary, overriding, and overlapping preliminary determinations. First, we must assess whether plaintiffs have met their burden of coming forth with sufficient evidence *aliunde* of the existence of a conspiracy among the various defendants to enable them to go forward with their conspiracy claims. *See United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980). Additionally, we must rule on defendants' outstanding motions for summary judgment, and it is indisputable that a Rule 56 determination must be made upon admissible evidence. *See* Rule 56(e).

In determining admissibility under Rule 56, the same standards apply as at trial. *See Munoz* v. *International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 207 n.1 (5th Cir. 1977); *608 Hamilton Street Corp.* v. *Columbia Pictures Corp.*, 244 F.Supp. 193, 195 (E.D.Pa.1965). Thus, in ruling upon summary judgment motions, courts refuse to consider hearsay (*Daily Press, Inc.* v. *UPI*, 412 F.2d 126, 133 (6th Cir.), *cert. denied*, 396 U.S. 990, 90 S.Ct. 480, 24 L.Ed.2d 453 (1969); *Trist* v. *First Federal Savings and Loan Association*, 466 F.Supp. 578, 588-89 n. 15 (E.D.Pa.1979) (Lord, Ch. J.)); unauthenticated documents (*California Pacific Bank* v. *Small Business Admin.*, 557 F.2d 218, 222 (9th Cir. 1977); *United States* v. *Dibble*, 429 F.2d 598 (9th Cir. 1970)); inadmissible expert testimony (*Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666, 671-74 (D.C.Cir.1977); *Herbert* v. *Lando*, Civ. No. 74-434 (CSH) (S.D.N.Y. March 19, 1980)); documents without a proper foundation (*Hamilton* v. *Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976)); parol evidence (*Starling* v. *Valmac Industries Inc.*, 589 F.2d 382 (8th Cir. 1979)), and even evidence barred by the dead man's rule (*Super Valu*

Stores Inc. v. *First National Bank*, 463 F.Supp. 1183, 1192-93 (M.D.Ga.1979)).

In order to act upon the outstanding summary judgment motions, we must therefore assess the admissibility of disputed items of evidence. To do so in an *in limine* proceeding will greatly expedite the trial and will avoid duplicative argument. Such a proceeding comports with § 4.22 of the Manual for Complex Litigation, which suggests that the court make pretrial rulings on objections to documentary evidence. Wright & Graham set forth a list of factors bearing upon the use of *in limine* rulings in particular cases. *See* 21 Wright & Graham, *Federal Practice and Procedure*, § 5037 at 193-95. The factors favoring such rulings include increasing trial efficiency and promoting improved accuracy of evidentiary determinations by virtue of the more thorough briefing and argument of the issues that are possible prior to the crush of trial. To these salient factors we add the utility of *in limine* rulings in connection with summary judgment motions. Countervailing factors include inadequacy of the record prior to trial, the possibility that the issue may not arise at trial, and the burdensomeness of *in limine* proceedings.

As will be seen as we proceed through the materials before us, the evidentiary issues in this case are complex. Detailed briefing and argument have been essential, as can be seen from the fact that even after argument, we found it necessary to request supplemental briefing on over twenty issues that arose during colloquy. To devote the kind of attention to these matters that they require during, rather than before, trial, would create delays that would be terribly unfair to the jury. Furthermore, because many of the categories of items offered for rulings during these pretrial hearings comprise major chunks of plaintiffs' case, a pretrial ruling will permit counsel for both sides to make efficient use of their trial preparation time by narrowing the issues, and, to the extent that they may to some degree be outcome determinative, permit interlocutory review which might save many months of trial otherwise conducted in error.

Of the inhibiting factors, none apply to this case. Our record is not inadequate, for we consider the summary judgment motions based upon an extensive record as set forth in plaintiffs' preclusive final pretrial statement, *see* n. 3, *supra*. Because the documents under consideration are the critically important ones, they would certainly be offered for our consideration at trial. As to the burdensomeness of these proceedings, we need only note that the issues must be faced sometime, and now, before a jury is empanelled, strikes us as better than later.

In the course of describing this litigation, we have had occasion to observe that it spans the law of antitrust. *See Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 478 F.Supp. 889, 893 (1979), *vacated and remanded*, 631 F.2d 1069 (3rd Cir., 1980). It is appropriate at this juncture to observe that the issues raised in the evidentiary hearings span the law of evidence, or at least the Federal Rules of Evidence (F.R.E.) and pose a number of questions which are apparently of first impression under those rules. Of critical importance, and often of not inconsiderable difficulty, are problems arising under the following Rules: 104 (Preliminary Questions of Admissibility); 401 (Relevant Evidence); 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time); 410 (Inadmissibility of Pleas, Offers of Pleas and Related Statements); 602 (Lack of Personal Knowledge); 605 (Competency of Judge as Witness); 702 (Testimony by Experts); 703 (Bases of Opinion Testimony by Experts); 704 (Opinion on Ultimate Issue); 705 (Disclosure of Facts or Data Underlying Expert Opinion); 801(d)(2) (Admission by Party-Opponent); 803(5) (Recorded Recollection); 803(6) (Records of Regularly Conducted Activity); 803(8) (Public Records and Reports); 803(24) and 804(b)(5) (The Residual Hearsay Exceptions); 804(b)(1) (Former Testimony); 804(b)(3) (Statement Against Interest); 805 (Hearsay Within Hearsay); 806 (Attaching and Supporting Credibility of the Claimant); 901 (Authentication); 902 (Self Authentication); 1003 (Admissibility of Duplicates); and 1005 (Public Records). Also implicated are the general constructional rule (Rule 102) and the relationship of many of the

Rules inter se; e.g., 104 and 901; Rules 104 and 803(6); Rules 703 and 803(8).

Because Rule 403 assumed a prominent role in many facets of our hearings and because of its potential scope, we think it useful to comment at the outset on the appropriateness of making Rule 403 determinations at a pretrial hearing.

Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Although there appear to be no cases discussing the applicability of Rule 403 to motions for summary judgment, there are many cases in which pretrial rulings have been made under Rule 403. *See Thomas* v. *C.G. Tate Construction Co.*, 465 F.Supp. 566 (D.S.C.1979) (motion *in limine* by defendant to prohibit personal injury plaintiff from offering films of himself into evidence); *Depew* v. *Hanover Insurance Co.*, 438 F.Supp. 358, 360 (E.D.Tenn.1977) (motion *in limine* to prohibit defendants from offering testimony regarding deceased's statements implicating plaintiff in alleged arson); *Grimes* v. *Employers Mutual Liability Insurance Co. of Wisconsin*, 73 F.R.D. 607, 610 (D.Alaska 1977) (motion *in limine* in personal injury action to determine admissibility of films of plaintiff); *United States* v. *Jackson*, 405 F.Supp. 938, 943-45 (E.D.N.Y.1975) (motion *in limine* by defendant to exclude evidence of presence in another jurisdiction and use of a false name); *Apicella* v. *McNeil Laboratories*, 66 F.R.D. 78, 86 (E.D.N.Y.1975) (motion *in limine* to preclude parties from using medical newsletter at trial in action against drug manufacturer). *See also United States* v. *Bocra*, 623 F.2d 281 at 284 (3rd Cir. 1980) (affirming grant of motion *in limine* to preclude defendant from mentioning other bribe cases involving I.R.S. agent); *United States* v. *Nu-Phonics, Inc.*, 433 F.Supp. 1006, 1014 (E.D.Mich.1977) (establishing rule that economic evidence would be excluded in antitrust conspiracy prosecution if it were too distant in time from duration of alleged conspiracy).

Because pretrial rulings expedite the trial and eliminate surprise, *in limine* rulings on objections under Rule 403 are favored by the commentators. *See* Manual for Complex Litigation, § 4.22; 22 Wright & Graham, *Federal Practice and Procedure: Evidence*, § 5224 at p. 320-21 (1978) (Wright and Graham); Saltzburg & Redden, *Federal Rules of Evidence Manual* (2d ed. 1977) at 116. In their discussion of Rule 403, Wright and Graham state that:

> Courts and commentators generally agree that any inquiry into preliminary facts in an invocation of discretionary exclusion should be heard out of the earshot of the jury. This suggests the desirability of a pretrial hearing where the issue is important and complex. The use of the motion *in limine* for this purpose should be encouraged.

Accordingly, when objections have been made to otherwise admissible evidence based upon factors enumerated in Rule 403, we have considered them and include our 403 determinations in these evidentiary opinions.

By way of preliminary "across the board" discussion, we also address two principles that plaintiffs ask us to apply generally to all of the evidentiary questions before us. First, they read in F.R.E. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined") a charter of liberality in the admission of evidence and a presumption that would require us, where the question is close, to err on the side of admissibility. We do not so read Rule 102. While we agree that the Rules are designed to be flexible, we do not see that flexibility as favoring admission where specific requirements set forth in particular rules are not met. To read Rule 102 as giving the court unbridled discretion would essentially render the individual rules meaningless. In this regard we endorse the comments of Saltzburg and Redden in *Federal Rules of Evidence Manual* (2d ed. 1977) at 14:

> When Rule 102 states that the Federal Rule shall be construed to the end that the truth may be ascertained and proceedings justly determined, does this signify that whenever the Judge is doubtful as to whether evidence should be admitted or excluded, he should err on the side of admission in order to aid the search for truth?
>
> The answer must be NO for several reasons. First, the Fourth Article of the new Federal Rules makes it clear that certain evidence must be excluded even though it is relevant, because it is too prejudicial or possibly too confusing. In such instances, the search for truth would not be aided by admitting this evidence. When the Trial Judge has doubts about the admissibility of evidence, he must always remember to balance the possible prejudicial effect of evidence against its probative value. Only then can he be sure that the search for truth is aided by his ruling. Second, the Rules also recognize that there are other policies served by rules of evidence aside from reaching accurate decisions as to what happened in a particular case. In dealing with offers to compromise, evidence of insurance, subsequent remedial measures, and privileges, for example, the Trial Judge must consider factors other than accurate reconstruction of historical facts. Finally, Rule 102 itself notes that the Rules must be construed to eliminate unjustifiable expense and delay. In short, there are other factors to be weighed against the probative value of evidence.

Professors Saltzburg and Redden's observation about delay is especially pertinent in the context of this case, which we have estimated will take at least a year to try.

Second, plaintiffs place great reliance on certain statements of Judge Forman in *United States* v. *General Electric Co.*, 82 F.Supp. 753, 903 (D.N.J. 1949); "Broad discretion and great latitude are permitted in the reception of evidence in conspiracy cases . . . Exaggerated and over-refined niceties in the rules of evidence must give way to the broad terms of Rule 43(a), Federal Rules of Civil Procedure, if full effect of the anti-trust laws is to be given." *Accord*, *United States* v. *E.I. DuPont de Nemours and Co.*, 10 F.R.D. 618, 621 (D.Del. 1950) (Leahy, J.). Plaintiffs thus advance the principle that more liberal evidentiary rules apply in antitrust cases. In response,

we note only that these opinions preceded the Federal Rules of Evidence by many years and that we have found nothing in the Rules themselves to indicate that they are to be applied less (or more) stringently in antitrust cases than in any other kind of lawsuit.

Our pretrial evidentiary hearings have consisted mostly of legal argument and colloquy, although on some points testimony has been taken. Numerous and lengthy supporting briefs and affidavits have been filed. Each piece of evidence to be considered has been accompanied by what we have termed a Document Submission Sheet (DSS). The DSS was prepared in three stages: the proponent of the evidence prepared Part I, identifying the document, referencing it to the FPS and enclosing it within a folder (both Japanese original and English translation, in cases of Japanese language documents). The party opposing admission completed Part II, setting forth the grounds of objection, and the proponent then completed Part III, stating its rejoinder. A copy of the DSS is attached as an exhibit to this opinion.

The hearings were grueling. They consumed almost five weeks, with most sessions running into the early evening (and one running well past midnight). Notwithstanding the length of the hearings, we were unable to cover all of plaintiffs' critical documents but will consider them on the basis of detailed post-hearing submissions and supplemental memoranda.

We turn first to a discussion of the basic principles of Rule 803(8), with particular emphasis on 803(8)(C), to be followed by an application of these principles (and those of Article IV of the F.R.E.-Relevancy and Its Limits) to the specific documents at issue here.

II. Rule 803(8)—Its Scope and its Requisites

A. *Matters Admissible Under 803(8)(C)*

Rule 803(8) creates an exception to the hearsay rule for:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the

> activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The first two elements of the Rule, sections (A) and (B), are relatively simple and, at least as applied to civil actions, are essentially self-explanatory. They represent a codification of generally accepted evidentiary principles, and we shall not dwell upon them herein.[7] Section (C), on the other hand, is quite complex, and represents a major change from common law principles.[8] For, quite contrary to what was generally permitted at common law, under the aegis of 803(8)(C), materials representing the distillation of a process that may have involved years of investigation and the taking of thousands of pages of testimony may be presented to the trier of fact in one fell swoop.

A graphic example may be found in *In Re Plywood Antitrust Litigation*, 1979-1 Trade Cases ¶ 62,459 (E.D.La. 1978) in which three manufacturers of softwood plywood were alleged

---

[7] One point that has arisen with respect to 803(8)(B) is whether it or Rule 803(6) is applicable to what might be considered a business record prepared by a public official. The weight of authority seems to be that 803(8)(B) applies, *see United States* v. *Orozco*, 590 F.2d 789 (9th Cir.), *cert. denied*, 439 U.S. 1049, 99 S.Ct. 728, 58 L.Ed.2d 709 (1979); *United States* v. *Oates*, 560 F.2d 45 (2nd Cir. 1977); *United States* v. *Smith*, 521 F.2d 957 (D.C.Cir. 1975). *Cf. Baker* v. *Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979) (803(8)(B), rather than 803(5) (Recorded Recollection), applied to police report). We agree with these decisions and do not apply 803(6) to the public records and reports at issue herein.

[8] Judge Rubin in *Fraley* v. *Rockwell Int'l Corp.*, 470 F.Supp. 1264, 1266 (S.D. Ohio 1979) termed 803(8)(C) "one of the most controversial exceptions to the hearsay rule."

by a class of purchasers to have conspired in violation of the Sherman Act to fix and maintain a system of delivered prices. The private antitrust case followed on the heels of a lengthy Federal Trade Commission (FTC) proceeding under § 5a of the FTC Act, which had involved the same facts. Judge Pointer, relying on 803(8)(C), admitted into evidence in the antitrust trial findings of an FTC Administrative Law Judge and lengthy excerpts from the FTC's opinion.

The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, *inter alia*, factual findings ("reports . . . setting forth . . . factual findings . . ."). It is clear, however, that the intent of the drafters was to permit admission of a somewhat narrower class of materials, *i.e.*, factual findings set forth in reports. The question thus becomes what constitutes a factual finding, a question that is not free from difficulty given the general willingness of the courts to admit as 803(8)(C) material the so-called evaluative report, which often contains, in addition to findings, a large amount of material that is not independently admissible.[9] *See* discussion *infra*.

---

[9] The Advisory Committee Note accompanying 803(8)(C) makes clear the intent of the drafters to permit admission of the evaluative report. The House Committee on the Judiciary, however, adopted a narrow interpretation of the term "factual findings":

> The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

Report of the Committee on the Judiciary, H.R. Rep. No. 93 650, 93d Cong., 1st Sess. 14 (1973), 1974 U.S. Code Cong. & Admin. News pp. 7051, 7088.

The Senate rejected this construction:

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (C) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (C) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary

tiffs' Final Pretrial Statement (FPS), with preclusive effect.[4] We later decided that a second step was necessary—the holding of pretrial evidentiary hearings at which we could focus clearly on plaintiffs' key documents and also rule on admissibility since summary judgment motions are to be determined on the basis of admissible evidence. *See* Rule 56(e).

Even before the FPS was filed, the emanations from the JFTC proceedings pervaded the case. During the course of many pretrial conferences, and in the initial summary judgment briefs, we were constantly confronted with plaintiffs' allegations that the documents seized by the JFTC during the course of the Six Company Case were laden with evidence of conspiratorial activities by the defendants, in both the domestic Japanese and the export markets. The most frequently cited sources were the three diaries of Seiichi Yajima, an official of Toshiba Corp. The significance of Yajima's diaries was underscored when the FPS was finally filed, for it contained no less than 600 references to them.

The FPS was similarly suffused with references to other documents which had their source in the JFTC proceedings, many of which were likewise represented as demonstrating the existence of a broad based unitary conspiracy to destroy the American consumer electronic products industry by a low price predatory export conspiracy funded or "war-chested" by conspiratorial high prices in Japan. Because of the extremely broad and allegedly damning implications of the JFTC material as portrayed in the FPS, it became evident to us that the intensive scrutiny of all of the critical documents was a condition precedent to any full and fair decision on the summary judgment motions.

On the other hand, the references to import-related documents were, generally, more limited in character. What is reflected in most of the import related documents is a practice

[4] The FPS was required by Pretrial Order 154, *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 478 F.Supp. 889, 946 (E.D.Pa. 1979), *rev'd on other grounds*, 631 F.2d 1069 (3d Cir. 1980).

on the part of the Japanese manufacturers to give rebates to the American importers. These rebates had the effect of reducing the actual price paid by importers below the "check-price" divulged to American customs authorities and to the Japanese Ministry of International Trade and Industry (MITI). The existence of the rebate practice is not disputed by most of the defendants (although they do dispute plaintiffs' allegations of customs fraud). While the plaintiffs contend (and defendants deny) that a variety of inferences may be drawn from these documents that point to concerted activity by defendants and their co-conspirators in furtherance of a predatory export scheme, the important point here is that the fact of the rebate payments is not generally in issue. As a result, the admissibility *vel non* of most of these documents is not significant for the Rule 56 motion.

We will thus consider—and at some length because of its importance—the admissibility of Mr. Yajima's diary. Also to be considered at some length, because they are alleged to be of similarly great import are the diaries of Messrs. Yamamoto and Yamada, both employees of Hitachi; Mr. Okuma, an employee of MELCO; and Mr. Tokizane, an employee of Matsushita. During the course of the Six Company Case proceedings, Mr. Yajima and a number of other officials of Japanese companies were interviewed and gave statements, referred to herein as "protocols." They also gave formal testimony at hearings before the JFTC. In plaintiffs' submission, the protocols and testimony contain significant evidence of conspiratorial activity by defendants, and also authenticate the diaries under Federal Rule of Evidence 901 and qualify them as business records within the meaning of Federal Rule of Evidence 803(6).[5] These matters will also be treated at length, as will certain of the materials produced in discovery relating to the activities in Japan of Japanese manufacturers or manufacturers' associations.

The evidence whose admissibility is treated in this opinion is not only of critical importance to plaintiffs' case in chief, but it

[5] We abbreviate "Federal Rules of Evidence" hereinafter as "F.R.E."

also forms a major part of the factual basis for the opinions of their expert witnesses, the admissibility of which we will consider in a subsequent opinion. In plaintiffs' submission, the documents coming from Japan demonstrate that the Japanese consumer electronic products manufacturers, including the seven manufacturing defendants, Matsushita (MEI), Toshiba, Hitachi, Sanyo, Melco, Sharp, and Sony, entered into conspiratorial arrangements, effectuated through a series of monthly meetings involving mid-level to top-level management, the purpose of which was to fix prices in Japan at a high level in order to finance the predatory export campaign to destroy the American consumer electronics products industry to which we have referred. The documents themselves, for the most part, are said to set forth accounts in a variety of forms of what transpired at the meetings of the various "conspiratorial groups," principally the so-called "Tenth Day Group," but including higher echelon groups as well.

Textually, the protocols, testimony and other writings indicate that there were meetings of Japanese consumer electronics products executives, and that at those meetings they discussed predictions of domestic demand, the establishment of domestic "bottom prices," *i.e.* minimum suggested retail sales prices, and appropriate domestic wholesale profit, retail profit, and "rebate" margins in the retail distribution chain. There are scattered references in the documents to "export," though, for the most part, the executives attending the meetings had no responsibility for export matters.

The protocols, which were prepared by JFTC investigators and signed by the witnesses, are straightforward, readily comprehensible, narrative statements. The testimony is similarly clear, and is developed through question and answer in a manner which is generally similar to that employed to develop testimony in the U.S. legal system.[6] The diaries and memoranda are another matter. The diaries all appear to have been written solely for the diarist, with the notations written in a kind of shorthand or code which the writer presumably himself can understand, but which no one else could fully understand except for occasional excerpts. As defendants correctly note, they are a "hodge podge" of notes in which the author has not explained with any degree of clarity what he meant, to what he was referring, or even where he was when he wrote them. While plaintiffs have clarified a few of the references in the diaries by cross reference to JFTC testimony or protocols, only an infinitesimal part has been thus explained. One would have to engage in the rankest of speculation to make sense out of the vast bulk of the diaries.

[6] As will be seen, however, portions of the protocols and testimony are not based on the witnesses' personal knowledge. Plaintiffs' and defendants' experts agree that the Japanese legal system does not exclude hearsay evidence in civil cases or in JFTC proceedings.

One cannot tell with any certainty where entries begin and end. There are many time gaps in the notebooks or diaries, and only a portion of the "conspiratorial meetings" otherwise demonstrated to have taken place are recorded in them. There are all kinds of arrows and innumerable symbols and notations and references which are unintelligible to the translators, who report those references as "illegible." Many of them are written in a code which only a cryptographer could solve.

There is both intrinsic and extrinsic evidence that many of the diary entries reflect occurrences at meetings which the diarists did not attend, but rather about which they were informed by others. The diaries plainly contain numerous instances of second and third level hearsay. Because of the manner in which the diaries are kept, however, it is not possible to sort out which entries are based upon the diarists' personal knowledge and which are based upon hearsay. There is no evidence of regular or continuous habit on the part of any of the diarists in making their notebook entries or checking them systematically. There is no evidence that the diaries were ever communicated (or intended to be communicated) to anyone else. Given this general description, it is obvious that the admissibility of the diaries would be in sharp dispute.

The evidentiary hearings focused only upon the important documents in the case. Some, including the diaries, were con-

sidered in enormous depth, in argument lasting hour after hour. During the course of argument, plaintiffs would advance many reasons why the particular document was authenticated, why it was a business record or an admission or a statement against interest, and so forth, referencing a host of matters in the voluminous record. The defendants would respond, and all would join in extensive colloquy with the court on each point.

Unlike our procedure in connection with the public records and reports, we did not address at the hearings matters of relevancy and its limits (F.R.E. Article IV). There are serious relevancy issues with respect to many of these documents; however, with one exception, we will defer relevancy considerations, including those under Rule 403, until our opinion on the summary judgment conspiracy motions.[7] We also defer until then the determination as to whether the plaintiffs have produced evidence *aliunde* of a conspiracy which would render their evidence admissible against coconspirators under Rule 801(d)(2)(E).[8]

The admissibility of the referenced JFTC materials has been fought on a number of battlegrounds. First, the defendants have challenged the authenticity of much of the proffered material, asserting that the plaintiffs have failed to meet their burden of establishing authentication under F.R.E. 901 and 902. Defendants urge that the notion of authentication does not implicate merely the genuineness of the subject document, but also involves additional layers of foundation. In order for a diary to be authenticated within the meaning of Rule 901, for

[7] We do consider the relevancy of plaintiffs' proffer of certain documents as non-assertive conduct or verbal acts under Rule 801(a)-(c), since this matter is closely linked to the admissibility of those documents under the hearsay rule and its exceptions.

[8] *See Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660 at 665 (3d Cir. 1980); *United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980); *United States* v. *Trowery*, 542 F.2d 623 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1132, 51 L.Ed.2d 555 (1977). *Cf. United States* v. *Cryan*, 490 F.Supp. 1234 (D.N.J. 1980).

example, defendants argue that plaintiffs must not only establish its genuineness, but also, to the extent that it is proffered as a faithful account of what transpired at meetings attended by the diarist, must establish personal knowledge by the diarist of the recorded events.

The remaining disputed issues relate to Article VIII of the FRE, the hearsay rules. The principal hearsay objection is defendants' contention that none of the diaries or memoranda are records of regularly conducted activity within F.R.E. 803(6), the "business records" exception to the hearsay rule. This contention is advanced in four aspects: (1) that plaintiffs have failed to qualify the materials as business records by the testimony of a "custodian or other qualified witness" as required by 803(6); (2) the documents do not meet the requirement that they were kept in the regular course of business and that it was the regular practice of the business to make the record; (3) the plaintiffs have failed to establish the "personal knowledge" required under 803(6); and (4) the materials are untrustworthy. Defendants characterize the diaries and memoranda as an unintelligible hodge podge of materials which inherently cannot qualify as business records, especially in the absence of a witness to explain them. Plaintiffs rejoin that a "custodian or other qualified witness" is not necessary and that they have adequately qualified the documents through circumstantial means, including analysis of the documents themselves, cross-validation by way of comparison with other documents, and the fact of production of the documents by defendants under F.R.Civ.P. 33(c) or 34.[9]

Alternatively, the plaintiffs seek admissibility of some of the diaries and memoranda under F.R.E. 801(d)(2)(B), (C) & (D)

[9] This latter contention is a subject of much dispute, and runs through the foundational aspect of the evidentiary problems. The plaintiffs virtually assert an estoppel against defendants to deny the authenticity or foundation for admissibility of documents by virtue of certain interrogatory answers. The defendants respond that under the Federal Rules of Civil Procedure, their broad production of documents carries with it none of the consequences claimed by plaintiffs.

as admissions against the company which employed the declarant. In each such instance, defendants object that the requisite foundation has not been laid on the grounds that the requirements of subsections (B), (C) & (D) have not been met. Moreover, admission of the diaries is resisted on the grounds that in each case they were not communicated to anyone within or outside the company and hence do not qualify under the rules for authorized or vicarious admissions. Defendants also argue that the diaries do not constitute "assertions" within the meaning of Rule 801(a), hence cannot be admissions, and that they cannot in any event qualify as admissions because they are rambling, conjectural, and suppositious statements, rather than specific, clear, and concise ones.

Plaintiffs also seek admission of the diaries and memoranda under Rule 803(1), as present sense impressions, under Rule 803(5) as recorded recollection, and under 803(24) and 804(b)(5), the residual or "catchall" exceptions, on the grounds of their supposed truthworthiness. They apparently also assert them to be statements against interest under 804(b)(3). The defendants deny the applicability of 803(1) and 804(b)(3) to the diaries for a variety of reasons, substantive and foundational. Defendants also argue that the foundational requirements of the residual exceptions are not met (or have been waived) because of plaintiffs' failure to try to secure equally or more probative evidence by other reasonable means (*i.e.* depositions of the diarists and memo writers). They further assert that the materials lack the circumstantial guarantees of trustworthiness required by 803(24) and 804(b)(5). Finally, they argue that the residual exceptions are not intended to be available in situations otherwise provided for by the rules, an argument which they dub the "near miss" doctrine.[10]

The protocols are said by plaintiffs to be admissible as statements against interest under F.R.E. 804(b)(3), under the residual exceptions, and as admissions of a party opponent under 801(d)(2)(C) and (D). Plaintiffs' reliance on F.R.E. 804(b)(3) requires a showing under 804(a) of unavailability of the declarant. While there is no dispute as to Mr. Yajima's unavailability, since he died in 1968, defendants strongly contend that all of the other declarants are available because, under 804(a)(5), their attendance or testimony could easily have been procured. More specifically, defendants represent that virtually all of the diarists and persons who attended the alleged conspiratorial meetings are alive and well and still employed by their respective companies and that they have been available for discovery or trial depositions for years.

[10] The questions relative to various memoranda and "minutes of meetings" produced in discovery are similar to those affecting the diaries, and we do not treat these other documents separately in the Preliminary Statement.

Defendants also contend that the requirements of 804(b)(3) are not met because the statements and testimony given in the JFTC proceeding were not against the pecuniary or proprietary interest of any witness whose statement of testimony is proffered, much less "so far" contrary to his interest, or "so far" subjecting him to civil or criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true, the requirement of Rule 804(b)(3). They also assert that plaintiffs have advanced no evidence of *consciousness* of contrariety to interest, another requirement of 804(b)(3). Defendants add that even if the witnesses' statements tended to subject their employers to civil or criminal liability, the posture of the employers does not matter for Rule 804(b)(3) purposes.

The JFTC transcripts are said to be admissible as former testimony under 804(b)(1), as well as under 804(b)(3) and (5) and 801(d)(2). Defendants object to the introduction of the JFTC testimony mainly on the grounds that they did not have a similar motive to develop the testimony by direct, cross, or redirect examination as is required by Rule 804(b)(1), since the issues in that case were very different from this one. The defendants also object to admission of the testimony under the other hearsay exceptions for the reasons already stated with respect to the protocols and diaries.

Defendants argue that neither the protocols nor the testimony are admissions because the persons making them were neither authorized to make a statement concerning the subject, nor were the statements made concerning a matter within the scope of their agency or employment. Finally, defendants oppose the notion that the residual hearsay exceptions are available in these circumstances. First they invoke the so-called "near-miss" doctrine under which the residual exception cannot be invoked if the proffered hearsay fits within the framework but fails to qualify under a specific hearsay exception. Second, they challenge the trustworthiness of these materials. Third, they assert that more probative evidence could have been procured by reasonable efforts.

In connection with each of our determinations, whether under the authentication rules or the hearsay rules, we must determine whether admissible evidence is required to support the factual findings which are the underpinnings of the ruling on the admissibility of the evidence proffered. Rule 104(a) provides that in making determinations of preliminary questions concerning the admissibility of evidence, the court is not bound by the Rules of Evidence, except with respect to privileges. Under Rule 104(b), entitled "Conditional Relevancy," however, the jury rather than the court makes the ultimate determination of admissibility, hence admissible evidence is required. The parties dispute the need for admissible evidence in the qualification process not just in connection with authentication, but also at the subsequent levels, *e.g.* qualification as a business record. The plaintiffs argue that admissible evidence is not required in the qualification process, relying principally on 104(a), while the defendants maintain that it is.[11]

---

[11] A related question which surfaced in the dialogue over business records is whether, if something is qualified as a business record as against one defendant, it is thus qualified as against all. Put differently, and to paraphrase Gertrude Stein, is it the case that "a business record is a business record is a business record," or must the record be qualified as against each defendant? The answer to this question of course turns on whether admissible evidence is required under Rule 104.

The foregoing is a catalog of the more significant legal questions which have arisen during the course of our hearings over the JFTC and cognate materials. As we have noted, similar questions have arisen in connection with the materials produced in discovery in connection with import transactions. Still other interesting legal questions have arisen which we shall enumerate as we proceed through our discussion. Because virtually all of these questions have been raised with respect to each document, the discussion of each will perforce be many layered, though we hope not labyrinthine.

We have observed about the diaries the difficulty that anyone other than the diarist would have in understanding them. It is of course obvious that there are indeed persons who could eliminate that difficulty and decipher any code—like references in any diary: either the diarist himself, or, in his absence, someone present at the meeting whose proceedings are supposedly recorded in the diary, or someone contemporaneously familiar with the content of the diary or memo and the diarist's recording practices. However, the plaintiffs, despite their role as proponents of the documents, hence bearers of the burden to qualify them, have not proffered the testimony in any form of any such person. Moreover, they have made it clear that they have no intention of doing so, before or at trial. Rather, they prefer to qualify the documents circumstantially and to offer selected (though voluminous) excerpts therefrom in connection with the summary judgment motions and at trial.

The litigation strategy we have described is not our supposition, but rather the plaintiffs' clear statement. Edwin P. Rome, Esquire, plaintiffs' lead counsel, has confirmed the strategy again and again. For instance, he noted during the course of the evidentiary hearings:

> I assume personally, Your Honor, whatever onus there may be about the fact that we chose quite deliberately, and I state it of record, we chose quite deliberately not to undertake to depose persons in a foreign language when we had documents that in our view documented and explicated a conspiracy to violate American law.

PTO 268 at 143-44 (June 27, 1980). There are numerous similar statements by Mr. Rome in the voluminous pretrial record in this case.[12]

This litigation strategy was maintained in the face of repeated warning from the defendants that they intended to challenge the admissibility of the diaries, memoranda, protocols, and testimony. This warning came not only during the course of our numerous pretrial conferences, but even in Melco's motion for summary judgment, filed April 1978, well before the close of discovery. In that motion, Melco spent many pages detailing the kinds of evidentiary foundational deficiencies we deal with herein. Yet the plaintiffs, all the while insisting they were ready for trial, declined to take depositions of those who might shed light upon the documents. For example, at the pretrial conference of June 14, 1978, six months before the close of plaintiffs' discovery period, plaintiffs' counsel stated to the Court:

> MR. McELROY: We said a long time ago, and Ed Rome has repeated throughout, that the plaintiffs in this case are ready to go to trial upon reasonable advance notice. We believe that discovery in the case to date is sufficient for us to get to a jury and to get a verdict. Likewise, we believe that, and it follows, that we believe we have had enough discovery, we have enough evidence to defeat a motion for summary judgment. We don't need further discovery in order to respond to [Melco's counsel] Mr. Reath's motion.

PTO 107 at 21.

Indeed, the plaintiffs were challenged on several occasions by the Court as to why, having proceeded with this case for close to a decade, and having inspected literally millions of

[12] We note that plaintiffs' strategy does not reflect sloth or any lack of experience on the part of plaintiffs' counsel. Plaintiffs' lead counsel, Edwin P. Rome, is one of the ablest antitrust lawyers in the United States. A brilliant and eloquent advocate, Mr. Rome tried some of the pioneering antitrust cases in the motion picture industry and has assembled a stellar litigation team whose efforts have been prodigious, as well as of the highest quality.

documents, they had failed to take depositions for the purpose of laying foundation for the admissibility of the challenged JFTC materials.[13] It was pointed out that such foundational depositions are regular fare in complex cases, *i.e.*, it is the custom for counsel to take them.[14] Mr. Rome consistently responded that it was his considered decision not to do so. The plaintiffs did take depositions of some Japanese executives in connection with the motions relative to personal jurisdiction and venue.[15] That foundational (or substantive) depositions of Japanese executives were feasible is demonstrated by the repeated and uncontroverted representations of defense counsel that, with the exception of Mr. Yajima who died in 1968, all of the diarists and all persons whose names were focused upon during the evidentiary hearings are alive and well in Japan, still employed by their companies, and that they have been available for depositions for many years.

It is important to note that our observations about plaintiffs' strategy are not merely retrospective, for it is clear that plaintiffs intend to call no witnesses from Japan to lay foundation for admissibility at trial either. Not only have they so conceded,

[13] We also sharply questioned plaintiffs as to why, given the magnitude of their claims and the existence of so much fodder for examination, they had failed to take depositions, for substantive purposes, of a single Japanese executive who attended any of the allegedly conspiratorial meetings which are at the core of the plaintiffs' case. We noted that we found it difficult to conceive of counsel pursuing that strategy in a case with purely U.S. roots.

[14] Defendants have taken them in this very case. For another example see the pretrial order governing non-party discovery in the Uranium Antitrust Litigation, which makes specific reference to "depositions . . . taken solely for the limited purpose of . . . authenticating documents produced by such non-party." Joint Pretrial Order No. 8 at 2-3, *In Re Uranium Antitrust Litigation*, M.D.L. 342 (N.D. Ill. Nov. 13, 1979).

[15] Although plaintiffs have occasionally complained about the cost and cumbersomeness (due to translation problems) of taking depositions in Japan in the Japanese language, they have abandoned any reliance upon such problems as their rationale for not taking depositions. They concede, as they must, that given the magnitude of the litigation they have instituted and maintained, cost factors provide no excuse. PTO 268 at p. 143.

but had they intended to do so they would have been obliged to list those witnesses in their preclusive F.P.S., which they have not done.

The defendants' explanation for plaintiffs' litigation strategy is not gentle. They state it in their "Memorandum of Certain Defendants in Support of their Position that Materials from the JFTC Proceeding Are Not Admissible in Evidence" (pp. 3-4) as follows:

> Indeed, it seems clear that it was precisely because the Japanese materials do not constitute records of the only two matters that could make them properly probative in this case, that plaintiffs chose not to follow the normal route of taking depositions to lay a proper foundation for their introduction. Plaintiffs knew that such depositions would not be helpful to their case and that, at the end of such discovery, while they might have come up with admissible evidence regarding discussions of "bottom prices" by six companies for two years (1965-1966), they would not come up with any admissible evidence of the creation of a U.S. export invasion fund or of a United States predatory price agreement. They, therefore, seized upon the ploy of attempting to introduce the materials without proper foundations—and without any opportunity by the other side to cross examine—and arguing to the jury that all kinds of wild inferences can be drawn from a handful of cryptic and basically incomprehensible "export references" found in materials which were obviously not written to record export activities. Since plaintiffs' direct case will last for some months, the jury will be hopelessly prejudiced by such tactics before the first of the defendants could even be heard.
>
> In furtherance of this approach, plaintiffs adopted the tactic of piling into the FPS hundreds of thousands of Materials and spuriously arguing that they are all evidence of conspiracy, so that they could create the argument that it would be extremely burdensome for them to lay foundations in the normal way, even though their PPTM and summary judgment briefs show that they are, in fact, relying on a relatively small number of such Japanese materials.

Defendants conclude with a little homily:

> Fortunately, as we will demonstrate below, our Rules and evidentiary precedents, which are rooted in basic fairness and due process, do not allow for such a result. Evidence must be shown—through the establishment of a foundation in prescribed ways—to be proper and reliable before it can be thrown before a jury and begin to affect that jury's mind.

Of course, the legal aspect of their homily is quite correctly stated. And while we do not endorse defendants' rhetoric, we do note that we find a kernel of truth in defendants' evaluation of plaintiff's litigation strategy.

The volume of material before us for consideration is staggering. We refer not only to the large number of documents (and the large volume of document pages), but also the extensive briefs and other submissions of the parties. It was represented to us during the hearings that, at that juncture, some 85 or more lawyers and paralegals were working close to full time on the case (75 for the defendants). Scores of memoranda relating to admissibility were filed during the hearings, and it is difficult to digest all of that material so as to write a worthy opinion. We shall do our best.

Because the plaintiffs have not produced the conventional evidentiary foundation, *i.e.* testimony of a custodian or other qualified witness, it is necessary that we evaluate the subject documents on the basis of the circumstantial factors called to our attention by plaintiffs' counsel at our evidentiary hearings. Doing so will be a tedious process, requiring us, in the case of each document, to review plaintiffs' foundation and defendants' response and then to apply the applicable legal standards to determine admissibility. We are aided materially in this regard by the post-hearing submissions of the parties which summarize the plaintiffs' foundation and defendants' response on each document, and we draw heavily upon those submissions. After a point there will be some degree of repetition in the factual patterns, enabling us to simply incorporate earlier discussion by reference. However, because of the importance plaintiffs attributed to each of the critical documents taken up in this opinion, we cannot, in fairness, unduly trun-

cate or abbreviate our description of plaintiffs' foundational proffer or defendants' response. All of this makes for a very long opinion for which we apologize but which we cannot avoid. This is because of our obligation to the parties in this very important case to which they have devoted so much time and expense, and also to the Court of Appeals which will ultimately review it and will need a full statement of the reasons for our major rulings.

For the variety of reasons which follow, we conclude that neither the diaries, memoranda or "minutes of meetings" nor discrete portions thereof are admissible in evidence; that the JFTC testimony is admissible against the defendants in the Six Company Case only, except for any so-called "export" and war-chesting "references," which are, with minor exceptions, inadmissible; and that the protocols are admissible against the employer of the maker of the protocol.

In terms of opinion structure, we shall follow the same course here as we did in the first opinion in this series. In Part II, we shall set out the legal principles applicable to the evidentiary questions we must decide, resolving the disputes between plaintiffs and defendants on legal issues. We shall take up all of the sections of the F.R.E. claimed by the parties to have bearing upon whether any of the documents were authenticated or admissible under one of the exceptions to the hearsay rules. As will be seen, there is hardly a section or subsection of Article VIII (hearsay) or Article IX (authentication) of the F.R.E. that escaped their advocacy. The number of rules invoked is largely a function of plaintiffs' circumstantial mode of laying foundation, as opposed to doing so by direct testimony. Because of these myriad issues and the fact that some of them are of first impression, this discussion will be extremely detailed. Then, in Part III, we shall describe the documents at issue and then apply the legal principles to the documents, determining their admissibility *vel non*. Fortunately, the breadth of the Part II discussion will cut "across the board" and will obviate the necessity for further legal discussion in Part III.

II. *Rulings on Contested Legal Issues Concerning Interpretation of the Federal Rules of Evidence*

A. *Authentication*

The requirements for authenticating documents are set forth in Article IX of the F.R.E. The general provisions of Rule 901(a) provide:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

1. *The Standard for a Preliminary Ruling on Authentication Under Rule 104; Will Inadmissible Evidence Suffice?*

Plaintiffs and defendants differ as to whether admissible evidence is necessary to authenticate evidence. Defendants say "yes" and plaintiffs say "no." We begin with the Advisory Committee's Note to Rule 901, which states expressly that the requirement of showing authentication falls in the category of "relevancy dependent upon fulfillment of a condition of fact," and is thus governed by the procedure set forth in Rule 104(b), and not that set forth in Rule 104(a). Rule 104, titled "Preliminary Questions," provides in pertinent part:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. . . .
>
> (e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

The Advisory Committee Note to Rule 104(b) makes plain that preliminary questions of *conditional relevancy* are not determined solely by the judge, for to do so would greatly restrict the function of the jury as the trier of fact. If, for instance, there were serious questions in this case as to whether Mr. Yajima's diary was a forgery, it is obvious that a question of evidence so critical could not be decided solely by the court. Under the aegis of rule 104(b), the judge makes a preliminary determination whether the foundation evidence is sufficient to permit a factfinder to conclude that the condition in question has been fulfilled. If so, according to the Advisory Committee Note:

> . . . the item is admitted. If after all of the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.

In *United States* v. *Goichman*, 547 F.2d 778, 784 (3d Cir. 1976), the Court of Appeals formulated this principle as follows:

> [T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility. Rather, there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility.

Thus, once a *prima facie* showing has been made to the court that a document is what its proponent claims, it should be admitted. At that point the burden of going forward with respect to authentication shifts to the opponent to rebut the *prima facie* showing by presenting evidence to the trier of fact which would raise questions as to the genuineness of the document.[16] The required *prima facie* showing of authentica-

[16] Much is made by the plaintiffs of the fact that defendants, despite he "hard line" taken by some of them on matters of authentication, have not come forward with any evidence to refute plaintiffs' showing with respect to various documents. It is in fact true that defendants have come forward with no evidence countering plaintiffs' claim of authentication of the various documents. However, that does not alter the plaintiffs' burden.

tion need not consist of a preponderance of the evidence. Rather, all that is required is substantial evidence from which the trier of fact might conclude that a document is authentic. As the court in *Goichman*, *supra*, stated:

> [I]t is the jury who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been *substantial evidence* from which they could infer that the document was authentic.

Id. (emphasis added).[17]

The plaintiffs contend that in determining whether an adequate *prima facie* showing has been made, the court may consider inadmissible evidence. We disagree. Under Rule 104(b), authentication must be established by the "introduction of evidence." By using this language, the Rule plainly contemplates that the jury's determination of authenticity will be made only on the basis of admissible evidence. We find nothing in either Rule 104 or the Advisory Committee Notes to suggest that the jury may consider inadmissible evidence in this regard, except to the extent that evidence may be admitted "subject to" the introduction of subsequent (admissible) evidence of its authenticity.

So then, while the court's power to "consider" inadmissible evidence under Rule 104(a) is clear, the substantive determination which the court is required to make on the issue of authenticaton is whether *admissible* evidence exists which is sufficient to support a jury finding of authenticity. For it would be a pointless exercise for a judge to rely upon inadmissible evidence to fulfill the substantial evidence requirement when the trier of fact can only consider *admissible* evi-

[17] Although the defendants have offered no evidence to rebut the authenticity of the documents, we need not consider any such evidence at the preliminary stage. The substantial evidence standard, unlike a preponderance standard, requires no balancing of the evidence. The Court must only conclude that a prima facie showing has been made in order to admit the documents. It is for the trier of fact to consider the rebuttal evidence and balance it against the authenticating evidence in order to arrive at a final determination on authentication.

dence that a proffered document is authentic.[18] Accordingly, we hold that under Rule 104(a), Rule 104(b), and *Goichman*, our task in ruling on authenticity is limited to determining whether there is *substantial admissible evidence* to support a finding of authentication by the trier of fact.[19]

Since only admissible evidence can form the basis for the determination of authentication, the degree to which plaintiffs rely on using some of the documents they have submitted to authenticate other documents creates problems of circularity, and in some cases it is more logical to determine other aspects of admissibility before reaching the 901 determination. This will be considered *infra* with regard to specific categories of documents.

2. *The Notion of Authentication and the Scope of Rule 901(a); is Authenticity More Than Mere Genuineness?*

Another important issue addressed in argument and briefs is the intended scope of Rule 901(a) and, in particular, the meaning of the last phrase which defines authentication as a finding "that the matter in question is what its proponent claims." In contrast to the position of the plaintiffs, who equate authentication with genuineness, the defendants contend that the scope of authentication is determined by the claims made by the proponent of a document and encompasses all of what the proponent "*must* claim it is in order to use it as he wishes to"[20] (emphasis in original). They argue that the subject documents' "logical status as evidence, and hence their authenticity, could be established only by showing that they are accurate and reliable accounts . . ."[21] (of the allegedly conspiratorial meetings reported), otherwise "they are not probative"[22] and thus not what their proponent claims. Since authentication is but a "special aspect of relevancy," Advisory Committee Note to Rule 901(a), this is an appealing argument. After all, the plaintiffs claim that Yajima's diary should be admitted to portray the agreements made at certain meetings. What does it matter then that the diary is not a forgery, if it is not an accurate and reliable account of what transpired at the meetings Yajima purported to record?

The problem with defendants' argument is that it reads the language of 901 to subsume nearly all of the issues involved in many cases in which the issue may arise. For example, the proponent claims that many of the documents under consideration here are "business records." As the Advisory Committee Notes to 901 make clear, however, this is a completely separate determination which must be addressed outside the scope of the authentication inquiry.[23] While the Advisory Committee Notes state specifically that authentication is an aspect of conditional relevancy, they are also quite clear that it is but one kind of conditional relevancy,[24] and does not subsume all of the evidentiary foundation which must be established in order to show that a document is relevant evidence:

> Authentication and identification represent a *special aspect* of relevancy. Thus a telephone conversation may be

[18] Weinstein notes in his discussion of Rule 901 that:

> since the jury will not be able to evaluate the authenticity of a document unless it has admissible testimony before it, the court should consider whether the jury could find the document authentic before it admits it on the basis of inadmissible evidence.

5 Weinstein's Evidence 901(b)(1)[01] at 901 22 (1978) [hereinafter cited as "Weinstein"].

[19] As a corollary of this holding, we acknowledge that some documents may be authenticated only as against certain parties, since the authenticating evidence for those documents may be admissible only against certain parties.

[20] Defendants' Memorandum Concerning Admissibility Under Fed.R.Evid. 104 and Fed.R.Evid. 901, p. 3.

[21] *Id.* p. 4.

[22] *Id.* p. 6.

[23] Plaintiffs also claim that the documents establish the existence of a conspiracy, an issue certainly not reached in the authentication determination.

[24] The Advisory Committee Notes to Rules 602 and 1008 state, for example, that a witness's personal knowledge of a matter under 602 or matters of other evidence of contents of writings, documents or photographs under Rule 1008(a), (b) and (c), are also questions of conditional relevancy.

> irrelevant because on an unrelated topic or because the speaker is not identified. The *latter aspect* is the one here involved.[25]

(emphasis added) (citations omitted).

The specific illustrations under subsection (b) further support a narrow interpretation of authentication. For example, authentication can be established by expert or nonexpert opinion on handwriting, F.R.E. 901(b)(2), a method which would do nothing to establish a document as the "accurate and reliable account" that defendants claim it must be in order to authenticate it.

While, as defendants urge, different showings are required in accordance with the *type* of evidence presented, in all of the cases and examples which they have cited authentication involves establishing the origin or authorship of an item, or the connection of an item to a particular individual or party.[26] In *Rhoads* v. *Virginia-Florida Corporation*, 476 F.2d 82 (5th Cir. 1973), upon which defendants place their strongest reliance, the authenticity of the drawings at issue had been conceded by the opposing party. The court there pointed out that:

> authentication of the documents *merely established* their authorship, the proof of some human's "personal connection with a corporal object." 7 Wigmore On Evidence § 2129, at 564 (3d ed. 1940).

[25] Advisory Committee Notes to Rule 901(a).

[26] *Medley* v. *United States*, 155 F.2d 857 (D.C. Cir.) *cert. denied*, 328 U.S. 873, 66 S.Ct. 1377, 90 L.Ed. 1642 (1946), cited by the defendants, does not even mention authentication, and contains no consideration of the issues involved here. Similarly there is no mention or indication that authentication is an issue in *Lathrop* v. *Henkels & McCoy, Inc.*, 351 F.Supp. 1052 (E.D.Pa.1972). *Coughlin* v. *Capital Cement Co.*, 571 F.2d 290 (5th Cir. 1978), cited by defendants, is an example of a case explicitly decided on the basis of the requirements of 803(6), but using the term "authentication" to refer to the foundation requirements under that rule. We feel that it is better practice, in order to avoid semantic confusion, to confine the use of the term "authentication" to requirements under rule 901.

476 F.2d at 85 (emphasis added). The court then proceeded to discuss additional requirements for admissibility and suggested that the drawings must either be "verified" by testimony of a witness, citing 3 Wigmore On Evidence § 790, at 218, or must qualify as an exception to the hearsay rule.[27] As we have noted *supra*, a finding of authentication does not establish admissibility, and any other applicable requirements must also be met.

We conclude that, notwithstanding the apparent sweep of 901, created by its use of a rather expansive location, *i.e.*, the prescription that authentication is satisfied by evidence sufficient to support a finding that the matter in question is "what its proponent claims," the notion of authentication is a narrow one, akin to the notion of genuineness. The other foundation requirements should not be simply subsumed under the authenticity terminology, but should remain analytically distinct. We find other support for this conclusion. First, the Advisory Committee Note, subdivison (a) provides:

> Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least *prima facie genuine* items of the kind treated in Rule 902, *infra*.

(emphasis added). Moreover, a review of the annotations under Rule 901 confirms this view, for the cases discussing the Rule have a similarly limited scope. *See* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 651-52 (1977) and 245-47 (1980 supp.) [hereinafter cited as "Saltzburg"]. Thus such foundation issues as personal knowledge of the declarant, which defendants urge us to treat as authentication issues, will be dealt with separately under the appropriate rules.

[27] The court in *Rhoads* concluded that since the proffered drawings did not qualify as either official written statements or as business records they had been properly excluded, 476 F.2d at 86.

3. *Methods of Authentication*

Rule 901(b) lists several examples of methods of authentication which would meet the requirements of 901(a).[28] The

[28] Rule 901(b):

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

(2) **Nonexpert opinion on handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by trier or expert witnesses.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Advisory Committee Notes for this subsection state that these examples are not intended to exhaust all the possibilities, "but are meant to guide and suggest, leaving room for growth and development in this area of the law."

In their endeavors to authenticate the matters before us, the plaintiffs place primary emphasis on 901(b)(4), Distinctive Characteristics. They also assert, however, that the testimony and protocols from the JFTC proceedings may provide evidence of authenticity under 901(b)(1) (Testimony of a Witness with Knowledge), and that since some of the documents fall just short of the age requirements under 901(b)(8) (Ancient Documents), this subsection in conjunction with other circumstances would be sufficient to fulfill the 901(a) requirements. Once authenticity has been established for one document, 901(b)(3) may be used to authenticate other documents of a similar type.

Rule 903 (Subscribing Witness' Testimony Unnecessary) and the illustrations given under 901(b) make it clear that *testimony* is not essential to establish authenticity, and, as McCormick states, "authentication by circumstantial evidence is uniformly recognized as permissible."[29] Elements which tend to establish authenticity may be found both in Rule 901 itself, in the Advisory Committee Notes, and in the cases which we will outline in the following discussion. One such element is the source of a particular document, *i.e.*, the method or place of its discovery.

a. *Source of the Document*

Plaintiffs urge that the defendants' production of certain of the documents in answer to interrogatories under Rule 33(c) is

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

[29] McCormick's Handbook on the Law of Evidence § 222 (2d ed. 1972) [hereinafter cited as "McCormick"]. See also *United States* v. *Natale*, 526 F.2d 1160 at 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 193 (1976); *United States* v. *Smith*, 609 F.2d 1294, 1301 (9th Cir. 1979).

itself sufficient to establish them *ipso facto* as authentic. We disagree with this reading of the Rule.[30] Given the breadth of the discovery rules and the broad requirements for production, we feel it would undermine the liberal intent of the those rules to interpret such production as an admission of authenticity in the absence of a specific assertion by the producing party regarding the nature or authorship of the documents produced.

The production of the documents by the defendants may, however, provide circumstantial evidence of authenticity. McCormick notes that a *prima facie* showing of authenticity is made by the emergence of a document from public custody. He concludes that, while the circumstances of private custody are too varied to warrant an expansion of the rule in every case, "proof of private custody, together with other circumstances, is frequently strong circumstantial evidence of authenticity."[31]

In *Alexander Dawson, Inc.* v. *N.L.R.B.*, 586 F.2d 1300 (9th Cir. 1978), the Ninth Circuit upheld the decision of an administrative law judge admitting job application forms even though there had been no testimony regarding who had filled out the particular applications, and no witness could testify to a specific chain of custody. The circumstances surrounding their discovery,[32] considered along with their contents[33] was held adequate to authenticate the forms. In *United States* v. *Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 193 (1976), a notebook that had been seized during the defendants' arrest for extortion was admitted at trial. The Court of Appeals enumerated among the facts supporting its authenticity: (1) the presence of the defendants at the office where the notebook was discovered; (2) that defendants had held numerous meetings with a witness in that office; and (3) that one of the defendants admitted that the office was his. This, together with evidence supplied by the notebook's contents, *see infra*, was sufficient to allow its admission into evidence.[34] We will follow the *Dawson* and *Natale* courts by treating the circumstances of their production as one element of circumstantial evidence which tends to authenticate the documents produced by the defendants.

b. *Characteristics of the Document Itself*

The characteristics of the document itself are also a basis for establishing authentication, Rule 901(b)(4). The last phrase of the rule indicates, however, that characteristics of a document must be considered "in conjunction with circumstances." Although Weinstein states that a document "can be authenticated by its contents alone," it is clear, from the examples used, that he "means in light of surrounding circumstances." ¶ 901(b)(4)[01] at 901-46. All of the characteristics mentioned in 901(b)(4) are also subject to the overriding requirement of "distinctiveness" under that example.

The first characteristic mentioned in 901(b)(4) is "appearance." Weinstein gives as examples of the types of appearance

---

[30] We discuss this point more extensively at p. 1236, *infra*, in connection with the "business records" aspect of this opinion.

[31] McCormick § 224 at 552. McCormick cites *United States* v. *Imperial Chemical Ind.*, 100 F.Supp. 504 (S.D.N.Y.1951), an anti-trust case where two unsigned documents were admitted. Though there was no proof of their authorship, they were from defendant's files, the subject matter was corroborated by other evidence, and the documents gave indications that they were prepared by responsible agents of defendant. The court stated that:

> [i]ndeed, the only logical explanation of their appearance in the ICI files if they are not authentic, is that the documents are forgeries, or spurious. Such an explanation is rejected as entirely improbable.
>
> However, the weight to be given the documents, particularly to the second, is necessarily decreased. While they bear every indication that they were prepared by persons in a position to know of the matters set down, their anonymity must go to the weight to be given them. With this caveat, the two documents will be received.

[32] Applications had been taken from the company's premises by two employees (without authority) and given to the union, who in turn gave them to the General Counsel for the N.L.R.B.

[33] Discussed *infra*.

[34] See also *United States* v. *Zink*, 5 F.Evid.Rep. 1131, 612 F.2d 511 (10th Cir. 1980); *United States* v. *King*, 472 F.2d 1 (9th Cir.), *cert. denied*, 414 U.S. 864, 94 S.Ct. 37, 38 L.Ed.2d 84 (1973).

the courts may wish to consider: a postmark, a return address, a letterhead, a signature even where affixed by a rubber stamp, typing or form which corresponds to usual practice.[35] The aspect of the document's appearance which is most relevant with respect to the JFTC documents is the fact that many of them are marked with a particular person's name in the form of a "chop," a Japanese seal which contains a stylized rendition of a person's name and is sometimes used in lieu of a signature. During the discussion of authenticity of the so-called MITI statement,[36] proffered by defendants, they urged that the "chop" affixed to the document made it in the legal equivalent of a signed document. Though this contention was resisted at that time by plaintiffs, we conclude that a "chop" should be given weight equivalent to a signature. We recognize that a "chop," like a signature, may not always be genuine. Furthermore, many people with the same surname may have a common "chop," hence the "chop" does not in every case indicate authorship. The particular use of a "chop" will be considered with respect to the individual document upon which it appears. Many of the import transaction documents also have distinguishing characteristics, particularly letterheads.

A second characteristic mentioned in 901(b)(4), again subject to the distinctiveness requirement, is the contents, or substance, of the document. Contents have been used to establish authentication in a variety of ways. In *United States* v. *Smith*, 609 F.2d 1294 (9th Cir. 1979), hotel records of defendant's registration and charges incurred were introduced. Included in the evidence linking the defendant to the records were independent corroboration of his presence at meetings in the hotel, the use of names used by defendant in signing records, and the use of the address which appeared on defendant's

[35] Weinstein, 901(b)(4)[02], 901 51 through 901 54.

[36] The "MITI Statement" is a document which was transmitted to the court by the Japanese Ministry of International Trade and Industry ("MITI") via diplomatic channels. The defendants urge that it supports their "sovereign compulsion" defense, an aspect of the summary judgment motions which we have not yet decided.

business card.[37] In *Natale, supra*, the court similarly relied upon the corroboration of the contents of the notebook involved by independent evidence. One of the entries referred to a loan made to a witness in the case, and served to authenticate the document.

In *Goichman, supra*, 547 F.2d at 783, an unsigned document entitled "History of Children's Assets," which listed the defendants' expenditures, had been produced as part of the docket record in a prior (domestic relations) proceeding. The contents of the document were corroborated by defendant's complaint in that proceeding, and the words "I" and "my" were used in conjunction with the first names of the defendant's three children. The Third Circuit held that this evidence of contents was sufficient to establish a prima facie showing of authentication.

If the subject matter of a document refers to knowledge which only one individual would have had, it is sufficient to authenticate the document. 7 Wigmore on Evidence § 2148 (3d ed. 1940). Weinstein disagrees with the insistence on knowledge by only a single person, however, as he states, "the force of the inference decreases as the number of people who know the details . . . increases." Weinstein, ¶ 901(b)(4)[01] at 901-46 and 47. In *United States* v. *Wilson*, 532 F.2d 641 (8th Cir.), *cert. denied*, 429 U.S. 846, 97 S.Ct. 128, 50 L.Ed.2d 117 (1976), the prosecution sought to introduce a notebook which contained records of drug transactions. Though it was admitted that the author was unknown, the Court of Appeals upheld the authentication of the notebook on the grounds that only those persons acquainted with the particular transactions involved could have written the entries.[38]

Some of the documents involved are said to contain information allegedly known only to a limited number of individuals

[37] The court in *Smith* noted that the objections concerning the identity or competency of the individual who prepared the records were relevant to evidentiary weight or credibility, but not to authenticity.

[38] The activities were characterized by a "code" and the writer used "nicknames" of individuals involved in the conspiracy. 532 F.2d at 645.

who attended various meetings. The plaintiffs' own showing demonstrates that the number was not all that limited. However, to the extent that information contained in documents is corroborated by other admissible evidence, and is known to a limited number of individuals, these factors may be considered in determining whether sufficient evidence exists to authenticate it.

c. *Testimony and Interrogatory Answers*

Testimony before the JFTC, to the extent that it is found admissible, may also be used to authenticate other documents. Rule 901(b)(1) specifically holds testimony sufficient to establish authenticity. Where the testimony does not deal directly with any particular document offered, it may still be helpful in proving authenticity circumstantially. Weinstein ¶ 901(b)(1)[01] at 901-22.[39] We will have occasion below to consider JFTC testimony both as circumstantial and as direct evidence of authenticity.

The answers to interrogatories may also be considered as "testimony" where they directly identify a document's source or author, corroborate the contents of particular documents, indicate the presence of a purported author at a meeting or a meeting's limited attendance, or otherwise establish the document's authenticity. While Weinstein notes that Interrogatories, Requests for Admissions and Stipulations "should be relied upon to dispose of most authentication problems before trial," ¶ 901(b)(2)[01] at 901-23, the questions and answers in most of the interrogatories here are not specific enough to constitute a concession of authenticity.

Since we have ruled that documents must be authenticated by admissible evidence, the admissibility of former testimony and the interrogatory answers themselves is an additional issue to be determined. Since the interrogatories may not be

[39] Weinstein states that "[t]he witness's testimony need not, in and of itself, suffice to authenticate . . ." but should, however, be considered "so long as it is relevant on the issue of identification."

admissible against all defendants unless the plaintiffs' conspiracy theory is accepted, this presents a particularly difficult situation.[40] Where authentication depends on the admissibility of an interrogatory, which itself depends on the plaintiffs' establishment of a conspiracy, the documents may be admitted "subject to" such a showing.

d. *Similarity to Other Authenticated Documents*

The example in 901(b)(3) allows the trier of fact to compare a document to another authenticated document in order to establish its authentication. In *Dawson*, *supra*, the employment applications involved were "on the same form" as applications whose authenticity was conceded. This, in conjunction with the circumstances of production, was considered sufficient to establish their authenticity, 586 F.2d at 1303. Many of the documents involved here are members of "groups" of documents, sharing similar characteristcs. The authentication of one such document may serve as the basis for authenticating the others in a group on the basis of comparison, initially by the court, and ultimately by the trier of fact.

e. *Age of the Document*

A final element to be considered in our determination of authenticity is the age of the document. Rule 901(b)(8)(C) sets twenty years as the age requirement for "Ancient Documents." None of the documents now before us is twenty years old, although some may reach that age by the time of trial.[41] While Weinstein urges that this figure should not be regarded as an absolute necessity,[42] it is itself ten years shorter than the

[40] Under F.R.E. 801(c), an interrogatory answer is hearsay except as to the party furnishing the answer, as to whom it is not hearsay under Rule 801(d)(2). While a deposition by written questions under F.R.Civ.P. 31 may be used against all parties present or represented or with reasonable notice, under F.R.Civ.P. 32(a), no such depositions were taken here.

[41] It should be noted, however, that the twenty year age period for a document is dated from "the time it is offered" according to 901(b)(8).

[42] Weinstein 901(b)(8)[01] at 901 101.

period under common law.[43] This is explained in the Advisory Committee Notes as being due to a shift in the underlying rationale for the rule from an emphasis on the unavailability of witnesses to an emphasis on the unlikeliness of a fraud over such an extended time perid. While the Notes state that any time period is bound to be arbitrary, we feel that in the present case some additional indicia of authenticity are needed where all of the documents fall short of the twenty year limit.

4. *Self-Authentication Under Rule 902*

Rule 902 provides that certain documents are "self-authenticating" to the extent that no extrinsic evidence of authenticity is needed. Although 902(3) lists Foreign Public Documents as being of this type, the Advisory Committee Notes to 902(4) make it clear that 902(3) applies to the originals of documents and that 902(4) is the section applicable to copies. Under this section the copy must be certified as correct by either the custodian or other authorized person, and this certification must itself conform to Rule 902(3) in order to be received.[44]

None of the documents involved here were obtained by plaintiffs from official custody or were accompanied by this type of official certification, and thus none are "self-authenticating" under Rule 902. Since the method of authentication provided in Rule 902 is not exclusive, however, plaintiffs' failure to procure certified copies does not bar authentication of the documents under Rule 901.

5. *"Best Evidence" Rule*

An issue closely related to authentication is set forth in Article X, often referred to as the "Best Evidence Rule." Rule 1002 states that the original of any writing is required, "except as otherwise provided in these rules . . ."

---

[43] Advisory Committee Notes to Rule 901(b)(8).

[44] Advisory Committee Notes to Rule 902(4).

One such exception is stated in Rule 1003, which admits "duplicates"[45] to the same extent as the originals, provided there are no genuine questions as to authenticity and it would not be "unfair" to admit them in the circumstances. The documents involved are all duplicates and would satisfy these conditions. However, the protocols and testimony which plaintiffs offer may be viewed as public records, and there is authority which suggests that Rule 1005 supersedes Rule 1003 with respect to public documents.[46]

Rule 1005 deals specifically with Public Records, and provides two alternative methods of satisfying the "best evidence" requirements for copies of documents falling within its scope. The first is by providing a copy certified as correct in accordance with Rule 902, which as we noted *supra* has not been done with respect to any of the documents under consideration here. The second method is by presenting testimony of a witness who has compared the copy with the original. Only if neither of the foregoing can be obtained by "reasonable diligence" may other evidence of the contents be given. The plaintiffs have offered no testimony on the correctness of the copies offered, and have repeatedly asserted their intention to rest on their documentary evidence. Since "reasonable diligence" has not been exercised, the final clause of the rule is also inapplicable.

This section is one which, it turns out, was not invoked by the parties. Rather, we called it to the parties' attention as we were surveying the law after the conclusion of the evidentiary hearing, concerned that, in the welter of argument, it had in fact been invoked directly or indirectly. By letter, we inquired of the parties about its applicability. Plaintiffs replied in their letter to the Court of August 5, 1980, that:

---

[45] "Duplicate" is defined in Rule 1001, and would include the photocopy reproductions involved here.

[46] Saltzburg states that it is "an obvious point" that Rule 1003 is preempted by Rule 1005. Saltzburg at 255 (1980 supp.). Weinstein also concludes that 1003 is preempted. 5 Weinstein 1005[01] at 1005-4 (1978). *Cf. Amoco Production Co. v. United States*, 619 F.2d 1383, 1389-91 (10th Cir. 1980), *rev'g* 455 F.Supp. 46 (D.Utah 1977).

> defendants have not objected to the admissibility of the protocols or transcripts of testimony, or any other public records (or any other document for that matter) on the grounds that they are not true and correct copies of original records lodged elsewhere.

A review of the record reveals that this contention is correct. Melco has argued that many of the documents were "copies that merely happened to be in the possession of the party" and in their July 12, 1980 brief, they listed among their objections to the testimony and protocols several points relating to the absence of certification or authenticating testimony, which are listed in our discussion of the testimony in Part VIII-B, *infra*. At no time have any defendants invoked Rule 1005, however, and none of the other defendants have made even passing reference to the issues involved under Article X. We therefore conclude that, despite the fact that defendants might have prevailed on the point, any potential issues under Rule 1005 have been waived. *See* Rule 103(a)(1). We will consider Melco's objection under the standards of Rule 901 which we have explained *supra*.

Melco has also urged that the testimony is inadmissible under Fed.R.Civ.P. 80(c), which provides:

> (c) Stenographic Report or Transcript as Evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

Plaintiffs have provided no certification for the JFTC testimony they have proffered. There is little case law or commentary on this rule. Rules 80(a) and (b), which dealt with the appointment of stenographers to take evidence in U.S. federal courts, were abrogated by 1946 amendments to the Rules because of the Official Court Reporter Act of 1944, 28 U.S.C. § 753. *See* 7 Moore's Federal Practice Part 2 ¶ 80.01 at 80-2. Because of its original context, we believe that Rule 80(c) should be read to apply only to evidence which was stenographically reported in the United States federal courts.

See id. ¶ 80.02 at 80-7 (rule should now be read in conjunction with Official Court Reporter Act of 1944). Accordingly, the rule has no application to the testimony before us, which was recorded in Japan.

Having concluded our discussion of authentication and related matters, we turn to what are probably the most hotly contested evidentiary points, those relating to foundation requirements under 803(6), the business records exception to the hearsay rule.

B. *Qualification as a Business Record Under Rule 803(6)*

It is conceded that the numerous diaries, memoranda and letters considered during the pretrial evidentiary hearings are hearsay[47] and that to be admitted they must qualify under one of the exceptions to the hearsay rule.[48] The principal exception

---

[47] Plaintiffs contend that the documents are not hearsay because they are admissions under Rule 801(d)(2). We consider this contention in its legal aspects in Part II C, *infre*. There are also some instances where the plaintiffs purport to offer documents for a non-hearsay purpose, *i.e.*, not to prove the truth of the matters contained herein. This proffer is made primarily with respect to certain of the diary entries, and the Japan Victor document. The plaintiffs contend that these notations are "verbal acts" which are evidence of the conspiracy merely by virtue of their having been made, regardless of the truth or falsity of the matters asserted therein. They also contend that certain notations in the diaries which might otherwise be "internal hearsay," *see* part II G, *infra*, are similarly offered not for the truth of the matter asserted therein, but simply for the fact of their having been made, thereby overcoming any internal hearsay objection. *See generally United States* v. *Zenni*, 492 F.Supp. 464 (E.D.Ky.1980). We discuss these matters *infra*.

[48] In addition to the hearsay exception of Rule 803(6), which we consider in this section, plaintiffs suggest that two other exceptions listed in Rule 803 are applicable to some or all of the documents: 803(1) and 803(5). These exceptions permit the admission into evidence of:

> (1) *Present sense impression*.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

> (5) *Recorded recollection*.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been

made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

There are three principal requirements of Rule 803(1). The first requirement is that the declarant personally perceived the event described. *See* 4 Weinstein 803(1)[01] at 803-74 (1979). The second requirement is that the statement be an explanation or description of the event, rather than a narration. *See id.* at 803 76. The third and perhaps the most important requirement is contemporaneity of the statement and the event described. The reason for the exception for present sense impressions, as stated by the advisory committee, is "that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." In *United States* v. *Narcisco*, 446 F.Supp. 252, 285 288 (E.D.Mich.1977), a period of two hours between the event and the statement was found to be ample time for reflection, and the statement was excluded for lack of contemporaneity. In *Hilyer* v. *Howat Concrete Co., Inc.*, 578 F.2d 422 (D.C.Cir.1978), a period of fifteen to forty-five minutes between the event and the statement was too great to allow admission of the statement under 803(1). And in *Wolfson* v. *Mutual Life Insurance Co. of New York*, 455 F.Supp. 82 (M.D.Pa.), *aff'd mem.*, 588 F.2d 825 (3d Cir. 1978), the district court stated that statements made several hours after a meeting probably would not be sufficiently contemporaneous.

The requirements of Rule 803(5) are apparent from its language. First, the rule itself, as well as the Advisory Committee Note, the legislative history, and all commentators, speaks of "the witness," in contrast to the other hearsay exceptions, which speak of "the declarant." We think it plain that in the contemplation of its drafters and of Congress, Rule 803(5) applies only to the recorded recollection of a witness who is present and testifies, and not to the recorded recollection of an absent declarant. Moreover, the proponent of the statement must show that it was made or adopted at a time when the subject matter was fresh in the witness's memory, and that the witness now has insufficient recollection to enable him to testify fully and accurately. *United States* v. *Williams*, 571 F.2d 344 (6th Cir.), *cert. denied*, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978); *United States* v. *Judon*, 567 F.2d 1289, 1294 (5th Cir. 1978). If these requirements are not met, the evidence must be excluded. *Id.*

Although the plaintiffs have invoked each of these sections in support of their claims of admissibility of certain documents, in no case have they laid the necessary foundation (that which we have just described), hence we shall not burden the record by further reference to these rules.

upon which the plaintiffs, as proponents of the evidence, rely is F.R.E. 803(6), the business records rule.[49] The Rule creates an exception from the hearsay rule for evidence which meets the following requirements:

> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

It is clear that business records need not be in a particular form to be admissible under Rule 803(6), which refers broadly to "a memorandum, report, record, or data compilation, in any form." There are cases which hold, for example, that personal diaries or appointment books which are kept regularly for a business purpose may be admissible under Rule 803(6). *E.g.*, *United States* v. *McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979). We thus reject defendants' position that a personal diary, though kept for business purposes, is per se inadmissible. Other cognate documents which have been found admissible are notes made in the course of negotiations for a business opportunity, *Magnus Petroleum Co., Inc.* v. *Skelly Oil Co.*, 446 F.Supp. 874, 882-83 (E.D.Wis.1978), and a customer book kept by a member of a heroin importation consipiracy. *United States* v.

---

[49] The use of the term "business records" is imprecise. Rule 803(6) uses the phrase "records of regularly conducted activity." However, because "business record" is a widely used and convenient shorthand version, we shall utilize it throughout this opinion.

Baxter, 492 F.2d 150, 164 (9th Cir. 1973), *petition for cert. dismissed*, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974). Of course, a diary may fail to qualify as a business record. In *Hospital Television Inc.* v. *Wells Television, Inc.*, 462 F.2d 417 (8th Cir.), *cert. denied*, 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972), Mr. Justice Clark, sitting specially, upheld the District Court's refusal to admit a diary of longhand notes into evidence under 28 U.S.C. § 1732(a) on the grounds that it was not a business record.

1. *The Impact of Rule 104(a); Will Inadmissible Evidence Suffice?*

In determining whether the diaries and memoranda qualify under 803(6), we must, at the threshold, confront the question whether such a determination depends upon admissible evidence. Defendants submit that it does; plaintiffs submit that it does not. Neither the Advisory Committee Notes nor any of the commentators have specifically addressed the question whether determination of 803(6) status comes under 104(a), in which case it could be made on the basis of inadmissible evidence, or whether it is subject to the provisions of 104(b), which on our reading requires admissible evidence. *See* p. 1219, *supra* (quoting Rule 104). Rule 104(b) applies by it terms only "[w]hen the *relevancy* of evidence depends on the fulfillment of a condition of fact" (emphasis added). The question is a close one, but with the qualification hereinafter stated, we conclude that hearsay exceptions do not raise questions of *relevancy* conditioned on fact.

The term "relevancy" as used in the Federal Rules of Evidence does not encompass all objections to the admissibility of evidence. Evidence may be quite relevant to the issues in a lawsuit, but still be barred as hearsay, or for other reasons. Conversely, evidence may be otherwise admissible, but barred as irrelevant. *See* Seidelson, *Conditional Relevancy and Federal Rule of Evidence 104(b)*, 47 Geo.Wash.L. Rev. 1048, 1059-1062 (1979). The Advisory Committee Note to Rule

104(a) gives several examples of evidentiary issues which are *not* matters of conditional relevancy-unavailablity of a hearsay declarant and the against-interest nature of a hearsay declaration. Thus it is clear that Rule 104(b) does not generally apply to determinations of the applicability of the hearsay exceptions.

The determination of business record status, in particular, is one which, before the Rules, was always for the court to make; indeed, we know of no instance where that matter has been submitted to the jury. We conclude that this determination is still for the Court to make in accordance with Rule 104(a), and that we are not bound by the Rules of Evidence in making the 803(6) determination. Therefore, we may rely upon evidence which is wholly inadmissible, or is admissible only against certain parties, in determining whether or not the proffered documents meet the requirements of Rule 803(6).

Since the determination of business record status will not be submitted to the jury at any point, there is no reason for us to treat our ruling on admissibility under 803(6) as a "prima facie" test. *Cf.* discussion at pp. 1218-1219, *supra*. Consequently, there is no reason to apply a lowered standard of proof to the determination. *Cf. id.* As a result, we will decide the questions relating to business record status on the basis of the preponderance of the evidence.[50]

As a corollary of this ruling, we hold that if the proffered documents qualify as business records, they will be admissible against all parties. The defendants have argued that a document which is qualified as a business record by evidence which is admissible only against one defendant would itself be admissible only against that defendant. Our ruling that 104(b) does not apply to 803(6) undercuts defendants' position, since the qualification of a document under 104(a) may be based on evidence which is not admissible against the party against whom the document is offered.

[50] *See* Saltzburg at 502 (court should "find" facts relevant to hearsay exceptions).

The defendants make forceful arguments against this position. They note, correctly, that they are entitled to attack the weight of any documents offered as business records before the jury by showing the lack of regularity of their preparation or other indicia of untrustworthiness. If admissibility as a business record is predicated upon inadmissible evidence, they submit that they should then be permitted to counter it with other inadmissible evidence. Coming full circle, they doubt the viability of the latter proposition, hence they question the validity of the former. Acknowledging the force of this position, we conclude that a strong argument can be made that the "custodian or other authorized witness" provision of 803(6) is tantamount to a requirement of qualification of a business record by admissible evidence.

While the question is not free from doubt, we nonetheless conclude that 104(a) applies in this area and that qualification as a business record may be based upon inadmissible evidence.

2. *The Requirement That The Records Be Kept In the Course of A Regularly Conducted Business Activity And That It Was The Regular Practice of That Business Activity to Make the Record.*

Rule 803(6) requires not only that a document must be "kept in the course of a regularly conducted business activity," but also that it must be "the regular practice of that business activity to make the memorandum, report, record, or data compilation" (we refer to this hereinafter as the "regular practice" requirement). It is the regular practice requirement which is mainly at issue. We address it at length because of the significant dispute between plaintiffs and defendants as to its meaning.

Defendants' approach to the language is literal, and rigorous. In defendants' submission, the rule says just what it means and means just what it says because of its underlying rationale. On their view "business records" can come in without the necessity of calling all the persons with personal knowledge of their construction precisely because their reliablity is

demonstrated by evidence of their making pursuant to established and routine company procedures for the systematic conduct of its business. Plaintiff, on the other hand, despite lip service to the text of the rule, downplay the "regular practice" terminology, virtually excising notions of "routineness" from the rule, and instead appear to substitute therefor a requirement of reliability. Plaintiffs' theory is that no more need be shown to require admission of a business-related document under 803(6) than that it is business-related and that its sources of information or other circumstances indicate reliability and trustworthiness. As will be seen, we conclude that the defendants' view of the Rule is the correct one.

The regular practice requirement originated in the Business Records Act, 28 U.S.C. § 1732(a), which governed the admissibility into evidence of business records in federal courts until the Federal Rules of Evidence took effect in 1975. Rule 803(6) as submitted to Congress did not include this requirement in its text, although a comparable requirement might well have been inferred from the Advisory Committee Note, which commented that "[t]he element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." The House Judiciary Committee restored the explicit regular practice requirement, and commented that "the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a *neccessary further assurance* of its trustworthiness."[51] (emphasis added). Thus it is plain that the regular practice requirement was taken by the House Judiciary Committee directly from existing law. Accordingly, we may appropriately consult pre—F.R.E. decisions interpreting the Business Records Act,

[51] H.Rep.No. 93-650, 93rd Cong., 1st. Sess. (1973) [hereinafter cited as "House Report"], U.S. Code Cong. & Admin.News 1974, p. 7051, 7087. The Senate Judiciary version of the rule in this respect. *See* S.Rep.No. 93-1277, 93rd Cong., 2d Sess. (1974) [hereinafter cited as "Senate Report"].

as well as post—F.R.E. decisions, to determine the content of the requirement.

Plaintiffs argue that "Congress, in enacting Rule 803(6), intended to liberalize the business records exception rather than to restrict prior practice."[52] Although the rule did liberalize the definition of what constitutes a "business," to the extent that they argue that there is a liberalization of *foundational* requirements over prior practice, we note our disagreement. We find nothing in the Advisory Committee Notes or congressional debates suggesting otherwise. The House Judiciary Committee's action and the requirements of 803(6) relating to personal knowledge, *see* Part II.B.5, *infra*, support our view.

In *Gordon* v. *Robinson*, 210 F.2d 192, 196 (3d Cir. 1954), the Court of Appeals commented:

> The legislative history of the Business Records Act clearly shows that it was not the intent of the draftsmen to make admissible all evidence, no matter how incompetent or irrelevant, merely by virtue of the fact it appeared in a record made in the regular course of business. Rather it was Congress' purpose to admit into evidence entries of a purely clerical or routine nature not dependent upon speculation, conjecture or opinion, where "accuracy is substantially guaranteed by the fact that the record is an automatic reflection of observations" without the necessity of calling the various entrants to identify the entries as their own, as was required under the common law shop book rule.

In *Standard Oil Company of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958), the Court of Appeals considered the admissibility of a number of memoranda, letters, and reports dealing with the pricing and marketing policies of oil companies other than the ones in whose files the writing was found. The Court of Appeals excluded the documents because of its finding

[52] Plaintiffs' Supplemental Memorandum in Support of the Admissibility of Evidence Relating to Certain Issues Raised during the Evidentiary Hearings, at p. 5 (hereinafter Post-Hearing Supplemental Memorandum).

that the plaintiff had failed to meet the burden of proving that the memoranda were made pursuant to any systematic or routine procedure. In so holding the Court discussed the regular practice requirement of § 1732:

> A memorandum or record cannot be considered as having been made in the "regular course" of business, within the meaning of § 1732, unless it was made pursuant to established company procedures for the systematic or routine and timely making and preserving of company records . . . .
>
> Concerning almost all of the items comprising the grist of interoffice memoranda and letters which were introduced, the nonexistence of any such company procedure seems almost self-evident. They were patently intended as communications between employees, and not as records of company activity. Many of them were casual and informal in nature, seeking or providing information of a kind which could be, and no doubt often was, communicated by telphone or in conference. Most of them were apparently written as a result of the exercise of individual judgment and discretion.
>
> If there was any systematic or routine procedure being followed in the preparation and filing of such writings, the burden was upon appellee to prove it. He failed to do so, at least with regard to most such exhibits. Where this foundation was lacking, the exhibit was not admissible under § 1732.

Id. at 215 (footnotes omitted).[53]

The more recent decisions interpreting the regular practice requirement in Rule 803(6) have adhered to the standards articulated in *Gordon* and *Standard Oil*. *E.g.*, *United States* v. *Kim*, 595 F.2d 755, 761 (D.C.Cir.1979); *United States* v. *McPartlin*, *supra*, 595 F.2d at 1347-50; *Coughlin* v. *Capitol Cement Company*, 571 F.2d 290, 307 (5th Cir. 1978). We endorse these standards too. Plaintiffs rely heavily upon

[53] While the Advisory Committee's Note takes issue with *Moore* on one point, it is a different one, relating to whether the reporting employee must be a participant in the matters reported.

McPartlin, an action involving conspiracy to violate the wire and travel statutes arising from Ingram Corporation's bribery of city officials in connection with a sludge-hauling contract. The Court of Appeals for the Seventh Circuit upheld the trial court's determination that desk-calendar appointment diaries of William Benton, and unindicted co-conspirator, and a witness for the government, who was also a vice-president of Ingram Corporation, were admissible business records pursuant to Fed.R.Evid. 803(6). However, the *McPartlin* decision did not depart from the rule that the proponent of a business record show that it was a regular practice to make the entries in question. As a foundation for admission, Benton testified at trial that he kept the diaries and made entries in them as a regular part of his business activity as a vice-president of Ingram. Moreover, he testified that he relied upon them, thereby establishing the important element of reliability. Also worthy of note is the fact that the diaries were used at trial not independently, but for corroboration of details.

Plaintiffs, in their Post-Hearing Supplemental Memorandum, argue that the courts have permitted documents to qualify as business records without regard to whether the particular type of record was routinely made. In support of this proposition they cite several cases, mostly pre-F.R.E., none of which support their position. In *United States* v. *Hyde*, 448 F.2d 815, 846 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972), the Court admitted handwritten notes on the details of a certain settlement made at a meeting at which the notewriter, Branum, was present. However Branum *testified* at trial that he *regularly* kept informal notes of transactions on note cards in such situations which he turned over to another officer of his company for safekeeping. In *United States* v. *Moran*, 151 F.2d 661 (2d Cir. 1945), the Court admitted a memorandum of a telephone conversation made by a bank employee. However, the court found that the memorandum was a "routine record made for the bank's business as such," *id.* at 662, thereby satisfying the regular practice requirement. *Magnus Petroleum Co.* v. *Skelly Oil Co.*,

supra, involved notes made in the course of negotiations for a business opportunity. However, based on the *testimony* of the scrivener, who was subject to cross-examination, the Court found them to be a part of a regularly conducted business activity.

Thus, we hold that for the diaries and memoranda to be admissible under 803(6), the plaintiffs must show[54] that their entries were made pursuant to a systematic and routine procedure for the conduct of business, one characterized by careful checking and habits of precision and regularity such as will justify confidence in the reliability of the record keeping. At the least there must be detailed showing of the nature of the business practice creating the document, the method of record-keeping, the source of the information, and the author's reliance on it. We will review the evidence of regular practice as we proceed through the documents one-by-one in our subsequent discussion. We turn now to cognate question, the method of establishing that regularity of practice.

3. *The Requirement of Qualification by a Custodian or Other Qualified Witness*

F.R.E. 803(6) provides that its requisites be shown "by the testimony of the custodian or other qualified witness." This provision not only places the burden of laying a proper foundation upon the proponent of the document, but appears to require that the foundation be laid in a specific way. The plaintiffs have not sought to establish that the diaries are business records by such testimony. Rather the plaintiffs have relied upon a variety of other means and contentions: (1) evidence from the protocols and to a lesser extent from the JFTC testimony; (2) the fact that the diaries, memoranda, and other materials were produced by defendants pursuant to certain answers to interrogatories in which they invoked F.R.Civ.P. 33(c); (3) alleged estoppel to deny business records status because of the text and terms of certain answers to interroga-

---

[54] *See* p.____, *infra* (burden of proof).

tories; (4) cross references to other diaries, documents, and answers to interrogatories in the case; and (5) evidence from the diaries and other documents themselves, *i.e.*, the fact they they refer to important business matters; relate information supposedly relied upon by the employers of the diarists; and are said to look like business records (we have dubbed this the "res ipsa loquitur" theory of business records).

Because of plaintiffs' failure to comply with literal terms of F.R.E. 803(6) the defendants maintain that the diaries and memoranda do not qualify as business records. As evidence of the rigor of the requirement, the defendants point to the fact that Business Record Act, 28 U.S.C. § 1732, which, as we have noted, governed the admission of business records into evidence in federal courts from 1936 until the F.R.E. became operative in 1975, contained no such requirement. They contend that this change in the law was carefully considered, and reflects a desire to be more rigorous in connection with the qualification of documents as business records, by requiring testimony of some qualified witness. *Cf.* p.____, *supra*. The defendants cite a number of cases which, on their reading, hold that such testimony is required. *E.g., Coughlin* v. *Capitol Cement Company*, 571 F.2d 290 (5th Cir. 1978); *United States* v. *Jones*, 554 F.2d 251 (5th Cir.), *cert. denied*, 434 U.S. 866, 98 S.Ct. 202, 54 L.Ed.2d 142 (1977); *United States* v. *Carranco*, 551 F.2d 1197 (10th Cir. 1977). Defendants also cite a number of pre-F.R.E. cases to similar effect. *See, e.g., United States* v. *Rosenstein*, 474 F.2d 705 (2nd Cir. 1973); *Hagans* v. *Ellerman and Bucknall Steamship Company*, 318 F.2d 563, 574-77 (3d Cir. 1963).

Coughlin, for instance, appears to be quite specific on the point:

> There can be no doubt but that the party who seeks to introduce written evidence must in some way authenticate it. We agree that under the exception, "[t]he testimony of the custodian or other qualified witness who can explain the record-keeping of the organization is essential. If the witness cannot vouch that the requirements of Rule 803(6) have been met, the entry must be excluded."

571 F.2d at 307 (citation omitted). There are similar statements in *Hagans* v. *Ellerman* ("no foundation was offered to qualify the document as a record kept in the ordinary course of business . . . or that such surveys were systematically ordered for it"). *See also Lewis* v. *Baker*, 526 F.2d 470, 474 (2d Cir. 1975) ("All that is required is that someone who is sufficiently familiar with business practices be able to testify that the record was made regularly as part of those business practices and that the record is a truly authentic one"); *United States* v. *Blake*, 488 F.2d 101, 105 (5th Cir. 1973) ("testimony must be given by a custodian"); *National Reserch Development Co.* v. *Great Lakes Carbon Corp.*, 410 F.Supp. 1108, 1113 n. 20 (D.Del.1975) (M. Schwartz, J) ("basic elements of the Federal Rules of Evidence 803(6) exception . . . are lacking in that there has been no showing by a 'custodian or other qualified witness' that the notes were either made or kept in the regular practice of investors' professional activity"). Plaintiffs, on the other hand, counter with the argument that the literal approach to 803(6) has been discarded by courts under appropriate circumstances. Plaintiffs cite a number of cases where records were qualified by courts under 803(6) in the absence of a custodian. *E.g., United States* v. *Hines*, 564 F.2d 925 (10th Cir. 1977), *cert. denied*, 434 U.S. 1022, 98 S.Ct. 748, 54 L.Ed.2d 770 (1978) (vehicle bill of sale); *United States* v. *Holladay*, 566 F.2d 1018 (5th Cir.), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978) (seized gas station notebooks demonstrating themselves to be part of single entry bookkeeping system continually maintained since 1967 for purpose of accounting for receipts and disbursements held admissible under 803(6)). *Accord*, 4 Weinstein ¶ 803(6)[02] at 803-152. Plaintiffs also cite pre-F.R.E. decisions in support for their position. *United States* v. *Leal*, 509 F.2d 122 (9th Cir. 1975) (hotel registration forms required by Hong Kong law supported by affidavit of assistant manager); *United States* v. *Ragano*, 520 F.2d 1191 (5th Cir. 1975) (corporate reports required by state law admitted without testimony). Plaintiffs submit that this result is supported by the modern and flexible approach of the Federal Rules which favor the submission

rather the the exclusion of probative evidence, citing F.R.E. 102.

Close examination of the cases cited by both parties reveals that none of them have come squarely to grips with the question with which we are faced: may the proponent of materials sought to be qualified under F.R.E. 803(6) meet his burden without introducing testimony of the "custodian or other qualified witness." In the cited cases upholding exclusion there was plainly an inadequate basis to meet 803(6), whether or not live testimony was supplied.[55] In the cases admitting the documents, the court had no difficulty in finding the test met, but did not expressly resolve the question whether the evidence which qualified the document must be disregarded because of the absence of the witness. *See also E. C. Ernst, Inc.* v. *Koppers Co.*, 626 F.2d 324 at 330 (3d Cir. 1980) (rule satisfied by testimony of the custodian). Indeed, defendants correctly distinguish the cases relied upon by plaintiffs in this area (some

[55] For instance, in *Coughlin*, the Court noted:

> Only two witnesses testified with respect to the agenda. J. Dan Bohannan, one of plaintiff's attorneys, testified that he found it in the Association's files during discovery and acknowledged that it did not bear a signature. Bohannan knew nothing else about the source or authenticity of the document. Doug Riff, who was president of Olmos Rock Products Corp. and an officer of the Association in 1969, identified the agenda and stated: "I don't know who prepared it. I suppose Al Brown." Brown, the executive director of the Association, was not available to testify.

571 F.2d at 307. It is plain that the document was not qualified as a business record, notwithstanding the testimony of these two witnesses. In *Rosenstein*, defendants were convicted of conspiracy to evade and evasion of income taxes, having accomplished this by creating a dummy corporation, CTE, in Liechtenstein. Their American clients were asked to make their commission payments payable to CTE and were instructed to send the checks to an attorney, Batliner, in Liechtenstein. At trial, the government offered a CTE file into evidence through the testimony of an associate of Batliner. The Court held that the file was inadmissible under the business records exception because the witness "not only did not keep the records, he did not even know from his personal knowledge that the records were kept in Batliner's office. He did not testify to the business practice of CTE or that it was the practice of CTE to keep the documents which were introduced." 474 F.2d at 710.

but not all of which are cited in the text) on one of three grounds: (1) there was some form of testimony—or stipulation—establishing foundation; (2) unlike diaries or memoranda of meetings, the records involved in those cases were on their face routine and regular clerical or financial documents such as hotel receipts, purchase orders, financial statements, stock transfer records, or filings with government agencies; and (3) the courts did not discuss the precise issue before us.

In order to resolve this question of law, we look first to the Advisory Committee Note to Rule 803(6). After listing a number of business records statutes drafted or enacted in the 1920's and 1930's, including the federal Business Records Act, 28 U.S.C. § 1732, which was based on the so-called Commonwealth Fund Act, the committee continued:

> These reform efforts . . . concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.
>
> On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. [citations omitted]. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, *abolished the common law requirement in express terms*, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

(Emphasis added). There is no indication in the Advisory Committee Note that the Committee intended, by following the language of the Uniform Business Records as Evidence Act, to

change federal law by requiring live testimony where none had been required before. To the contrary, the committee strongly endorsed the liberalization of common-law requirements as to the production of witnesses to qualify documents as business records. Moreover, the committee's adoption of the language of the Uniform Act appears to reflect a determination that the "burdensome and crippling" common-law rules should be abolished "in express terms," instead of implicitly as in the Business Records Act.

Because we believe that the Federal Rules of Evidence favor a flexible approach, see Rule 102, and in the absence of a clear indication to the contrary in the Advisory Committee Note, we opt for the view that the testimony of the custodian or other qualified witness is not a sine qua non of admissibility in the occasional case where the requirements for qualification as a business record can be met by documentary evidence, affidavits, or admissions of the parties, *i.e.*, by circumstantial evidence, or by a combination of direct and circumstantial evidence.

It is clear from the express language of F.R.E. 803(6) that before a document can be admitted into evidence a proper foundation for its admission must be laid and that the burden of laying such a foundation is on the party seeking to introduce the document. *Accord, United States* v. *McPartlin, supra; Standard Oil Co. of California* v. *Moore, supra; Hagens* v. *Ellerman & Bucknall Steamship Company, supra; Coughlin* v. *Capitol Cement Co., supra.* We hold that to meet this burden in the absence of a "custodian or other qualified witness," plaintiffs must show regularity of practice in some precise and explicit manner, either by external evidence or from the documents themselves plus surrounding circumstances. To require less would strip the regularity of practice requirement of vitality, at least in a case such as this where what are proffered are not routine clerical or financial documents such as hotel registration forms or vehicle bills of sale or bank statements, but rather diaries and memoranda heavily laden with cryptic and half-expressed statements which cannot, we

find, be interpreted without the testimony of the author explaining what he meant by each entry. We will consider plaintiffs' proffer, notwithstanding the lack of "custodian or other qualified witness," but against this rigorous standard.

4. *The Import of Rule 33(c) Production.*

Plaintiffs contend that by producing the diaries and memoranda pursuant to F.R.Civ.P. 33(c) the defendants have conceded that they are business records. They rely in this respect upon the language of Rule 33(c), of the Civil Rules which is entitled "Option to Produce Business Records."[56] They also rely upon the wording of their interrogatories 8 and 42-44 to each of the producing defendants and their responses thereto.

The first problem with this argument is that the answers to the interrogatories make clear that the defendants are not conceding that the materials produced are business records within the meaning of 803(6). Secondly, we think that the bar and the courts would be startled if they were retrospectively to find that a production under Rule 33(c) constituted an admission that everything that was produced qualfied as a record of regularly conducted activity within the meaning of F.R.E. 803(6). There is nothing in the language of Rule 33(c) which suggests that the very specific requirements of 803(6) are waived by its invocation. That invocation is considered a convenience to the bar and a means to facilitate the discovery process. The problems of federal discovery are great enough without rendering Rule 33(c) into a trap for the unwary.[57]

5. *The Personal Knowledge and Trustworthiness Requirements*

Rule 803(6) requires as a condition of admissibility that business records be "made at or near the time by, or from

---

[56] While not the basis for our conclusion, we note that 803(6) refers to "records of regularly conducted activity," not "business records," the terms used in Rule 33(c). *See* n.49 *supra*.

[57] We have cited no cases in this segment of our opinion because we can find none that are apposite.

information transmitted by, a person with knowledge." This provision represents a change from the Business Records Act, which provided that "lack of personal knowledge by the entrant or maker" could be shown to affect weight but not admissibility. 28 U.S.C. § 1732(a) (repealed 1975).

This provision of the rule was intended to deal with the problem of business records which merely record information transmitted by an informant. The Advisory Committee Note comments:

> An illustration is the police report incorporating information obtained from a bystander; the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson* v. *Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision . . . The rule . . . requir[es] an informant with knowledge acting in the course of the regularly conducted activity.

The Senate Judiciary Committee stated its view that the personal knowledge requirement not be interpreted to require the identification of the particular person upon whose knowledge the record was based, so long as the proponent of the evidence could show that it was the regular practice of the activity to base its records upon information transmitted by a person with knowledge:

> It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, *e.g.*, in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of

> a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system.

Senate Report, U.S. Code Cong. & Admin. News 1974, p. 7063. Thus, in order to meet the personal knowledge requirement of the rule, plaintiffs must show either (1) that the author of the document had personal knowledge of the matters reported, or (2) that the information he reported was transmitted by another person who had personal knowledge, acting in the course of a regularly conducted activity, or (3) that it was the author's regular practice to record information transmitted by persons who had personal knowledge. In the absence of a showing of personal knowledge, made in one or more of these three ways, a document cannot qualify as a business record.

A related provision of Rule 803(6) denies admissibility even to evidence which meets every other requirement of the rule, if "the source of the information or the method or circumstances of preparation indicate lack of trustworthiness." The burden of showing the untrustworthy nature of evidence which is otherwise admissible under 803(6) is on the opponent of the evidence. In assessing the trustworthiness of the documents before us, we would look, *inter alia*, to factors analogous to those enumerated in our Public Records Opinion at 26-27. Thus, we might find that a document which is obviously riddled with hearsay statements which were not transmitted by a person with knowledge is so untrustworthy as to fail to qualify under the 803(6) exception. *See* Part II-G, *infra* (discussion of Rule 805).

We also think that a document which is unintelligible is for that reason untrustworthy if offered to prove the truth of *one* interpretation out of many possible interpretations which could be put on the document. The requirement of trustworthiness is intended to prevent the trier of fact from deciding cases on the basis of mere speculation rather than probative evidence. When a document which is unintelligible on its face is presented to the trier of fact, it is not probative evidence, but merely an invitation to engage in unfounded speculation. In

such a situation, the document itself reveals its own "method or circumstances of preparation" sufficiently to make it untrustworthy under the 803(6) proviso.

Having completed our analysis of Rule 803(6), we turn to the issues presented by plaintiffs' proffer of the documents as admissions under Rule 801(d)(2)(B), (C) and (D).

C. *Qualification as Admissions by Party-Opponent under Rules 801(d)(2)(B), (C) and (D).*

In addition to asserting admissibility under 803(6), *supra*, upon which plaintiffs place primary reliance, they offer many of the documents being considered here as Admissions by Party-Opponent under Rules 801(d)(2)(B), (C) and (D):

> (d) Statements which are not hearsay. A statement is not hearsay if . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is . . . (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship . . .

Unlike statements admitted under Rule 803(6), which would be admissible against all parties, statements admitted under 801(d)(2)(B), (C) and (D) are admissible only against parties who have adopted the statement, or who bear the specified relationship to the declarant.

As a preliminary matter we must decide whether we are to determine admissibility under 801(d)(2) according to the provisions of 104(a) alone, *i.e.*, whether inadmissible evidence may be considered, or whether 104(b) also applies, limiting our decision to admissible evidence. *See generally* pp. 1219-1220, *supra*. While Rule 801(d)(2) is not a hearsay *exception* (see discussion *infra)*, the same types of "competency" issues must be evaluated in establishing "authority," "agency," or "scope of employment" as are considered in ruling on hearsay excep-

tions. These issues are *not* ones of conditional relevancy within the meaning of Rule 104(b), for the reasons stated in our discussion of the interface between Rules 104 and 803(6), at pp. 1229-1230, *supra*. In accordance with our reasoning stated there, we shall determine preliminary issues of fact under Rule 801(d)(2) on the basis of both admissible and inadmissible evidence, and shall apply a preponderance of the evidence standard of proof.[58]

1. *"Non-Hearsay"—the Treatment of Admissions in the F.R.E.*

Subdivision (d) of Rule 801 is a marked departure from the common law in that all of the statements it defines as "not hearsay" were considered hearsay under preexisting law. Saltzburg at 457. The subsection we are dealing with, (d)(2) Admission by Party Opponent, was an "exception" under the tradi-

---

[58] The decision of the court on these preliminary issues does not of course preclude the parties from raising the same issues with regard to the substantive portion of the case. For example, "scope of employment" issues may arise in conjunction with the attendance of defendants' employees at meetings of various trade associations. The preliminary determinations by the court should not affect these deliberations and the trier of fact is not bound by any such decision of the court. Only admissible evidence, of course, may be considered by the trier of fact on these ultimate issues. *See* 1 Weinstein ¶ 104[01] at 104-16, ¶ 104[02] at 104 23.

In some instances issues of "competency" may coincide with issues of relevancy. For example, under Rule 801(d)(2)(B), the statement of a non-party is admissible as an admission if a party adopts the statement. The determination of whether or not the statement was adopted by the party would not ordinarily be an issue of relevancy. However, the relavancy of a statement made in a party's presence may also depend on the party's response to the statement. For example, an otherwise irrelevant accusation of a third party may become relevant only if the party accused expressly or tacitly assented to it. Thus the factual predicate of the "relevancy" determination may coincide with that of "adoption." In such cases *both* relevancy and hearsay issues must be resolved in favor of admissibility for evidence to be received relevancy on a standard of substantial admissible evidence, *see* pp. 1219-1220, *supra*, and hearsay on a standard of preponderance of all evidence, including inadmissible evidence.

tional hearsay rule.[59] The rationale for admitting this type of statement has been the subject of lengthy academic dispute.[60]

The Advisory Committee Notes explain the treatment of admissions in the Federal Rules as follows:

> Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

Congress enacted the proposed Rule 801(d)(2) without change.[61]

---

[59] Saltzburg at 457; McCormick § 262 at 629 (1972); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore, Evidence § 1048, 4.

[60] Morgan and Wigmore propose that a party cannot object that his own statement was not under oath, or that he lacked opportunity to cross examine himself. Morgan, 266; Wigmore § 1048, 4. Strahorn asserts that admissions are "relevant conduct of the speaker," Strahorn, The Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484 at 576 (1937), and Lev claims they are admitted under the doctrine of "estoppel." Lev, The Law of Vicarious Admissions—An Estoppel, 26 U.Cinn.L.Rev. 17, 29, 30 (1957). Saltzburg and McCormick, however, feel that the most satisfactory explanation is that they are admitted as "the product of the adversary system." McCormick also notes the similarity to stipulations or admissions in pleadings. McCormick § 262, 629.

[61] Congressional action on another proposed rule suggests, however, that the distinction which the Rules make by defining admissions as non hearsay instead of as hearsay exceptions should be given little weight. Rule 806 as submitted to Congress provided that the credibility of a hearsay declarant might be attacked or supported as if the declarant had testified as a witness. The Senate Judiciary Committee amended the rule to apply to "a hearsay

The most important change from the common law made by Rule 801(d)(2), apart from denominating admissions as non-hearsay rather than a hearsay exception, was the addition of subsection (D), making admissible against a party "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Statements in this category, commonly known as "vicarious admissions," were not admissible under the traditional common law rule, which required "speaking authority" as codified in subsection (C). *See infra*. The Advisory Committee explained this change as follows:

> The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusive of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson* v. *Williams*, 256 F.2d 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N. V. KLM Royal Dutch Airlines* v. *Tuller*, 110 U.S.App.D.C. 282, 292 F.2d 775, 784 (1961); *Martin* v. *Savage Truck Lines, Inc.*, 121 F.Supp. 417 (D.D.C. 1954).

---

statement, *or a statement defined in rule 801(d)(2)(C), (D), or (E)*." (Emphasis added.). The Committee explained:

> While statements by a person authorized by a party opponent to make a statement concerning the subject, by the party opponent's agent or by a coconspirator of a party see Rule 801(d)(2)(C), (D) and (E) are traditionally defined as exceptions to the hearsay rule, Rule 801 defines such admission by a party opponent as statements which are not hearsay. . . . The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of Rule 806 is likely attributable to the *drafting technique used to codify the hearsay rule*, viz. some statements, instead of being referred to a exceptions to the hearsay rule, are defined as statements which are not hearsay.

(Emphasis added.) The House concurred in the amendment and the Senate proposal is now an integral part of the Rules, the consequence of which, we believe, should be widely noted.

The broad rule requiring receipt into evidence of the statements of a party's employee seems to rest on a slightly different foundation from the rule favoring receipt of a party's *own* statements. As Judge Weinstein has observed, "[v]icarious admissions do not lend themselves readily to any of the analyses proposed" to explain the receipt of admissions generally. He feels that vicarious admissions are received under the Rules because of the "practical need for pertinent evidence" and represent a judgment by the draftsmen that such statements would "on balance, be more helpful than harmful in determining truth." 4 Weinstein ¶ 801(d)(2)[01] at 801-137 & 138. This view is supported by the Advisory Committee Note, which explains the inclusion of vicarious admissions as the result of "[d]issatisfaction with [the] loss of *valuable and helpful evidence*." (emphasis added).[62]

2. *An Admission Must be an Assertion*

Under Rule 801(d)(2), an admission is defined as a "statement" which possesses certain attributes. The term "statement" is defined in Rule 801(a) to include oral and written assertions as well as nonverbal conduct, if intended as an assertion. Since all of the hearsay evidence before us is in written form, for our present purposes the term "statement" is equivalent to the term "written assertion."

The fact that admissions are defined as types of "statements" probably would not be of much import in the ordinary case. The term assumes prominence in this case, however, because the diaries of a number of Japanese executives offered by the plaintiffs are compilations of written notations. Some of the diary entries are comprehensible to the reader, but most are not, and are, in any event, recordation not of utterances or "statements" of the diarist, but "statements" or thoughts of a third party. Plaintiffs also offer a number of memoranda which are equally unclear. We are thus presented with two questions: (1) can a document which is, at best, a compilation of "statements" be admissible as a whole under 801(d)(2), without separate analysis of each statement therein; and (2) can a written notation which does not clearly assert the truth of some proposition be admissible under 801(d)(2)? We answer both questions in the negative.

[62] Quoted at p. 1240, *supra*.

First, as to whether or not a compilation can be admissible as a whole without separate analysis of each statement within it, we think that Rule 801(d)(2) requires that each statement be separately admissible. Unlike Rule 803(6), for example, which expressly authorizes the admission of a "data compilation" as a whole, Rule 801(d)(2) speaks in terms of individual "statements." Obviously, in some situations a compilation might be admissible because each of the statements within it is separately admissible. *E.g.*, *United States* v. *Evans*, 572 F.2d 455, 488 (5th Cir.), *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978) (defendant's appointment calendar admitted under 801(d)(2)(A)). The diaries before us are not of this character, however. Quite apart from the problem of entries which are incomprehensible, the diaries include at least two types of statements which may fail to qualify as admissions. First, there are entries which have been shown to be outside the scope of the diarist's employment by evidence extrinsic to the diaries themselves. For instance, some of the Japanese executives testified before the JFTC that their responsibilities related solely to the domestic Japanese market, but their diaries included scattered references to matters interpreted by plaintiffs as relating to exports. Secondly, there are a great many internal hearsay statements within the diaries. *See infra.* Under these circumstances, we cannot determine the admissibility of the diaries without a separate analysis of the individual statements in them.

Of equal importance is the question whether a written notation which cannot reasonably be characterized as an assertion can be admissible under 801(d)(2). The diary entries and memoranda which the plaintiffs seek to qualify under that rule differ greatly in their form from the usual type of statements which the courts have allowed into evidence as admissions. It is

instructive, for example, to examine the three cases cited favorably by the Advisory Committee in its notes explaining the admissibility of vicarious admissions under 801(d)(2)(D). In *Grayson* v. *Williams*, 256 F.2d 61 (10th Cir. 1958), the court of appeals upheld the admissibility of hearsay statements made by a truck driver concerning the collision which had given rise to the action:

> The judgment is challenged on the further ground that the court erred in allowing admissions of appellant Grayson [the driver] to be admitted in evidence against Southern Freightways, Inc. Three persons visited Grayson in the hospital several hours after the accident. They asked him if appellee's truck was in its proper lane. Lockhead testified in substance that Grayson replied that it was and stated further that he didn't see the Union Pacific truck until the last minute and couldn't avoid striking it. Minardi testified that he said both trucks were in their proper lane and "I just didn't see the truck in time enough to avoid striking it." Sgt. Schwarting testified that Grayson said he didn't see the other truck until it was right on him; that he cramped his wheels to the left but was too late and they hit.

Id. at 66. In *Martin* v. *Savage Truck Line, Inc.*, 121 F.Supp. 417 (D.D.C. 1954), the court admitted "a statement made by the driver of the truck to an investigating police officer at the scene of the collision . . . to the effect that he was driving at the rate of thirty miles an hour, but that the green light was with him," *Id.* at 418. In *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines* v. *Tuller*, 292 F.2d 775 (D.C.Cir.), *cert. denied*, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961), the court of appeals upheld the admissibility of a statement made by an aircraft radio operator to an investigator concerning the operator's own conduct during the airplane crash which was the subject of the lawsuit. In each of these cases, which the Advisory Committee cited as archetypal admissions, it was clear that the declarant was asserting certain facts, and it was equally clear what the facts were which he was asserting.

The statements which have come into evidence as admissions since the enactment of the Federal Rules of Evidence are for the most part equally clear. To take only one graphic example, in *Mahlandt* v. *Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626 (8th Cir. 1978), the plaintiffs claimed that their 3-year-old child had been bitten by a wolf named Sophie, who was kept by a naturalist in his back yard. The court of appeals reversed the trial court's exclusion of hearsay statements, including the wolf's custodian's written assertion that "Sophie bit a child that came in our back yard." *Id.* at 629. A clearer assertion of fact could hardly be imagined.

There are two reported decisions in which diary entries which may have been similar to those offered here have been allowed into evidence as admissions. *United States* v. *McPartlin*, 595 F.2d 1321, 1347-51 (7th Cir.), *cert. denied*, 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979); *United States* v. *Evans*, *supra*. The opinions in those cases do not provide sufficient information about the contents of the diaries offered there for us to determine whether they were as inscrutable as those offered here. In any event, both cases are plainly distinguished from the situation now before us by one crucial circumstance: in both cases the diarist himself was present at the trial and could clarify the meaning of any unclear diary entries. In *McPartlin*, the diarist testified at length as "the principal government witness." 595 F.2d at 1345. In *Evans*, the diarist was one of the defendants and could have challenged the government's interpretation of any entries which were unclear by testifying or by his counsel's objections. We are aware of *no* decisions holding that written notations which are not clearly assertions can come into evidence in the absence of testimony to explain their meaning.

The plaintiffs argue that a diary entry which is not an assertion is *ipso facto* not hearsay, since "hearsay" is defined in Rule 801(c) as "a statement . . . offered in evidence to prove the truth of the matter asserted." Although this argument has a superficial plausibility, it is fatally flawed as it applies to the documents involved here. Apart from a few entries which

plaintiffs purport to offer for a non-hearsay purpose, *i.e.* not to prove the truth of the matter asserted,[63] the plaintiffs' theory of the relevance of the diary entries is that the entries are susceptible to a certain interpretation which supports the plaintiffs' case. In other words, whatever the plaintiffs from time to time say, the fact is that plaintiffs' offer of the diary entries is for the truth of the matter which they claim to be asserted therein. Thus if the entries are not assertions, they are not probative evidence of any fact which is material to the determination of the action. Therefore any entries which are not assertions will be excluded as irrelevant under Rules 401 and 402, except insofar as they can be demonstrated to have been truly offered for a non-hearsay purpose.

We think that plaintiffs, as proponents of the diary entries, bear the burden of establishing that they are assertions and of ascertaining, with reasonable clarity, what the facts are which are asserted therein. The mere claim, in the form of counsel's argument, that entries which are on their face unclear and inscrutable are susceptible of a certain interpretation which supports plaintiffs' case, and that a jury should be permitted to decide what they mean, is not a sufficient foundation. Instead, the plaintiffs should have established the meaning of unclear diary entries through foundational evidence, in the form of testimony or otherwise. In the absence of such a foundation, the entries cannot qualify as admissions under Rule 801(d)(2).

The defendants have argued that an admission must be "clear and concise," citing *Pulver* v. *Union Inv. Co.*, 279 F. 699, 705 (8th Cir. 1922); *Evis Manufacturing Co.* v. *FTC*, 287 F.2d 831, 839-40 (9th Cir.), *cert. denied*, 368 U.S. 824, 82 S.Ct. 43, 7 L.Ed.2d 28 (1961). Although we find their authorities inapposite, we are in substantial agreement with their teaching that an unclear notation cannot be an admission, at least in the absence of foundation evidence, for the reasons stated. The defendants also argue that an admission must be communicated to someone. This is apparently an extension of their argument that an agent's statement cannot be an admission unless it was communicated to someone other than the agent's principal. While the latter contention has ample support in pre-F.R.E. law, we have determined that the decisions upon which defendants rely were overruled by the enactment of the Rules. *See* pp. 1246-1247, *infra*. We recognize the force of defendants' argument that a statement or notation which is never communicated by the declarant to *anyone* is less likely to be trustworthy than a statement which *is* so communicated. However, we see no reason to read into Rule 801(d)(2) a requirement which would preclude all uncommunicated statements, including, for example, all entries made in a private diary, from ever coming into evidence as admissions.[64]

[63] We will address that proffer *infra* in ruling on specific documents.

In accordance with the overall plan of this opinion, we defer our consideration of specific diaries and entries until after our discussion of all the legal issues raised by the parties.

3. *Adoptive Admissions*

Although the particular legal issues which now confront us under 801(d)(2)(B) were never sharply drawn in argument or briefs, a major difference in the positions of the parties sur-

[64] The defendants also argue that a vicarious admission under Rule 801(d)(2)(C) & (D) must be based upon the agent's personal knowledge. We find this issue very troubling, particularly since Judge Weinstein argues persuasively in support of such a personal knowledge requirement. 4 Weinstein ¶ 801(d)(2)(C)[01] at 801-156-58 and ¶ 801(D)(2)(D)[01] at 801-164. Judge Weinstein criticizes *Mahlandt* v. *Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626 (8th Cir. 1978), in which the Eighth Circuit refused to infer such a requirement. 4 Weinstein at 801-164-65. In view of our rulings that an admission must be an assertion, that an admission does not include internal hearsay statements unless adopted by the declarant, *see* pp. 1266-1267, *infra*, and that an admission under 801(d)(2)(D) must meet the clear requirement of the rule that it concern matters within the scope of the agent's employment, *see*, pp. 1245-1246, *infra*, we do not reach the question of a personal knowledge requirement for authorized or vicarious admissions. Any diary entries to which an objection might be interposed on the basis of an inadequate showing of the declarant's personal knowledge are here also subject to objection on the other grounds mentioned.

faced in the outlining of those factual patterns which, in plaintiffs' submission satisfied the criteria for adoption but which defendants claimed were insufficient. This disagreement involves the circumstances in which a party's reference to a document in a protocol, testimony, or interrogatory, constitutes an adoption of all or part of the writing referred to.

Rule 801(d)(2)(B) provides for the admissibility of a statement of which a party has "manifested his adoption or belief in its truth." We agree with Judge Weinstein that the language of the rule requires evidence that the party's conduct was "intended" as an adoption. Weinstein § 801(d)(2)(B)[01] at 801-144.[65]

---

[65] It seems clear that many such references are to writings which the "adopting" declarant has not read, either in whole or in part. The Advisory Committee Note to 801(d)(2)(B) state that while knowledge of contents is not "inevitably" essential, it is ordinarily so. The example given, where a party states that "X is a reliable person and knows what he is talking about," suggests that the adoptive declaration must quite explicitly manifest the party's adoption or belief in statements beyond those which he has heard or read. In cases of this type of "advance" adoption, McCormick suggests that the statements may be classified as "representative or vicarious admissions, rather than adoptive." McCormick § 246, at 525. We believe that it is the scope of the adoptive statement which renders knowledge of contents unimportant rather than its timing, and where such "carte blanche" approval is expressed, it is unimportant whether it is given in "advance" of the statements adopted or after they have been made, or whether the other criteria of representative admissions have been satisfied.

The only case which we have found that is close to the situation we have here, where long, complex writings are involved and where the adopting party has not been shown to have knowledge of the contents of the material "adopted," is *United States* v. *Article of Drug*, 362 F.2d 923 (3d Cir. 1966). The evidence there consisted of transcripts of a series of radio broadcasts, admitted to establish the intended use of vitamin and mineral products offered for sale by the defendant manufacturer. While the Court found that the defendant had "adopted as its own representations" the declarant lecturer's broadcasts, it is clear from the factual circumstances that the statements were not only adopted but also "authorized" and "within the scope of" the lecturer's "agency or employment." The declarant radio lecturer's picture appeared in defendant's catalogue along with the facts that he was defendant's "Chief Consultant" and had "scientifically formulated the exclusive formulas" in the catalogue. He received a weekly salary from defendant

In *United States* v. *Coppola*, 526 F.2d 764 (10th Cir. 1975), for example, the Court of Appeals distinguished the improper admission of evidence in defendant's first trial from the proper admission of the same statements in defendant's second trial:

> It is not enough that Herman recounted Molina's statements in Coppola's presence and Coppola was silent or did not otherwise respond. Testimony that an accused adopted statements of another person may be let in as an adoptive admission only if it appears the accused understood and unambiguously assented to those statements.

Id. at 769 n. 2 (citations omitted).

One of the most interesting questions posed in regard to 801(d)(2) admissions is the extent to which production of documents in response to interrogatories, as permitted under F.R.Civ.P. 33(c), constitutes an "admission of" or "adoption of" the contents of the documents so produced. Written answers to interrogatories may be utilized as admissions,[66] although they are not conclusive on the issues addressed.[67] We agree with the Court in *National Research Development Corp.*

---

under a written consulting agreement, under which he contracted, among other things, to "aid the sale and promotion of the products" and not to perform any of the services specified for any other company. 362 F.2d at 926. Thus, *Article of Drug* follows the "advance adoption" pattern suggested by McCormick, *supra*, and is quite distinct from the situation in which an employee of one company supposedly adopts a diary of an employee of another company after being shown only a short segment of it.

[66] *Lumbermens Mut. Ins. Co.* v. *Cantex Mfg. Co.*, 262 F.2d 63, 67 (5th Cir. 1958) (defendant insurance company's interrogatory answer admitted the amount of plaintiff's losses and thus constituted a liquidation of the claim as of the date the answer was filed); *Brayton* v. *Crowell Collier Pub. Co.*, 205 F.2d 644, 646 (2d Cir. 1953); *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F.Supp. 914, 954 (S.D.N.Y. 1965) (defendant's answers to interrogatories from an Eastern District of Pennsylvania case admitted). *See also Gadaleta* v. *Nederlandsch-Amerekaansche Stoomvart*, 291 F.2d 212, 213 (2d Cir. 1961).

[67] *Giraffa* v. *Moore-McCormack Lines, Inc.*, 270 F.Supp. 342 (S.D.N.Y.1967) (interrogatory answer which referred to a contract purportedly covering injured worker was admitted as evidence, but was rendered nugatory by countervailing evidence).

v. *Great Lakes Carbon Corp.*, 410 F.Supp. 1108 (D.C.Del.1975) that "the language of each interrogatory and the wording of the corresponding reply becomes significant" when it is not the written answers themselves, but documents referenced in the answers or produced in lieu of such answers, which the opposing party seeks to use.

In the *National Research* case the plaintiff sought to introduce an inventor's notebook to support its contentions concerning the meaning of a technical term used in a patent. Although the information plaintiff wished to use was apparently on a page of the notebook which had been referenced by defendants in their answers to interrogatories, the Court concluded that the broad and alternative wording of the questions created an "ambiguity in the interpretation of the corresponding response" which rendered it impossible to determine whether any "adoptive connotation" existed. As a second ground for exclusion, the court noted that the question asked did not concern the use of the term involved, and stated that the scope of any "admission," if one existed, "would be narrowly limited by the wording" of the question, and would neither constitute a concession of any other points nor "embrace the truth of the designated documents' total contents."[68]

We conclude that for a document produced under F.R.Civ.P. 33(c) to qualify as an admission, the question and answer when taken together must manifest an "adoptive"

[68] 410 F.Supp. at 1114 n. 20. The Court also mentions the availability of other procedures for obtaining the desired evidence:

> Finally, assuming no financial constraints on defendants they could have utilized the procedures available under Fed.R.Civ.P. 28(b) to take the depositions in England of the non-resident non-party inventors and subsequently introduced the inventors' deposition under Fed.R.Civ.P. 32(a)(3). Alternatively during such depositions, the defendants could have developed a record sufficient to indicate that the inventor's notebook satisfied the requirements of the business records exception to the hearsay rule of 28 U.S.C. § 1732(a). However, the record presently before the Court indicates that such efforts were apparently not undertaken.

rather than merely a "referential" connotation. Further, the only issues conceded by such an "admission" are issues specifically addressed in the question, and responded to by the document.

The plaintiffs contend that certain documents are adoptive admissions because of a party's or a person's failure to disavow the documents. The Advisory Committee Notes to 801(d)(2)(B) recognize the possibility of an adoption by silence and state that "the theory is that the person would, under the circumstances, protest the statement made in his presence if untrue." The Notes caution, however, that the inference is a fairly weak one. In *United States* v. *Flecha*, 539 F.2d 874 (2d Cir. 1976), the Second Circuit held that the facts that a party has heard a statement and that he has failed to deny it are not in themselves sufficient to establish adoption by silence, but that the circumstances involved must be considered. The court of appeals quoted Lord Justice Bowen in *Wiedemann* v. *Walpole*, 2 Q.B. 534, 539 (1891):

> Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.

539 F.2d at 877. We agree.[69]

Another disputed point is whether a statement which is written by someone else but signed by a party opponent or his agent constitutes an admission of the party under 801(d)(2)(B).

[69] Some of the circumstances which might render it *im*probable that the party would deny a statement if untrue are, for example: the party is in official custody; the declarant's statement is ambiguous, *United States* v. *Flecha*, *supra;* the party would not have the requisite knowledge to deny the statement; the statement is made by a person to whom the party would be unlikely to respond (*e.g.*, a drunk, an unknown bystander); the party was in a mentally impaired state (*e.g.*, asleep, excited, confused, in pain), 4 Weinstein ¶ 801(d)(2)(B)[01] at 801-145; the party has no motive to respond, or has not heard or understood the statement, 4 Wigmore § 1062 at 117; the statement is made in the course of a judicial proceeding, where decorum prevents immediate response, 4 Wigmore § 1072 at 125. Since plaintiffs rely upon defendants' failure to deny statements made at the JFTC proceedings, this last circumstance is particularly significant.

In a criminal case, *United States* v. *Johnson*, 529 F.2d 581, 584 (8th Cir.), *cert. denied*, 426 U.S. 909, 96 S.Ct. 2233, 48 L.Ed.2d 835 (1976), the Court of Appeals upheld the trial judge's admission of a statement made by the defendant, taken down in longhand by a Secret Service Agent, and read and signed by the defendant at the conclusion of his interview with the agent. With respect to the hearsay aspects involved, the court stated:

> The objections must fail. A statement which is reduced to writing by one other than the accused is generally admissible where the accused reads it over and signs it. *See United States* v. *Evans*, 320 F.2d 482, 484 (6th Cir. 1963); *United States* v. *Del Porte*, 357 F.Supp. 969, 976 (S.D.N.Y.), *aff'd* 483 F.2d 1399 (2nd Cir. 1973). Moreover, under the *Federal Rules of Evidence*, which became effective on the date of Johnson's trial, the statement is not hearsay. Fed.R.E. 801(d)(2)(A), (B).

We find no cases or commentary to the contrary.[70]

4. *Authorized Statements*

Subsection (C) of 801(d)(2) is mainly a codification of prior common law, under which an authorized statement by a party's agent was receivable to the same extent as the authorizing party's own statement. Wigmore explains that the basis for this rule is the principle that:

> [h]e who sets another person to do an act in his stead as *agent* is chargeable in substantive law by such acts as are done under that authority; so too, properly enough,

[70] *See also United States* v. *Williams*, 571 F.2d 344 (6th Cir. 1977), *cert. denied*, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). In that case, a Secret Service agent questioned a witness and prepared a statement which the witness subsequently signed. In holding that the statement was "adopted" by the witness and thus admissible under 803(5), the court cites the Senate Report explaining the House amendment to the Rule, which added the phrase "or adopted by the witness":

> When the verifying witness has not prepared the report, but merely examined it and found it to be accurate, he has adopted the report, and it is therefore admissible.

Senate Report, 4 U.S.Code Cong. & Admin. News at p. 7074 (1974). There is no reason to believe that Congress intended any different approach to adoptions under 801(d)(2)(B).

> admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself.

IV Wigmore § 1078 at 162 (Chadbourn rev. 1972). The "speaking authority" required by subsection (C) may represent either express or implied authority, and the authority questions involved are to be determined under the law of agency. *Baughman* v. *Cooper-Jarrett*, 530 F.2d 529, 532 (3d Cir.), *cert. denied*, 429 U.S. 825, 97 S.Ct. 78, 50 L.Ed.2d 87 (1976).

The Advisory Committee Notes state that the wording of Rule 801(d)(2)(C) was intended to resolve a division among the circuits as to whether an agent's statements were only admissible if made to a third person, or whether statements to the principal himself or itself could also be authorized admissions. *See United States* v. *Lykes Bros. Steamship Co.*, 432 F.2d 1076, 1078 (5th Cir. 1970) (citing cases from several circuits on both sides of the dispute). Prior to the adoption of the Rules, the Third Circuit had held that an employee's statement made to his employer rather than to a third party could not constitute an admission by the employer. *Nuttall* v. *Reading Co.*, 235 F.2d 546, 550 (3d Cir. 1956). The Advisory Committee Notes to Rule 801(d)(2)(C) make it clear that under that Rule a statement may be an authorized admission even though it was never communicated to a third party. Thus we view *Nuttall* as legislatively overruled on this point by the enactment of the Federal Rules of Evidence.

5. *Vicarious Admissions*

As we have mentioned, subsection (D) represents a departure from the common law. As the Advisory Committee Notes state, the traditional test was whether the statement was made by the agent within the scope of his employment. They pointedly note that few agents were employed to make damaging statements, and thus most such remarks were excluded. The Rules, however, follow a trend which allows statements to be admitted so long as they are related to a matter which is within the scope of the agent's employment. Advisory Com-

mittee Notes to 801(d)(2)(D). The phrase "during the existence of the relationship" makes it quite clear that the statement must relate to a matter which was within the agent's scope of employment at the time he made the statement. Thus, we must exclude statements made after the termination of employment, or about matters with which an employee was not, or was no longer, involved.

The defendants have argued that two additional criteria must be met to satisfy 801(d)(2)(D): first, the statement must have been communicated to someone outside of the company which employed the declarant, and second, the declarant must be an employee with managerial responsibility. Since neither of these requirements are found in the language of the Rule, or in the Advisory Committee Notes, the defendants base their contention on two pre-Rules cases, *Nuttall* v. *Reading Company*, 235 F.2d 546 (3d Cir. 1956), and *Gilmour* v. *Strescon Industries, Inc.*, 66 F.R.D. 146 (E.D.Pa.), *aff'd mem.* 521 F.2d 1398 (3d Cir. 1975).

The *Nuttall* case was decided on the basis of the "authorized" admission exception, discussed *supra*. As we stated there, the Advisory Committee Notes to Subsection (C) make it clear that under that Rule there is no requirement that a statement must be communicated outside of the company against which it is offered. In *Gilmour*, Judge Broderick quoted *Nuttall*, but recognized that the then proposed Rule 801 might alter the common law rule, and decided the issue on other grounds.

The defendants acknowledge that the *Nuttal* rule is no longer valid with respect to authorized admissions under subsection (C), but contend that it retains force with respect to vicarious admissions under subsection (D), since the only discussion of the issue is in the Advisory Committee Notes to subsection (C). We reject that contention. It is plain that the committee viewed subsection (D) as an extension of common-law authorized admissions, which were codified in subsection (C). Thus the discussion in the note to subsection (C) of

whether a statement must be communicated to a third party is equally applicable to subsection (D), as the Eighth Circuit expressly held in *Mahlandt, supra*, 588 F.2d at 630. We conclude that *Nuttall* retains no vitality with respect to either type of admission.

The defendants also contend that a vicarious admission can be made only by an employee who has managerial responsibilities. This requirement is found only in decisions concerning who is authorized to make an admission for a corporate employer. *See Moran* v. *Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950); *Gilmour, supra*, 66 F.R.D. at 150. Thus the requirement of managerial responsibilities, if it remains valid after the enactment of the Rules, is pertinent only to authorized admissions, not to vicarious admissions. In any event, it is clear that every employee whose statements the plaintiffs offer did have managerial responsibilities.

6. *Admissions of a Subsidiary Corporation Offered Against the Parent Corporation*

Since the plaintiffs offer DSS 1029, the so-called Japan Victor document, against MEI on the basis of MEI's ownership of the majority of the stock of Japan Victor Co., a brief word is in order about the attribution to a parent corporation of a statement which would be an admission if offered against its subsidiary.[71] The facts and contentions surrounding the document are adequately stated in Part XIII, *infra*, and will not be restated here.

The issue to be considered is whether, assuming that a statement could come into evidence as an admission against the subsidiary, it may likewise be admitted into evidence against

[71] Similar issues are presented by plaintiffs' proffer of other documents: (1) the protocol of Mr. Maekawa, who at the time of giving his protocol was an employee of Nagoya Sharp Sales Corp., a non-defendant which plaintiffs apparently characterize, without foundation, as a subsidiary of Sharp Corporation; and (2) the EIAJ "Minutes," which plaintiffs offer as admissions against the defendants on the basis of their unsupported allegations that the defendants control the EIAJ, a Japanese trade organization.

the parent corporation. While there is no precedent precisely on point, we think the answer is clear: the proponent of the evidence must show either that the subsidiary had authority to make a statement concerning the subject, under Rule 801(d)(2)(C), or that the subsidiary acted as the parent's agent and the statement concerned a matter within the scope of its agency, under Rule 801(d)(2)(D). Under either subsection of the rule, the proponent of the evidence must establish the existence of an agency relationship between the parent and the subsidiary under the applicable principles of agency law.

The principles relevant to deciding whether or not a subsidiary is the agent of a parent corporation have recently been reviewed by Judge Caleb Wright in *Japan Petroleum Co. (Nigeria) Ltd.* v. *Ashland Oil Co.*, 456 F.Supp. 831, 840-41 (D.Del. 1978):

> Whether an agency relationship exists between a parent corporation and its subsidiary is normally a question of fact. The central factual issue is control, *i.e.*, whether the parent corporation dominates the activities of the subsidiary.
>
> In order to determine whether or not a sufficient degree of control exists to establish an agency relationship, the Court must look to a wide variety of factors, such as stock ownership, officers and directors, financing, responsibility for day-to-day operations, arrangements for payment of salaries and expenses, and origin of subsidiary's business and assets.

(citations and footnote omitted). *See also Walker* v. *Newgent*, 583 F.2d 163, 167 (5th Cir. 1978), *cert. denied*, 441 U.S. 906, 99 S.Ct. 1994, 60 L.Ed.2d 374 (1979); *Pacific Can Co.* v. *Hewes*, 95 F.2d 42 (9th Cir. 1938); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841 (N.D.Cal. 1979).

As Judge Wright noted, the existence of an agency relationship is a conceptually distinct question from the notion of "piercing the corporate veil." 456 F.Supp. at 839. However,

the mere fact that one corporation owns a controlling interest in another does not render the subsidiary the agent of the parent:

> "A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other". *Restatement (Second) of Agency*, *supra* § 14M. *See also*, *Pacific Can Co.*, *supra*, 95 F.2d at 46; *Eastern Industries [Inc.* v. *Traffic Controls, Inc.]*, *supra*, 142 F.Supp. [381] at 384 [D.Del.]; *Owl Fumigating Corp.* v. *California Cyanide Co.*, 24 F.2d 718, 719 (D.Del. 1928), *aff'd.*, 30 F.2d 812 (3d Cir. 1929); *Scott-Douglas Corp.* v. *Greyhound Corp.*, 304 A.2d 309, 314 (Del.Super. 1973). Nor does the fact that a parent and a subsidiary have common officers and directors necessarily indicate an agency relationship. *See*, *Pacific Can Co.*, *supra; Eastern Industries*, *supra; Owl Fumigating*, *supra; Scott-Douglas*, *supra*.

456 F.Supp. at 841.

We agree with Judge Wright's analysis, and adopt it. In the absence of any showing of express authority, we think that the plaintiffs, as proponents of the evidence, should be required to make the same kind of showing as would be required to impose vicarious liability upon the parent corporation: that the parent corporation "directly intervenes in the management" of the subsidiary so as to treat it as a "mere department of its own enterprise." *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, 524, 61 S.Ct. 675, 685, 85 L.Ed. 982 (1940). In conformity with the overall organization of this opinion, we defer our discussion of the facts pertaining to the relationship between MEI and the Japan Victor Company until Part XIII, *infra*.

D. *804(b)(1) Former Testimony*

Plaintiffs seek to introduce into evidence under Rule 804(b)(1) the prior testimony of approximately 16 witnesses,

employees of the Japanese manufacturer defendants, who testified before the JFTC in the 1966 "Six Company Case." Rule 804(b)(1) provides:

> (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

If admitted, the testimony would be offered against the six defendants who were present at the JFTC Six Company Case hearings to prove a conspiracy to fix prices in Japan, the home market aspect of the alleged "unitary conspiracy." It would also be offered against all other defendants on the ground that the "six companies" are their predecessor in interest. Moreover, plaintiffs propose to offer the testimony against all defendants insofar as it authenticates the diaries. Defendants object to the admission of the former testimony on the grounds that plaintiffs have failed to show; (1) that the declarants are "unavailable" as witnesses in the present trial, within the meaning of Rule 804(a); (2) that the six defendants who were respondents in the Six Company Case had a "similar motive to develop the testimony" in the JFTC hearings; and (3) that those six defendants qualify as "predecessors in interest" of the other eighteen defendants who were not represented at the JFTC hearings. We discuss the legal aspects of these issues in the order mentioned.

1. *Unavailability*

a. *Introduction*

The first requirement for application of all the Rule 804 hearsay exceptions, including 804(b)(1), is that the declarant

be unavailable.[72] Unavailability is defined in Rule 804(a) as follows.

> (a) Definition of unavailability.—
>
> "Unavailability as a witness" includes situations in which the declarant—
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of his statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

Rule 804(a) codifies the historically diverse bases for finding a witness "unavailable" for the purpose of admitting (under subsection (b) of the rule) evidence otherwise excluded by the hearsay rule. The burden of demonstrating unavailability falls, of course, on the proponent. 11 Moore's Federal Practice § 804.02 at 239.

Plaintiffs contend that the witnesses whose testimony they seek to introduce are unavailable within the meaning of subsections (3), (4), and (5) of 804(a). Plaintiffs' only claim under

---

[72] As will be seen *infra*, the requisites for proving unavailability for purposes of 804(b)(1) differ somwhat from those under 804(b)(2)(3) & (4).

804(a)(4) is that one of the declarants, Mr. Yajima, is unavailable because of his death in 1968, prior to commencement of this litigation. The defendants concede that Yajima is dead, hence unavailable, so that a discussion of 804(a)(4) is unnecessary. We can defer our discussion of 804(a)(3) until we reach the discussion of other hearsay exceptions because we find that the 804(a)(5) requirement is satisfied with respect to former testimony, and that is sufficient to establish unavailability.

b. *Inability to Procure Attendance Under Rule 804(a)(5)*

Rule 804(a)(5) provides that a declarant of former testimony is unavailable if the proponent "has been unable to procure his attendance . . . by process or other reasonable means." In civil cases, it has long been the rule that inability to procure attendance by "process or other reasonable means" is satisfied by demonstration of inability to serve a subpoena. 4 Weinstein ¶ 804(a)[01] at 804-41; Saltzburg at 600; McCormick § 253 at 609; *Trade Development Bank* v. *Continental Insurance Co.*, 469 F.2d 35, 42 (2d Cir. 1972); *McIntyre* v. *Reynolds Metals Co.*, 468 F.2d 1092, 1093 n.2 (5th Cir. 1972); *United States* v. *Squella-Avendano*, 478 F.2d 433, 439 (5th Cir. 1973). We have found nothing to indicate that the adoption of the Federal Rules of Evidence altered this longstanding rule.

The declarants in this case, Japanese citizens living in Japan, are beyond the subpoena power of this court as governed by Fed.R.Civ. P. 45(e). The statute governing federal courts' subpoena power over persons in a foreign country, 28 U.S.C. § 1783, extends that power only to "a national or resident of the United States" in a foreign country, and therefore plainly does not reach Japanese citizens residing in Japan. Nor do we find in Rule 804(a)(5) any requirement that plaintiffs seek the voluntary attendance of witnesses residing abroad whose attendance cannot be compelled by process. It would be anomalous to apply in a civil case a requirement which the Supreme Court has found inapposite under the stricter standards applied in criminal cases. *See Mancusi* v. *Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972).

Rule 804(a)(5) is written in the disjunctive. The rule, as promulgated by the Supreme Court, required only a showing of inability to procure *attendance* of the declarant with respect to all the 804(b) exceptions. However, the House Judiciary Committee added language to the Rule which provides that "in the case of a hearsay exception under subdivision (b)(2), (b)(3), or (b)(4)," a proponent must also be unable to procure the *testimony* of the declarant. The House Committee noted:

> the amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognizes the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subsdivision (b)(1).

House Report at 15, U.S.Code Cong. & Admin.News 1974, p. 7088. While the Senate deleted the language added by the House, the Conference Committee adopted the House version. Thus, in the Rule as enacted, there is no additional requirement that a proponent of former testimony attempt to depose the declarant.

Although the Senate Judiciary Committee rejected the House amendment, the Committee expressed its view that if the proponent of hearsay evidence had in fact *taken* the declarant's deposition, the proponent's failure to ask certain questions at the deposition might estop him from claiming subsequently that the declarant was unavailable at trial. The Committee stated:

> The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the [hearsay] statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amenable to

> process compelling his attendance at trial. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Senate Report, U.S.Code Cong. & Admin. News 1974, p. 7067. Although the House amendment imposed an attempt-to-depose requirement upon subsections (b)(2), (b)(3), and (b)(4), it did not alter the proposed rule with respect to former testimony. Defendants contend that the Senate Committee's "estoppel" position therefore remains applicable to the proponent of former testimony under subsection (b)(1).

The plaintiffs did not in fact depose the declarants of the diaries and memos written in Japan. However, they *did* depose other officials of the companies which employ or employed the declarants in Japan. Those depositions (in two waves) related first to personal jurisdiction, venue, and service of process, and second, to identification of documents produced in discovery. The defendants contend that application of the Senate "estoppel" guideline bars the plaintiffs from claiming that the declarants are now unavailable. They argue that the plaintiffs had ample opportunity to depose the declarants when they deposed the Japanese defendants. Moreover, they say, in such depositions as were taken plaintiffs did not confront the deponents with issues addressed in the testimony of their employees in the JFTC proceedings and did not attempt to elicit foundation for the admissibility of any of the documents produced. Plaintiffs, in response, do not address the application of Senate guidelines, but maintain that a literal construction of the rule renders a proponent of 804(b)(1) testimony exempt from any requirement of attempting to take depositions.

We cannot accept the defendants' reading of the Senate Committee's comment. First, it must be noted that the Senate Committee guidelines address fairness questions which would arise under the rule *as promulgated by the Advisory Committee*. Unlike that proposed rule, the rule as enacted makes a distinction between former testimony and the other 804(b) exceptions. We cannot speculate as to what the Senate Committee would have said in direct response to the rule thus drawn.

Even if the Senate Committee's view retains some vitality in the construction of the rule as enacted, the extension of the Senate guideline which defendants propose is contrary to the plain language of the rule itself. The defendants in effect contend that the Senate report should be read to impose on plaintiffs a requirement of taking depositions which they might not otherwise take, while the Senate report itself speaks only of a party's willful failure to ask certain questions at a deposition which he has taken voluntarily. To read the Senate report as broadly as the defendants propose would be in effect to impose a requirement that the proponent of former testimony must take the deposition of the declarant, even though the rule as enacted clearly distinguishes in this regard between former testimony and the categories of hearsay treated in subsections (b)(2), (b)(3), and (b)(4). Thus we conclude that the declarants of former testimony are unavailable under Rule 804(a)(5) if they are outside the subpoena power of the court, even if the proponent of the former testimony has made no effort to take their depositions or to request their voluntary attendance at trial.

2. *Similiarity of Motive*

In addition to meeting the requirement of unavailability, former testimony under 804(b)(1) must have been given under circumstances such that "the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." It is uncontroverted that the respondents in the JFTC proceedings had an opportunity to develop the witnesses' testimony, as they were represented by counsel who engaged in

extensive examination of the witnesses.[73] In this section, we discuss the requirement of similarity of motive to develop the testimony, and in the following section we turn to a discussion of what renders one party a "predecessor in interest" of another.

At common law, the hearsay exception for former testimony originally required identity of parties *and* identity of issues. Both were intended to insure the adequacy of the present opponents' opportunity to cross-examine the witness in the prior proceeding. Gradually the courts reduced these requirements to "predecessor in interest" and "substantial" identity of issues.[74]

Abandoning the old requirement of identity of issues, the Supreme Court promulgated, and the Congress adopted, the term "similar motive" in Rule 804(b)(1). The Advisory Committee explained its preference as follows:

> The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable.

Advisory Committee Note to Rule 804. The rule thus embodies McCormick's view that the requirement of identity of issues "should be restated, not as a mechanical one of identity or even

[73] Defendants do argue that there was no *realistic* opportunity to develop the testimony because prior opportunity to examine on particular facts is insufficient if those facts are not probative of substantially the same issue in the present case. However, as this argument goes to similarity of issues, it in effect is dealt with in the following discussion of similarity of motive which is a function thereof. We will confine our discussion to "similar motive" rather than "opportunity," since the semantic distinction may be artificial and in any event is of no great moment.

[74] *See* McCormick § 256; Weinstein ¶ 804(b)(1)[04].

of substantial identity of issues, but rather as a requirement that the issues in the first proceeding and hence the purpose for which the testimony was there offered, must have been such that the present opponent (or some person in like interest) had an adequate motive for testing on cross-examination the credibility of the testimony now offered." McCormick § 257 at 622.

That similar motive is predicated, at least in part, upon the substantial similarity of issues and purpose for which testimony is offered is clear. But motive may also be influenced by other factors. As Saltzburg observes:

> While common law jurisdictions require substantial identity of issues, the Federal Rule does not depart from the common law in its requirement of a similar motive to develop the testimony. *The way to determine whether or not motives are similar is to look at the similarity of the issues and the context in which the opportunity for examination previously arose.*

Saltzburg at 602.

Such circumstances or factors which might influence motive to develop testimony include (1) the type of proceeding in which the testimony is given,[75] (2) trial strategy,[76] (3) the potential penalties or financial stakes,[77] and (4) the number of issues and

[75] In many of the cases the former testimony was given at a preliminary hearing, and an argument can be made that strategy often dictates little or no cross-examination at that stage, since ample opportunity will be afforded at trial. However, the argument has not been received favorably by the courts.

McCormick § 255 at 616 (footnotes omitted).

[76] *See United States* v. *Franklin*, 235 F.Supp. 338 (D.D.C. 1964), where it was held that as a tactical matter, effective cross-examination in a prior proceedings was not possible.

[77] A discrepancy in the financial stakes involved in the two cases may also affect motive. An action in small claims court may not be defended with the same vigor as an action where considerably more is involved.

Weinstein ¶ 804(b)(1)[04] at 804-66.

parties.[78] Thus in determinig whether a party or his predecessor in interest had the opportunity and similar motive to develop the testimony, the court must evaluate, in terms of both the prior and the present proceedings (1) the similarity of issues, (2) the purpose for which the testimony is offered, and (3) the context or circumstances in which the testiony is given.

3. *The Meaning of "Predecessor in Interest".*

Rule 804(b)(1) permits the introduction into evidence of prior testimony against a party which was not represented in the earlier action, so long as there was in the earlier action a "predecessor in interest" of the present party, whose motive to develop the testimony in the earlier action was sufficiently similar to that of the present party to satisfy that requirement of the rule. The plaintiffs offer the JFTC testimony against all defendants in this action, arguing that the six respondents were "predecessors in interest" of the other defendants.

The meaning of the phrase "predecessor in interest" in Rule 804(b)(1) is somewhat confused because the relevant legislative history is ambiguous. As we have noted, the original common law rule concerning the admissibility of former testi-

---

[78] Although all the issues need not be the same in the two proceedings and the existence of additional issues in one of the cases is immaterial so long as the motive with which the testimony was developed is similar, the presence of additional issues may affect motive, particularly when additional parties are also involved.

Weinstein *id.* at 804-06. In *Wolf* v. *United Air Lines, Inc.*, 12 F.R.D. 1 (M.D.Pa. 1951), the court excluded depositions taken in prior actions against two co-defendants. Because the instant action involved only one of those defendants, the court concluded "under the prevailing circumstances the interest and motive of United Air Lines in its direct and cross-examination may very well not have been the same at that time as it is now in an action in which Douglas is not a party." *Id.* at 3-4. In *First National Bank* v. *National Airlines, Inc.*, 22 F.R.D. 46, 48 (S.D.N.Y. 1958), depositions taken in an action formerly brought against National Airlines only were excluded as against National and Douglas, the co-defendants in the case at bar. The court held that the depositions could not be offered against Douglas, applying the standard of identity of parties and identity of issues, and ruled that it would be impractical to expect the jury to consider the evidence only against National.

mony required identity of parties in the two proceedings. Prior to the enactment of the Federal Rules of Evidence, however, many courts and commentators had taken the position that the requirement of identity of parties should be relaxed. For example, Wigmore proposed that the inquiry should be only "whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has." 5 Wigmore on Evidence § 1388 at 111 (Chadbourn ed. 1974).

The Supreme Court followed the Wigmore position in its original submission of Rule 804(b)(1), making prior testimony admissible if a person with "motive and interest similar" to the party against whom it is offered had an opportunity to examine the witness. The House Judiciary Committee reinstated the traditional "predecessor in interest" language with the following rationale:

> Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the rule to reflect these policy determinations.

House Report at 15, U.S.Code Cong. & Admin. News 1974, p. 7088. Thus it appears that the House Committee intended that the phrase "predecessor in interest" be construed narrowly, a position that is consistent with the common law meaning of the term.[79]

---

[79] Black's Law Dictionary (5th ed. 1979) defines "predecessor" as "the correlative of 'successor,' " *id.* at 1060, and defines "successor in interest" as follows:

> One who follows another in ownership or control of property. In order to be a "successor in interest", a party must continue to retain the same

The Senate Judiciary Committee accepted the House amendment to the Supreme Court's proposed rule. It put its own gloss on the phrase "predecessor in interest," however, by means of the following comment:

> The House amended the rule to apply only to a party's predecessor in interest. Although the Committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment.

Senate Report at 28, U.S.Code Cong. & Admin. News 1974, p. 7074. Thus it seems that the Senate Committee intended that the statutory phrase "predecessor in interest" be broadly construed as essentially similar to the Supreme Court's proposed rule. In contrast, as we have noted, the House Committee apparently intended that the phrase be construed narrowly in accordance with its common law meaning. While both houses of Congress enacted the same language, they differed in their views of the meaning of that language.

In *Lloyd* v. *American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978), a majority of a Third Circuit panel adopted the Senate view of the phrase "predecessor in interest." Referring to the Senate Report quoted above, the court of appeals stated, "we, too, fail to see a compelling difference between the two approaches." *Id.* at 1185. The *Lloyd* majority added:

> We do not accept the view that this change in wording signalled a return to the common law approach to former testimony, requiring privity or a common property interest between the parties.

> rights as original owner without change in ownership and there must be change in form only and not in substance, and transferee is not a "successor in interest." In case of corporations, the term "successor in interest" ordinarily indicates statutory succession as, for instance, when corporation changes its name but retains same property.

Id. at 1283-84 (citations omitted). *See also Lloyd* v. *American Export Lines, Inc.*, 580 F.2d 1179, 1191 (3d Cir.) (Stern, D.J., concurring), *cert. denied* 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978) ("predecessor in interest" traditionally defined in terms of privity).

Id. at n.5. *Lloyd* was an action by a crewman (Alvarez) against the shipowner (Export) for injuries sustained in a fight with a fellow crewman (third party defendant Lloyd). Alvarez alleged that Export failed to protect him from Lloyd after Export had knowledge of Lloyd's dangerous propensities. The trial court excluded former testimony given by Lloyd in a Coast Guard hearing which sought to determine culpability in the altercation between Lloyd and Alvarez. The testimony was offered by Export against Alvarez and the question on appeal was whether the Coast Goard examiner was a "predecessor in interest" of Alvarez in terms of 804(b)(1).

Reasoning that there was the same "nucleus of operative facts" and the same "basic interest advanced" by both the Coast Guard examiner and Alvarez, the court concluded that the examiner was a predecessor in interest, stating:

> While we do not endorse an extravagant interpretation of who or what constitutes a "predecessor in interest," we prefer one that is realistically generous over one that is formalistically grudging. We believe that what has been described as "the practical and expedient view" expresses the congressional intention: "if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present part." *Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.*

Id. at 1187 (emphasis added) (footnote omitted).[80]

---

[80] There is some authority for a narrower construction of the phrase "predecessor in interest," which would follow the view of the House Committee. Another court, considering the same issue shortly before *Lloyd*, adopted a much narrower definition of "predecessor in interest." *In Re IBM Peripheral EDP Devices Antitrust Litigation*, 444 F.Supp. 110, 113 (N.D. Cal. 1978). And in *Government of Canal Zone* v. *Pinto*, 590 F.2d 1344 (5th Cir. 1979), a criminal case discussed in the text *infra*, Judge Wisdom commented that, "[e]ven for civil cases, the draftsmen of the Federal Rules *rejected* the theory that subjecting testimony to the questioning of a person who is not a party at the trial, *although he has like motive and interest*, will furnish a guarantee of trustworthiness equal to that of cross-examination by

In our view, it is highly significant that the "previous party" in *Lloyd* was a government investigator, presumably impartial, who had no role in the subsequent legal action. The *Lloyd* court itself commented on the community of interest that the government, as representative of the public, and an individual might share:

> [O]ur analysis of the concept of interests satisfies us that there was a sufficient community of interest shared by the Coast Guard in its hearing and Alvarez in the subsequent civil trial to satisfy Rule 804(b)(1). . . . The interest implicated here was a claim or desire or demand which Alvarez as an individual, and the Coast Guard as a representative of a larger group, sought to satisfy . . .
>
> Individual interests, like those of Alvarez, are involved immediately in the individual life. . . . Public interests, like those of the Coast Guard, are involved in the life of a politically organized society, here the United States, and asserted in title of that entity. Thus, Alvarez sought to vindicate his individual interest in recovering for his injuries; the Coast Guard sought to vindicate the public interest in safe and unimpeded merchant marine service.

Id. at 1185-86 (footnotes omitted).[81]

---

the one against whom the evidence is introduced." *Id.* at 1354 (emphasis added). Moreover, the panel in *Lloyd* was divided and District Judge Herbert J. Stern, sitting by designation, disagreed with the majority's construction of the phrase "predecessor in interest," although he concurred in the result. One commentator has called Judge Stern's opinion "persuasive." Saltzburg at 231 (1980 Supp.). We are bound, however, by the opinion of the panel majority in *Lloyd*.

[81] A similar emphasis upon the special relationship between the government and an individual is apparent in *In Re Master Key Antitrust Litigation*, 72 F.R.D. 108 (D.Conn. 1976). In that case Judge Blumenfeld admitted testimony developed by the government in a prior antitrust case into evidence in a subsequent action brought by a treble damage plaintiff. He reasoned that: "Congress seems to have intended to relax the common law requirement of actual privity between the parties" and:

> In this case there are special considerations which weigh in favor of holding that the United States was a predecessor in interest of the present plaintiffs. The unique relationship between the Government's antitrust enforcement suits and the private actions which follow has

Entirely different considerations come into play when prior testimony is offered against one co-defendant on the basis of prior examination of the witness on behalf of a different co-defendant, when the two have potentially conflicting interests and litigation strategies. In *Government of the Canal Zone* v. *Pinto*, 590 F.2d 1344 (5th Cir. 1979), for example, testimony from a preliminary hearing was not admitted under 804(b)(1) against a defendant who was not represented at the hearing, even though the lawyer who later represented him at trial attended the prior hearing on behalf of his co-defendant and engaged in cross-examination on behalf of the co-defendant. Judge Wisdom commented that, "the reliability of preliminary hearing testimony is not assured by the mere fact of cross-examination but only by cross-examination designed to illuminate the accuracy of the statement as it concerns the *particular* defendant." *Id.* at 1353-54 (emphasis added).

The facts and circumstances of this case will require us to determine whether a sufficient "community of interest" between alleged co-conspirators exists to satisfy the *Lloyd* requirements for finding the six respondents in the JFTC proceedings to be "predecessors" of the other defendants in the present case. Under *Lloyd*, our inquiry is whether the six respondents had a "like motive to develop the testimony about the same material facts" as the other defendants would have had if they had been represented at the JFTC hearing. In applying the principles of *Lloyd* to the vastly different circumstances of this case, we must also bear in mind the House Judiciary Committee's admonition that it is "generally unfair" to impose upon the present party the "responsibility for the manner in which the witness was previously handled by another party." House Report, *supra*, U.S.Code Cong. & Admin.News 1974, p. 7088.

> Congressional recognition and ratification, which has in turn provided special benefits to the private plaintiffs. . . . Under these circumstances it is clearly not unfair to allow the defendants to submit the prior testimony of witnesses at that proceeding who are now unavailable.

Id. at 109, 110.

E. *Statements Against Interest Under Rule 804(b)(3)*

Plaintiffs seek admission of numerous documents as statements against the interests of both the declarants and their corporate employers. As we have noted, the 804(b) hearsay exceptions require a showing of unavailability of the declarants. Plaintiffs argue that the declarants are unavailable under Rule 804(a)(3) and (5) and, in the case of Mr. Yajima, under (a)(4) because of his death. Defendants reply that, except for Yajima, declarants do not meet any of the tests of unavailability under 804(a). They also contend that the substantive requirements of 804(b)(3) are not met here because: (1) the statements were not contrary to the declarants' pecuniary or proprietary interests, nor did they tend to subject the declarants to civil or criminal liability, within the meaning of the rule; and (2) plaintiffs have failed to show awareness by each declarant of the implications of his statement such that a reasonable man would not have made them unless he believed them to be true. We consider first the issues relating to unavailability for purposes of Rule 804(b)(3).

1. *Unavailability*

a. *Inability to Procure Testimony Under Rule 804(a)(5)*

The standard of unavailability which is imposed by Rule 804(a)(5) on the proponent of declarations against interest is more rigorous than that imposed on the proponent of former testimony. As applied to 804(b)(3), the parenthetical clause of 804(a)(5) dictates that a witness is unavailable if he is absent from the hearing and the proponent of his statement is unable to procure his "attendance *or testimony*" (emphasis added). While we have ruled that the plaintiffs are unable to procure the attendance of Japanese citizens residing in Japan, pp. 1248-1252, *supra*, the proponent of declarations against interest is required to meet a higher standard by seeking the witness' *testimony* before hearsay evidence may be admitted. The legislative history of Rule 804(a)(5) has been reviewed in detail, *supra*. It is perfectly clear that the House Judiciary Committee, which added to the rule the parenthetical language applicable to subsection (b)(3), intended thereby to require that the proponent of such evidence attempt to depose the absent witness. There is an express statement of that intention in the House report, quoted at p. 1250, *supra*. Since the plaintiffs made no effort to depose any of the declarants, none of the declarants (except Yajima) are unavailable under 804(a)(5) for purposes of the hearsay exception for declarations against interest.

b. *Lack of Memory Under Rule 804(a)(3)*

Plaintiffs submit that the witnesses before the JFTC are unavailable under Rule 804(a)(3) because of lack of memory of the subject matter of their testimony and protocols and diaries. Notwithstanding the wording of the rule, which requires that lack of memory be established by the testimony of the declarant, plaintiffs seek to establish lack of memory by certain answers to interrogatories addressed to the declarants' *employers*. When plaintiffs asked for details of meetings among competitors in nos. 42, 43 and 44 of plaintiff NUE's Second Set of Interrogatories, the defendants are said to have answered to the effect that they had no knowledge or information aside from the documents which they produced. Those documents, produced under F.R.Civ.P. 33(c), included the JFTC testimony and protocols and diaries. Plaintiffs argue that under Federal Rule of Civil Procedure 33(a), corporations are bound to inquire of their employees before making a corporate response, and that a corporation's answers are deemed to represent the findings of those inquiries. They claim that the answers should therefore be treated as representations of the declarants themselves, who are defendants' employees, that they are unable to remember the subject matter of the statements, hence are unavailable with 804(a)(3).

Defendants contend, correctly, that there is no evidence that the declarants themselves are unable to recall the subject matter of the testimony and protocols. Except for Yajima, all the declarants are alive, well and still in the employ of the respective manufacturing defendants. Yet they have never

been asked whether or what they remember, because they have never been deposed. Rule 804(a)(3) provides that a declarant is deemed unavailable when he "testifies to a lack of memory of the subject matter of his statement." Defendants argue that Rule 804(a)(3) means what it says, *i.e.*, that the declarant is unavailable only when he "testifies to a lack of memory." Their position is supported by the Advisory Committee Note, which observes that "the practical effect" of a claimed lack of memory is to put present testimony "beyond reach," and notes that "the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination."

Despite the clear requirement of the rule that lack of memory must ordinarily be proved by testimony of the declarant, we might still find that the defendants were estopped to deny their employees' lack of memory, if their interrogatory answers clearly asserted that the declarants lacked memory, or even if the answers clearly asserted that the defendant corporations as institutions lacked memory of the pertinent subject matter.[62] However, we do not think that the relevant in-

[62] Rule 33(a) of the Federal Rules of Civil Procedure, in its provisions for serving and answering interrogatories to corporations, states that whatever officer or agent of the corporation is chosen to answer on behalf of the corporate party, he must "furnish such information as is available to the party." Since this language was added in 1946, the rule has been construed to place on the responding corporation a duty to inquire of appropriate employees before submitting its answers. *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). *See also Hornung* v. *Eastern Auto. Forwarding Co.*, 11 F.R.D. 300 (N.D.Ohio 1951); *Drum* v. *Town of Tonawanda*, 13 F.R.D. 317 (W.D.N.Y. 1952). A corporation's answers must speak as of the composite knowledge of the party and include facts and knowledge of its agents and any person under its control. 4A Moore's Federal Practice ¶ 33.07 at 44 and ¶ 33.26 at 143. The rationale underlying "corporate responsibility" to respond to interrogatories is obvious: in a large corporation, no single official is likely to have knowledge of the affairs of the entire corporate body. Responses to discovery which revealed only the knowledge of one individual would be useless in corporate litigation, where knowledge held by the corporate entity is sought.

terrogatory answers are susceptible of the interpretation which the plaintiffs seek to place upon them.

The pertinent interrogatories refer to the subject matter of the meetings in question as well as to dates and names of participants.[63] Interrogatory No. 42 asks defendant to:

> state the date or dates and identify the persons present at each meeting . . . during which there was any discussion, comment or reference to the prices, price levels or price formulae, rebates, discounts, allowances, or other terms or conditions of sale for television receivers.

No. 43 asks for identification of all documents and reports relating to or reporting these meetings. No. 44 asks for idenification (if a document) and description (if oral) of *each communication* between "you and other defendant or defendants, or any other manufacturer, seller, distributor, exporter or importer of television receivers" regarding pricing policies.[64] The defendants responded to these interrogatories

In *General Dynamics*, for example, interrogatories were served on the defendant corporation, Selb. Selb's corporate Secretary Frey, designated by Selb to answer on behalf of the corporation, responded that he had "insufficient personal knowledge upon which he [could] base an answer and there are no other present employees or officers available to answer." The 8th Circuit held that under Rule 33(a) Frey, in acting for the corporation, was "duty bound to secure all information available to Selb, including information within the personal knowledge of past and present employees." *Id.* at 1210. Moreover, "knowledge of officers and employees of Selb Manufacturing, relative to the subject matter of the instant case, is imputed to the corporation itself." *Id.* at 1210. Generally, a duty to inquire carries the burden of being deemed to possess knowledge such as an appropriate inquiry would have yielded. *Cage* v. *New York Central Railroad Co.*, 276 F.Supp. 778, 787 (W.D.Pa.), *aff'd*, 386 F.2d 998 (3d Cir. 1967).

[63] We thus reject defendants' contention that the interrogatories on which plaintiffs rely to show lack of memory refer only to dates and names, rather than to the subject matter of the meetings.

[64] NUE included in its first set of interrogatories a list of definitions of terms, including:

> (3) "Describe" means to state and date and identify the persons involved in the transaction, communication, event, or occurrence in ques-

both by making massive document productions, and by written answers. Although the written answers of the defendants are not identical, the general tenor of most of the answers is that, apart from the documents produced to NUE, the defendant corporations were not aware of the matters discussed at meetings among competitors.[85]

Plaintiffs would have us read the written answers to NUE's interrogatories as representations that defendants' employees have no knowledge of the subject matters contained in the former testimony, "protocols," diaries, and memoranda. We find this to be an inappropriate and excessive interpretation of these responses. First, the written answers cannot be considered in isolation from the defendants' production of a large body of documents from which the names, dates and subject

---

> tion, and of the transactions, communications, events or occurrence in question, and state the *nature and subject matter* of the transactions, communications, events or occurrence in question.

(emphasis added).

[85] For instance, responding to no. 42, Hitachi claimed that, except for references to certain meetings in documents produced for discovery, it had "no information as to the specific dates, persons present at or subjects discussed at meetings of trade associations or other groups." In answer to no. 44, Hitachi said that it was "aware of no such communication," and referred to its answer to no. 42. Toshiba responded to nos. 42, 43 and 44 by noting that the meetings were held irregularly and that it did not have information or documents identifying dates, persons or "the specific matters discussed at each meeting," other than in the documents produced. Matsushita gave similar negative responses; in its memorandum opposing NUE's motion for an order compelling answers to plaintiff's interrogatories, it further explained its answers by noting that it "could not recall the specific information requested for each such meeting and so stated that fact." In answering no. 44, MELCO said that except for routine correspondence, there were no other communications.

Several of the defendants responded to no. 44 by referring to their answers to no. 42. They now contend that in doing so, they did not opine as to the subject matter of the meetings, but only to names and dates as questioned by no. 42. Though no. 42 was so limited, interrogatory nos. 43 and 44 referred more broadly to documents and communications, and the defendants answered the latter interrogatory by incorporating by reference their answers to no. 42. Thus the fact that no. 42 was more limited in its scope than nos. 43 and 44 is of no consequence.

matters requested in the interrogatories could be gleaned. The production of documents itself contained much information—thousands of pages—but nowhere has there been a representation by defendants or their officials that they do not recall the subject matter of *those* materials.

Secondly, plaintiffs fail to show the necessity or prudence of accepting this second-hand evidence over depositions or in-court testimony. It would torture logic and the Federal Rules to conclude that, because corporations made limited responses as to knowledge of names, dates and facts, their officials should now be presumed forgetful of the myriad information contained in the several types of documents—without the plaintiffs ever questioning (deposing) those individuals at all. The unavailability requirement places a large burden on the proponent of the evidence to establish the necessity of foregoing individual testimony, with its circumstantial guarantees of reliability, in favor of inherently suspect and unclarified hearsay evidence. Since all but one of the relevant corporate officials (declarants) are alive and employed by defendants, the necessity of such forebearance is not readily apparent.[86] Accordingly, we hold that the plaintiffs may not avail themselves of 804(a)(3).

---

[86] Implicit in the unavailability of the 804 exceptions is the mandate that the proponent of the evidence show the necessity of admitting the hearsay evidence. *See Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 396-97 (5th Cir. 1961): Note, *The Theoretical Foundation of the Hearsay Rules*, 93 Harv. L.Rev. 1786, 1799 (1980). The 804 exceptions, "save that of former testimony, have fewer circumstancial guarantees of reliability than the exceptions in Rule 803." 11 Moore's Federal Practice § 804.02, p. VIII 239. Their trustworthiness must be rigorously guarded, and the hearsay evidence supplanted by the declarant's testimony whenever possible. Even where former testimony is introduced, "tradition, founded in experience, uniformly favors production of the witness if he is available." Advisory Committee Note to Rule 804(b)(1). Admissibility under the 804 exceptions rests on the theory that:

> It is better to have the hearsay evidence than no evidence at all. The 804 exceptions bear sufficient reliability to justify their admission when the only other alternative is to lose the declarant's information.

Id., 11 Moore's Federal Practice § 804.02, p. VIII 239. The mandate that necessity be shown is thus critical.

2. *Statement Against Interest—The Requirements of Rule 804(b)(3)*

Rule 804(b)(3) embodies the long-recognized hearsay exception for declarations against interest, and is "based on the guaranty of trustworthiness which accompanies a statement against interest." *United States* v. *Lilley*, 581 F.2d 182, 188 (8th Cir. 1978). In pertinent part, the Rule creates an exception to the hearsay rule, if the declarant is unavailable, for

> a statement which was at the time of its making so far contrary to the declarants' pecuniary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.

The rule proposed by the Supreme Court would have broadened the common-law exception by including in its scope statements which tended to make the declarant "an object of hatred, ridicule, or disgrace." Congress deleted this clause of the proposed rule, retaining "the traditional hearsay exception for statements against pecuniary or proprietary interest." House Report, U.S. Code Cong. & Admin.News 1974, p. 7089. However, Congress also retained the provision of the proposed rule relating to civil or criminal liability, which it viewed as a clarification rather than an alteration of the common law rule. *Id.;* Senate Report. On the precise legal issues before us—whether a statement which is against the interest of the declarant's employer falls within the exception, and whether the declarant must be subjectively aware that the statement is against his interest—the legislative history indicates no intention to alter pre-existing law.

Preliminarily, we note that the exception uses the term "statement." Thus it refers back to the definition of "statement" as "assertion," which we discussed at length in Part II-C-2, *supra*. For the same reasons stated there with respect to admissions, we think that a written notation which is not an assertion cannot be a "statement" against the declarant's interest. Accordingly, any of the diary entries or memoranda

which fail to qualify as admissions because they are not assertions will also fail to qualify as statements against interest for the same reason.

To qualify as an exception to the hearsay rule under 804(b)(3), a declaration must be against the employee's interest, not just the employer's interest. Since the trustworthiness of the declaration is insured only by the accompanying threat of loss or liability, the statement must be to the declarant's "immediate prejudice." *Nuttall* v. *Reading Co.*, 235 F.2d 546, 550 (3d Cir. 1956). In *Gilmour* v. *Strescon Industries, Inc., supra*, Judge Broderick, interpreting Rule 804(b)(3) [then Proposed Rule 804(b)(4)] in light of *Nuttall*, held that "a declaration against the interest of the declarant's employer . . . does not fall within this exception to the hearsay rule." 66 F.R.D. at 150. We agree with Judge Broderick's analysis, since the necessary guarantee of trustworthiness is lacking unless the declaration is against the personal interest of the declarant. We note, however, that statements against an employer's interest may be against the employee's own pecuniary or proprietary interests if, for example, they threaten the loss of employment or reduce the chances for future employment. *See Gichner* v. *Antonio Troiano Tile and Marble Co.*, 410 F.2d 238 (D.C. Cir. 1969).

Rule 804(b)(3) also requires that the statement be *so far* contrary to the declarant's interests that a "reasonable man in his position would not have made the statement unless he believed it to be true." Plaintiffs contend that the "reasonable man" language establishes an objective test for awareness of the possibility of loss or liability. While this approach is appealing, it is simplistic, for it denies the very rationale of this hearsay exception: that the credibility of self-implication is assured by the declarant's knowledge of the potential consequences. The standard then is objective only to the extent that it is based upon what a "reasonable man" would have said, given a *subjective* understanding of the danger to his interests. The Third Circuit in *Nuttall, supra*, held that the fact testified to must be "so palpably against the declarant's interests that

he must have *realized it to be so* when he made the statement." 235 F.2d at 550, quoting 2 Morgan, Basic Problems of Evidence 252 (1954) (emphasis added). Though both *Nuttall* and Morgan antedate the Federal Rules of Evidence, Rule 804(b)(3) does not change the traditional approach requiring consciousness of the implications of the statement against interest. Indeed, a post-F.R.E. case, *Workman* v. *Cleveland—Cliffs Iron Co.*, 68 F.R.D. 562 (N.D.Ohio 1975), has followed the same analysis. A contrary approach would undercut the very rationale of the rule, for as Judge Weinstein has observed:

> It is not the fact that the declaration is against interest but the awareness of the fact by the declarant which gives the statement significance.

Weinstein ¶ 804(b)(3)[02] at 804-98 (quoting Jefferson, "Declarations Against Interest: An Exception to the Hearsay Rule," 58 Harv.L.Rev. 1, 17 (1944).

Since the plaintiffs contend that the declarants' statements were against their interest because they tended to subject the declarants to civil and criminal liability under Japanese law, we must at some point review the pertinent Japanese law and practice. It is convenient to do so here.

Japanese antimonopoly law outlaws price-fixing, furnishes a cause of action against private entrepreneurs for damages, and provides for fines and imprisonment. Section 3 of the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Act No. 54 of April 14, 1947), as amended, provides:

> Sec. 3 [Prohibition of Private Monopolization and Unreasonable Restraint of Trade]
>
> No entrepreneur shall effect private monopolization or any unreasonable restraint of trade.

Under the Act, an "entrepreneur" is "a person, who carries on a commercial, industrial, financial or any other business." (Sec-

tion 2(1)). An unreasonable restraint of trade means (Section 2(5)):

> . . . such business activities, by which entrepreneurs by contract, agreement, or any other concerted activities mutually restrict or conduct their business activities in such a manner as to fix, maintain, or enhance prices.

Both civil and criminal remedies are set out by the Act. Section 25 provides for indemnification of the person injured by private monopolization or unreasonable restraint of trade. Criminal liability for employees who violate the Antimonopoly Act is available pursuant to sections 89 and 95. The Act states:

> Sec. 89 [Private monopolization and unreasonable restraint of trade]
>
> (1) Any person committing one of the following offenses shall be punished by penal servitude for not more than three years or by a fine of not more than five million yen [at pertinent times, less than $14,000]:
>
> (i) Any person who, in violation of the provision of Section 3, effects private monopolization or unreasonable restraint of trade.

Section 95 provides for "imprisonment or the imposition of a fine for employees who commit violations of the Act."

While private civil and criminal sanctions exist under the Japanese antimonopoly law, they are rare, and actions against employees are virtually unknown. Plaintiffs' own expert witness, Professor John O. Haley, testified that there have been only "three or four" civil actions brought in the thirty-year history of the Antimonopoly Act. PTO 264 at 305 (June 24, 1980). According to the defendants' unchallenged representations, none of these have ever been brought against individuals, and all were initiated *after* the Six Company Case commenced in 1966. Moreover, according to the defendant's unchallenged representations, only four Antimonopoly Act criminal cases were prosecuted in Japan prior to 1974, all of which involved consumer fraud rather than price-fixing, and the first criminal cases under section 89, the price-fixing sec-

tion, against individuals were the oil company cases initiated in 1974. Defendants' Supplemental Memorandum Concerning the Inadmissibility of the JFTC Materials Under Fed.R.Evid. 801(d) and 804(b)(3) at 18 (July 14, 1980).

We leave until later our conclusions as to the effect of this law and practice upon plaintiffs' claim that statements made by various declarants fall within the ambit of Rule 804(b)(3).

F. *The Residual Hearsay Exceptions: Rules 803(24) and 804(b)(5)*

1. *Introduction*

In addition to proffering the diaries, protocols, and testimony of witnesses before the JFTC under the traditional hearsay exceptions, plaintiffs proffer those documents under the residual exceptions codified in F.R.E. 803(24) and 804(b)(5), which create an exception from the hearsay rule for:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

All 804 exceptions are subject to a general showing of unavailability of the witness as required by subsection (a) of that Rule. Rule 803 has no such condition. The residual exceptions are otherwise identical in language and purpose.[87]

In *United States* v. *Bailey*, 581 F.2d 341, 346-47 (3d Cir. 1978), the court of appeals reviewed the legislative history of these exceptions and observed that "[t]he history . . . indicates

[87] Because the residual exceptions have their own unavailability requirements, the existence of two such identical provisions is rather mysterious. *See* Note, The Theoretical Foundation of the Hearsay Rules, 93 Harv.L.Rev. 1786, 1793, n. 27 (1980).

a congressional intention that the rules have a narrow focus."[88] *Accord, deMars* v. *Equitable Life Assurance Society*, 610 F.2d 55, 61 (1st Cir. 1979); *Huff* v. *White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979); *United States* v. *Kim*, 595 F.2d 755, 765 (D.C. Cir. 1979); *United States* v. *Mathis*, 559 F.2d 294, 299 (5th Cir. 1977).

The proposed rules as submitted to Congress included broad residual exceptions. The Advisory Committee explained:

> It would . . . be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exceptions (24) and its companion provision in [Rule 804(b)(5)] are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102. *See Dallas County* v. *Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961).

The proposed residual exceptions were eliminated by the House Judiciary Committee. The Senate reinstated the exceptions in a modified form, and the Senate version was accepted by the House-Senate Conference Committee.[89] The Senate

[88] The plaintiffs urge that in *Ebasco Services, Inc. v. Pennsylvania Power & Light Co.*, 460 F.Supp. 163, 185 n. 23 (E.D.Pa.1978), we indicated that the residual exceptions should be liberally construed. We find no such view expressed either directly or by implication in the footnote cited. It is clear from *Bailey*, as well as from the legislative history and decisions in other circuits, cited in text *infra*, that the residual exceptions are to be narrowly construed.

[89] The Conference Committee added a requirement of advance notice to the adverse party when the exceptions are invoked. *See United States v. Oates*, 560 F.2d 45, 72 n. 30 (2d Cir. 1977). The notice requirement is not before us.

Black defines a finding variously as "the result of deliberations of a jury or the court; a decision upon a question of fact reached as the result of a judicial examination or investigation; a determination from the evidence of a case; a conclusion by way of reasonable inference from the evidence." These definitions comport with the common sense meaning of "finding" and support the view that a finding does not include legal conclusions that may have been reached by an investigator[10] and is necessarily something more than a mere recitation of evidence, although we think the term is broad enough to encompass any statement of fact that represents a conclusion on the part of an investigator and that such factual statements need not be formally termed "findings" in order to come in under 803(8)(C).[11]

This conclusion accords with the case law, which has applied 803(8)(C) to a variety of materials. *See, e.g., Melville* v. *Amer-*

> of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b) bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

Report of the Committee on the Judiciary, S.Rep.No. 93-1277, 93d Cong., 2d Sess. 18 (1974), U.S.Code Cong. & Admin. News 1974, p. 7064.

The Conference Committee did not resolve this difference in interpretation, but as discussed *infra*, it is apparent that the courts have generally taken the more liberal view expressed by both the Advisory Committee and the Senate.

[10] Arguably, neither does the term "findings" encompass investigations stated in documents that are accusatory or prosecutorial in nature, although we conclude *infra* that such matters are more properly considered under the "trustworthiness" proviso of 803(8).

[11] Obviously, 803(8)(C) also encompasses the findings of public offices or agencies of state and foreign governments. *See Weinstein's Evidence*, § 803(8)[01] at 803 190. *Cf. Lloyd* v. *American Export Lines, Inc.*, *supra*, 580 F.2d at 1189.

ican Home Assurance Co., 443 F.Supp. 1064 (E.D.Pa. 1977), *rev'd on other grounds*, 584 F.2d 1306 (3rd Cir. 1978) (admitting Federal Aviation Administrative Airworthiness Directives); *Lloyd* v. *American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978) (factual findings of hearing examiner in Coast Guard proceeding admissible); *Baker* v. *Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979) (police report containing findings about color of traffic light at the time of accident admissible); *Sage* v. *Rockwell Int'l Corp.*, 477 F.Supp. 1205 (D.N.H. 1979) (reports discussing general circumstances of an airplane crash and conclusions about the cause of the crash admissible); *Fraley* v. *Rockwell Int'l Corp.*, 470 F.Supp. 1264 (S.D.Ohio 1979) (related case to *Sage, supra*, admitting report containing conclusion about the cause of the crash, but excluding report discussing general circumstances on the ground that it was prepared by an inexperienced investigator and was therefore not trustworthy); *United States* v. *School Dist. of Ferndale*, 577 F.2d 1339 (6th Cir. 1978) (findings of HEW hearing examiner admissible).

Although it was not entirely clear until the caselaw began to develop, it is now generally accepted (and settled in this circuit) that under the aegis of 803(8)(C) evaluative reports of public agencies (i.e., those rendering normative judgments or opinions, not just reciting facts) are admissible. *See Melville* v. *American Home Assurance Co., supra*, 443 F.Supp. 1064.[12] The caselaw has yet to make clear, however, whether the conclusion that evaluative reports come within the definition of 803(8)(C) findings renders admissible all materials within those reports—even those that do not fall within our definition of "finding," including hearsay materials that are not otherwise admissible. This is a critical question, for as will be seen,

[12] *Melville* has been followed in other jurisdictions. *See Baker* v. *Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); *Sage* v. *Rockwell Int'l Corp.*, 477 F.Supp. 1205 (D.N.H. 1979).

the staff workups upon which plaintiffs here rely contain, in many instances, multiple hearsay and broad ranging and highly conclusory statements.

Although the fact is not reflected in the published opinion, the record of the *Plywood* litigation, *supra*, shows that Judge Pointer admitted as findings only factual statements and excluded those that contained legal conclusions. Furthermore, he only admitted those findings of the administrative law judge that were approved and adopted in the opinion of the F.T.C.[13] We agree with the approach taken by Judge Pointer. We conclude that so long as the trustworthiness criteria are met (*see* discussion *infra*), where a staff report contains factual averments that are not mere recitations of evidence, but rather reflect conclusions made by the staff on the basis of evidence before it, those averments may be admitted as 803(8)(C) "findings." Where, however, the staff report is submitted to a commission or other public agency charged with making formal findings, only those factual statements from the staff reports that are approved and adopted by the agency will qualify as 803(8)(C) "findings."

Furthermore, we do not believe that the drafters envisioned that 803(8)(C) would result in the admission of all the exhibits and data that might accompany a given staff report. As we see it, the drafters of 803(8)(C) were motivated by a variation on the theme underlying all hearsay exceptions—that circumstantial guarantees of trustworthiness are provided by the presumption that governmental officials will perform their duties faithfully. Accordingly they were agreeable to the receipt into evidence of governmental agency findings. We do not perceive, however, that the drafters intended to piggyback the whole administrative proceeding on top of the trial. To do so would permit vast amounts of time to be spent addressing the admissibility of exhibits which are but excess baggage with no direct bearing on the issues at trial. Such a result would,

[13] We have reviewed extensive portions of the record in *Plywood* and have, by discussion with Judge Pointer, verified the scope of his rulings.

indeed, offend the basic constructional rule, F.R.E. 102, one of whose precepts is the "elimination of unjustifiable expense and delay," as well as the principles underlying Rule 403. *See John McShain, Inc.* v. *Cesena Aircraft Co.*, 563 F.2d 632 (3rd Cir. 1977). This point will come clearer as we proceed through our analysis of the evidence.

Conceptually, we believe this result is consistent with the principles of F.R.E. 703, under which an expert's opinion, based in part on inadmissible evidence, is admissible even though the underlying data is not admissible for its truth. We sense a reluctance on the part of the courts to permit the underlying data unless it is independently admissible. *See, e.g., Baker* v. *Elcona Homes, supra*, 588 F.2d at 559 (6th Cir. 1978). *But see Complaint of American Export Lines, Inc.*, 73 F.R.D. 454 (S.D.N.Y. 1977), in which Judge Tenney admitted not only the factual findings made pursuant to a prior proceeding of the United States Coast Guard but the exhibits that accompanied the Coast Guard record and report as well. Judge Tenney's decision as to the exhibits consumes but one brief paragraph of his opinion, and we do not feel bound by it. Instead, we adhere to the view that, unless independently admissible, the exhibits do not come along as "excess baggage." We agree, however, with Judge Tenney's decision that transcripts of agency hearings are not admissible under 803(8)(C), but are tested instead under the provisions of Rule 804(b)(1) (Former Testimony).[14]

With these general observations as to the scope of 803(8)(C) findings in mind, we turn to a discussion of the "trustworthiness" proviso of 803(8) under which those findings must be tested.

[14] In this regard, plaintiffs' reliance on *Hackley* v. *Roudebush*, 520 F.2d 108, 156 n. 193 (D.C. Cir. 1975) is misplaced. That case is in accord with our view. It held only that the transcript (as opposed to its substance) could come in under 803(6) or 803(8)(B), subject to objection to the testimony itself grounded upon 804(b)(1) or 801(d)(1) and (2).

B. *The Trustworthiness Proviso*

The text of Rule 803(8)(C), *supra*, and the Advisory Committee note, *see infra*, make plain that broad leeway is accorded to the trial judge to exclude 803(8) material where the sources of information and other circumstances indicate lack of trustworthiness. Because 803(8)(C) is such a potent litigation tool, the parties are prone to skirmish mightily over the trustworthiness *vel non* of public records and reports. The Advisory Committee makes clear that opponents of the evidence have the burden of rebutting the presumption that 803(8)(C) materials are trustworthy and admissible. "[T]he rule . . . assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Advisory Committee Note to Rule 803(8). *See Melville* v. *American Home Assurance Co., supra*, 443 F.Supp. at 1112.

The trustworthiness question is something which, as we see it, must be resolved prior to trial, lest there be lengthy delays in the midst of the trial process (most disconcerting to the jury) while the court adjudicates the matter; accordingly, the *in limine* or pretrial hearing is the appropriate vehicle for such adjudication, which can take the form of admission or exclusion of evidence or redaction thereof. Although Rule 803(8) requires the court to make a threshold determination on the trustworthiness issue, the Rule also clearly implies that where the court determines that the evidence passes that threshold, the party against whom the evidence is offered may counter it by introducing before the jury evidence of the untrustworthiness of the public record or report.[15] However, where the probative value of the report is outweighed by the danger of unfair prejudice, confusion of issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence attendant upon the opponents' efforts to establish untrustworthiness of the report, the court may ex-

[15] It is expected that the trial judge would, in any event, give a limiting instruction to the jury to the effect that they are not bound by the public agency finding, but rather must consider it as evidence along with all the other evidence.

clude the report under F.R.E. 403. *John McShain, Inc.* v. *Cessna Aircraft Co.*, 563 F.2d 632 (3rd Cir. 1977).

The Advisory Committee addressed the important question of the criteria to be applied in determining trustworthiness of evaluative reports, listing the following factors for assistance in passing upon admissibility:

> (1) the timeliness of the investigation . . .; (2) the special skill or experience of the official . . .; (3) whether a hearing was held and the level at which conducted . . .; (4) possible motivation problems . . . .

Advisory Committee note to 803(8) (citations omitted). The Committee also observed: "Others no doubt could be added." As we proceeded through our hearings on public records and reports, it became clear to us that this statement was correct, or perhaps prescient.

Consonant with the Advisory Committee's thought, and in aid of disposition of the evidentiary questions before us, we have fashioned a number of additional criteria for evaluating trustworthiness.[16] Each of these criteria has emerged from the crucible of our hearings, and is responsive to what we perceive to be a legitimate concern about the trustworthiness of the reports and findings proffered by plaintiffs. The criteria are responsive to a number of questions about the scope of Rule 803(8)(C) which have not been addressed, or at least extensively developed, in the caselaw. These criteria, which we shall apply in our trustworthiness evaluation, in addition to the Advisory Committee's four criteria, are as follows:

> (1) The finality of the agency findings, *i.e.*, the state of the proceedings at which the findings were made (whether they are subject to subsequent proceedings or *de novo* review), and the likelihood of modification or reversal of the findings.
>
> (2) The extent to which the agency findings are based upon or are the product of proceedings pervaded by re-

[16] Several of these criteria are essentially refinements of the Advisory Committee's criteria.

ceipt of substantial amounts of material which would not be admissible in evidence (*e.g.* hearsay, confidential communications, ex parte evidence), and the extent to which such material is supplied by persons with an interest in the outcome of the proceeding.

(3) If the findings are products of hearings, the extent to which appropriate safeguards were used (Administrative Procedure Act, Due Process), and the extent to which the investigation complied with all applicable agency regulations and procedures.

(4) The extent to which there is an ascertainable record on which the findings are based.

(5) The extent to which the findings are a function of an executive, administrative, or legislative policy judgment (as opposed to a factual adjudication) or represent an implementation of policy.

(6) The extent to which the findings are based upon findings of another investigative body or tribunal which is itself vulnerable as the result of trustworthiness evaluation.

(7) Where the public report purports to offer expert opinion, the extent to which the facts or data upon which the opinion is based are of a type reasonably relied upon by experts in the particular field.

There was considerable dispute about all of these matters during the course of the hearings. The foregoing formulation represents a conclusion on our part that public records and reports will fail to pass trustworthiness muster under the circumstances suggested in these criteria, which we shall now address briefly. Fuller explication will emerge from an application of these principles to the actual evidence before us.

Addressing our first additional criterion, we believe that where the proffered findings are preliminary, emerging at an early stage of the agency's proceedings,[17] and are not only subject to extensive reconsideration, but are highly susceptible to modification or reversal, they cannot be deemed trustworthy. The drafters of the Rule appear not to have contemplated that it might be used to admit administrative decisions which are subject to appeal, for unlike Rule 609(e)[18] nothing in the Rule precludes or qualifies its application when the findings that a party seeks to introduce are subject to extensive review. Given the absence of provision for such a situation by the drafters, we believe the appropriate course is to consider the preliminary finding a candidate for admissibility but to also consider the forthcoming review in determining whether or not the findings are trustworthy.[19] Of course, if administrative findings are reversed, rejected, or overruled on appeal, the rejected findings must be deemed untrustworthy, as we have occasion to discuss in more detail in connection with the CF29's. *See* Saltzburg and Redden, *Federal Rules of Evidence Manual* (2d Ed.Supp. 1980) at 152.

In sum, we think that the effect on admissibility of the fact that a particular finding was made in the "first inning," so to speak, of a protracted process should be considered under the rubric of trustworthiness and not, as the defendants contend, as part of the definition of "findings." The dangers of modification or reversal were demonstrated in the *Plywood* litigation, *supra*, when the decision of the FTC (though not the findings actually introduced) was recently reversed. *See Boise Cascade Corp., et al.*, [1978] Trade Reg. Rep. ¶ 21,393, *enforcement denied, Boise Cascade Corp.* v. *FTC*, [1980-2] Trade Cases ¶ 63,323. We turn to our second, third, and fourth additional criteria, which we shall address together.

The fact that the findings were based in part on hearsay or on confidential sources which were not divulged to the defendants

[17] We recognize that not all 803(8)(C) material emanates from agency proceedings, *cf. Baker* v. *Elcona Homes*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979), but in most cases it does. Moreover, the *Baker* sort of case, which involved a police investigation report of a motor vehicle collision, is usually much simpler to deal with.

[18] Rule 609(e) provides: "The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible."

[19] The availability or pendency of review should also be a factor which may be presented to the trier of fact to influence the weight given the finding. *Cf.* F.R.E. 609(e).

does not ipso facto render the findings so untrustworthy as to be inadmissible. No court has held that in order to be admissible under 803(8)(C) findings must result from proceedings with *all* the procedural protection afforded under the APA or in judicial proceedings. Such an interpretation would be at odds with the failure of the drafters of 803(8)(C) to require first hand knowledge by the investigator or a duty to report by those contributing information. It would also conflict with the Advisory Committee's "assumption that a public official will perform his duty properly," *i.e.*, will exercise his judgment and give appropriate weight to the various types of evidence relied upon by the government. Moreover, given the fact that most 803(8)(C) reports are in the nature of expert reports, such a construction would be inconsistent with Rule 703, which provides that the facts and data forming the basis for an expert opinion need not themselves be admissible so long as they are of a type reasonably relied upon by experts in the particular field.

We believe, however, that findings cannot be deemed trustworthy where they emerge from proceedings that are pervaded by the receipt of ordinarily inadmissible material or that are notably lacking in procedural safeguards, although appropriate weight must be accorded where the agency has complied with its own procedures. *Cf. Lloyd* v. *American Export Lines*, *supra*, 580 F.2d at 1189 (judgment of Japanese court held admissible under 803(22) where foreign proceedings accorded with "civilized jurisprudence" and were "stated in a clear and formal record").

Thus, when hearsay dominates, the report may be excluded. *See Swietlowich* v. *County of Bucks*, 610 F.2d 1157, 1165 (3rd Cir. 1979) (district attorney's report proffered in civil rights litigation excluded because based on hearsay); *John McShain, Inc.* v. *Cessna Aircraft Co.*, *supra* (National Transportation Safety Board report based upon hearsay statement excluded); and see *Melville, supra*, where one FAA airworthiness directive which rested on hearsay was excluded. 443 F.Supp. at 1115, n. 75. *But see* n. 21 *infra*.

The fifth additional criterion we have set forth—the extent to which the findings are a function of an executive, administrative, or legislative policy judgment or represent an implementation of policy—is essentially a variation on the theme of "motivational problems" identified as one of the Advisory Committee's trustworthiness criteria, although we think it different enough to warrant separate discussion. In our view, where there exists within an agency a preconceived notion of the policy that the agency is attempting to implement, *e.g.*, sheltering United States industry from what are perceived as the deleterious effects of unfettered international competition, *see* Part IV *infra*, the "findings" of that agency are to at least some degree a function of that preconceived notion, and though they may be "trustworthy" in light of the particular policy objectives the agency is attempting to further, they may or may not be trustworthy for other purposes. Overriding policy concerns bring into question the objectivity of an agency's findings just as the objectivity of a report prepared in anticipation of litigation, *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), may be questionable.

The final criterion upon which we need comment at any length is the last additional criterion we have listed—where the public report purports to offer expert opinion, the extent to which the facts or data upon which the opinion is based are ascertainable and/or are of a type reasonably relied upon by experts in the particular field.[20] That criterion is a function of the close relationship between 803(8)(C) and F.R.E. Article VII (the opinion evidence rules), which we discussed in our opinion in *Melville*, 443 F.Supp. at 1114-15, and of which the court of appeals likewise took cognizance. 584 F.2d at 1316. As we have suggested above, 803(8)(C) evaluative findings are

---

[20] We have not independently discussed additional criterion #5. The reason this criterion bears upon the question of trustworthiness is self-evident. Where a finding merely reiterates or depends in significant measure upon a finding made by another investigatory body, its trustworthiness is a function of the trustworthiness of the procedures used by the agency that made the finding initially.

frequently offered for their underlying (or overriding) expertise; hence, implicit in the trustworthiness determination is the right to attack: (1) the agency's expertise, *see* Advisory Committee Note ("the special skill or experience of the official"); (2) the basis of its opinion or finding, and (34) its helpfulness to the jury (F.R.E. 702). Just as an opinion may be held inadmissible if its basis is sufficiently tainted, so may a public record or report which is in effect an opinion.[21]

We have considered plaintiffs' argument that 803(8) and the opinion evidence rules differ in that the latter require a foundation to be laid prior to the introduction of the expert's testimony whereas 803(8) omits the foundation requirements. This argument is answered in *Melville, supra,* 443 F.Supp. at 1115—in the case of public records and reports, the foundation can be attacked under the trustworthiness rubric. "[W]here the foundation of an opinion would be discredited under Rule 705 cross-examination, the presumptive trustworthiness of the opinion might well be sufficiently impugned to disqualify the report under 803(8)(C), thus requiring the proponent of the report either to produce the declarant for purposes of cross-examination or to forego use of the evidence."

We have also considered, and concur with, plaintiffs' contentions that there is no requirement in the F.R.E. that evidence be dispositive of a particular factual issue to be admissible. Where a public record or report passes the trustworthiness threshold, its weight is for the jury, subject to evidence and

[21] *Cf. Fraley* v. *Rockwell Int'l Corp.*, 470 F.Supp. 1264 (S.D.Ohio) (1979), where Judge Rubin permitted introduction of a Naval Rework Facility report containing conclusions about the causes of an airplane crash. Even though the report was based exclusively on hearsay, it was held admissible because the hearsay was provided by persons with firsthand knowledge and the report was prepared by an experienced investigator. Judge Rubin excluded a second report that discussed general circumstances surrounding the crash because it was prepared by an inexperienced investigator. In a related case, *Sage* v. *Rockwell Int'l Corp.*, 477 F.Supp. 1205 (D.N.H. 1979), Judge Loughlin permitted introduction of both reports, ruling that the experience or inexperience of the investigator preparing the report was a factor that went to weight and not admissibility.

argument by the opposing party that the report is not trustworthy (and also subject to the overriding requirement that if the probative value of the report is outweighed by the delay involved in litigating trustworthiness, it may be excluded under F.R.E. 403. *John McShain, Inc.* v. *Cessna Aircraft Co., supra*). However, the court's obligation to make the threshold determination, at an *in limine* hearing, remains. This determination, as we see it, must come from a balancing process wherein all of the relevant factors are evaluated. Where the public report is in the nature of an expert opinion, those factors include a consideration of whether the agency possesses sufficient expertise, *see* n. 21, *supra*, whether the factual basis of the report is flawed, and whether the facts or data upon which the opinion is based are ascertainable and/or are of a type reasonably relied upon by experts in the field.

Against this background, we turn to consideration of the 1921 Antidumping Act material.

III. The 1921 Antidumping Act Material

A. *Introduction*

The plaintiffs have submitted for consideration seven documents arising out of proceedings instituted by the Treasury Department under the 1921 Antidumping Act, 19 U.S.C. § 160, *et seq.* (repealed 1980). We have sketched the procedure under the 1921 Act in our opinion filed on April 14, 1980, 494 F.Supp. 1190, dismissing the greater part of plaintiffs' claims under the Antidumping Act of 1916. The chronology of the proceeding may be gleaned from a description of the documents before us, listed by their DSS numbers:

1. The Antidumping Proceeding Notice, 33 FR 8851 (1968);

2. The Withholding of Appraisement Notice, 35 FR 14100 (1970);

3. The Treasury Department Determination of Sales at Less Than Fair Value, 35 FR 18549 (1970);

4. Determination of Injury, United States Tariff Commission Investigation No. AA1921-66 (undated);

5. Notice of Dumping Duty to Be Imposed, 36 FR 4576 (1971) [consists of DSS #4 with introductory text];

5A. The Treasury Department Finding of Dumping, 36 FR 4597 (1971); and

6. Numerous Customs Form 29's (various dates in 1978) [appraising dumping duties against various defendants and other importers].[22]

The defendants' objections to the 1921 Act submissions are manifold and we shall take them up in detail as we discuss each document. Suffice it to say by way of introduction that defendants' overriding arguments fall into the following categories:

1. The documents do not constitute findings within the meaning of § 803(8)(C).

2. The documents are not trustworthy.

3. The documents are not relevant.

4. Any minimal probative value the documents may have is outweighed by the factors listed in Rule 403.

It would take chapters, not pages or paragraphs, to describe the labyrinthine procedures under the 1921 Antidumping Act. Those proceedings, to paraphrase the old movie title, are a many-layered thing. Moreover, although the proceedings with which we are now concerned have been going on for years, they are nowhere close to resolution. On a fair estimate, it might take another decade before they are resolved, that is if the settlement recently entered into between the Treasury Department and the respondents in that proceeding is overturned in court.[23] We will not describe the entire procedure here; it is amply developed in the record. However, we will sketch the major events in the twelve-year history of the proceeding as a necessary background to our consideration of the defendants' evidentiary objections.[24]

---

[22] The record contains thousands of CF29's. However, as we have noted, *supra*, they all raise the same issues and can be disposed of together.

[23] *See* pp. 1153-1154, *infra*.

[24] The following account of the proceedings under the 1921 Act is taken from the public record consisting of the notices published in the Federal Register, i.e. DSS # # 1-5A themselves; from papers filed by the government in *Committee to Preserve American Color Television* v. *Miller*, No. 79 1948 (D.C.Cir.), copies of which have been made available to us by the defendants; and from the affidavits submitted by the defendants. Those affidavits were signed and sworn by A. Paul Victor, who is counsel of record for the Matsushita defendants in this action and also represented Matsushita in the 1921 Act proceedings, and by Lawrence R. Walders, who is counsel of record for the Hitachi defendants in this action and represented Hitachi and others in the 1921 Act proceedings. The plaintiffs have not controverted any of the material averments of the Victor and Walders affidavits, except to point out that judicial review of the LTFV and injury findings are not equivalent to a trial *de novo*, *see* n. 26, *infra*.

B. *The 1921 Act Proceedings*

An administrative proceeding under the 1921 Antidumping Act could be initiated by the Customs Service *sua sponte* or by any person who had information that merchandise was or was likely to be imported into the United States under circumstances bringing it under the purview of the Act, and who communicates that information in writing to the Commissioner of Customs. The Japanese television proceeding was intiated by the receipt of information from the law firm of Lincoln & Stewart on behalf of the Imports Committee of the Tube Division of the (United States) Electronic Industries Association. In accordance with applicable customs regulations, the Commissioner of Customs then undertook a summary investigation to determine whether or not the information was "patently in error" or whether for other reasons further investigation was not warranted. Following that summary investigation, the Commission published in the Federal Register an "Antidumping Proceeding Notice," as was required by the regulations whenever a proceeding was not discontinued after the summary investigation. That notice constitutes DSS #1. The notice stated, in principal part, that information had been received in proper form which tended to indicate that television receivers from Japan were being sold at less than fair value, within the meaning of the Act, and that the Customs Bureau was "instituting an inquiry . . . to determine the validity of the information." 33 Fed.Reg. 8851 (June 18, 1968).

In the course of that inquiry, Treasury officials investigated the prices during the six-month period from November, 1967 to May, 1968 of five Japanese companies: Matsushita, Hitachi, Toshiba, Sharp, and Sony. The "less than fair value" ("LTFV") investigation lasted for two and one-half years, during which time Customs officials sought to determine the "purchase price," the "exporter's sales price," and the "home market price," as defined in the 1921 Act and in regulations promulgated thereunder. The determination whether or not LTFV sales had been made depended upon whether the "purchase price" or "exporter's sales price," representing prices in the United States, were lower than "home market price," representing prices in Japan. The three types of prices on which the determination was based were not actual transactional prices, but were constructs derived by applying to actual transactional prices a variety of adjustments reflecting, for instance, freight charges, selling expenses, or differences in the circumstances of sale. The LTFV proceedings consisted primarily of the verification of transactional price data submitted by the five Japanese manufacturers, and of decisions, made informally by anonymous Treasury officials after *ex parte* contacts with representatives of United States and Japanese manufacturers, to allow or disallow adjustments claimed by the Japanese manufacturers.[25]

After the Antidumping Proceeding Notice, the next step in the formal 1921 Act procedures, as set forth in Treasury Regulations, was the publication of a "Withholding of

[25] According to the Walders affidavit, *see* n. 24, *supra*, the adjustments claimed by Hitachi and other companies for differences in the circumstances of sale of television receivers in the U.S. and in Japan would have eliminated the apparent margin of dumping if the adjustments had been granted instead of disallowed. Hitachi claimed adjustments to reflect, for example, cash discounts to retailers in Japan, costs of sales promotion in the Japanese market, and interest costs incurred in Japan. Hitachi was notified in informal conferences with Treasury officials that each of these claimed adjustments were disallowed, in whole or in part, but no written statement of the reasons for the disallowance was ever made, and Hitachi continues to maintain that the claimed adjustments should have been granted.

Appraisement Notice" if the Commissioner of Customs determined that there were "reasonable grounds to believe or suspect" that LTFV sales had been made. In conjunction with that notice, customs officials were directed to withhold their appraisement of imported merchandise of the specified type. The Withholding of Appraisement Notice in the Japanese television proceeding was published in the Federal Register on September 4, 1970, 35 Fed. Reg. 14100, and is DSS #2 in the litigation now before us.

Following the publication of that notice, the Treasury Department held an informal hearing on October 14, 1970, to permit interested persons to make oral presentations of their views. No testimony was taken at that hearing, and no record was made; indeed, the participants were forbidden to make a transcript of the hearing by electronic or other means. The ultimate decisionmaker in the LTFV phase of the proceedings, Assistant Secretary of the Treasury Euguene T. Rossides, did not attend the hearing.

On December 5, 1970, the final result of the LTFV inquiry was published in the Federal Register, 35 Fed.Reg. 18549. This "Determination of Sales at Less Than Fair Value" is now offered as DSS #3. In it, Assistant Secretary Rossides found that television receivers from Japan were being sold at less than fair value, within the meaning of the 1921 Act. The determination, which occupies little more than one column on one page of the Federal Register, was based on a comparison of either the "purchase price" or the "exporter's sales price" with the "home market price." Although the LTFV finding did not state the magnitude of the margin between United States and Japanese prices, subsequent statements of customs officials, which are in the record before us, put the LTFV margin at 2.2%. The determination listed, in a conclusory fashion, the types of adjustments which had been made to arrive at each of the price constructs, but offered no statement of the reasons why particular adjustments were made, the amounts of the adjustments, the models and categories of television receivers with respect to which each adjustment was made, or the manu-

facturer with respect to whose prices the adjustments were made. The determination made no mention whatever of the adjustments claimed by the manufacturers which Treasury officials had disallowed and, in particular, gave no statement of the reasons for disallowance of such claimed adjustments.

Following the LTFV determination, the 1921 Act proceeding was referred to the United States Tariff Commission in accordance with 19 U.S.C. § 160(a) for an investigation as to whether an industry in the United States was being injured by reason of LTFV sales of television receivers from Japan. An evidentiary hearing was held before the Tariff Commission, which issued its "Determination of Injury" on March 4, 1971. The Commission considered confidential submissions from American manufacturers which were not divulged to counsel for the importers. At the evidentiary hearing, counsel for the importers were not permitted to cross-examine witnesses with respect to confidential data to which those witnesses referred during direct testimony.

The Tariff Commission found that an industry in the United States was being injured by reason of the importation of television receivers from Japan which were being sold at LTFV prices. It found the injured industry to consist of "the facilities in the United States for the production of television receivers," and noted that there were approximately 20 firms in the industry. The Commission's report did not mention any firm individually, but discussed only injury to the industry as a whole. A typescript of the report is offered in this litigation as DSS #4, and the nearly identical version published in the Federal Register is offered as DSS #5, 36 Fed.Reg. 4576.

According to the statutory scheme of the 1921 Act, after a finding of LTFV sales by the Treasury Department and a finding of injury by the Tariff Commission have both been made, the Secretary of the Treasury was required to publish a finding of dumping. 19 U.S.C. § 160(a). The publication of a dumping finding was a purely ministerial act since it was an automatic consequence of the LTFV and injury findings. *See Timken Co.* v. *Simon*, 539 F.2d 221 (D.C.Cir. 1976). In the

Japanese television proceeding, a "Finding of Dumping" was published on March 10, 1971, 36 Fed.Reg. 4597. This finding, which is proffered as DSS #5A, consists of a brief report of the LTFV and injury determinations, and an announcement of the formal finding of dumping with respect to television receivers imported from Japan.

Following the issuance of the dumping finding, the Customs Service commenced the process of liquidating the dumping duties owed by each importer of Japanese television receivers. By statute, the duty equalled the difference between the purchase price or exporter's sales price and the foreign market price. 19 U.S.C. § 161(a). During the liquidation process, the Customs Service addressed for the first time the responsibility of particular importers for sales in the United States at lower prices than those charged for comparable merchandise in Japan. The liquidation of duties proceeded extremely slowly. Until March 31, 1978, seven years after the dumping finding and ten years after the initiation of the proceeding, no duties had been assessed against any importers. The Customs Service had undertaken the laborious task of requiring and then reviewing voluminous submissions from each importer of Japanese television receivers, concerning transactional prices and claimed adjustments. However, early in 1978, the Customs Service decided to accelerate the assessment of duties by discarding the traditional method of determining foreign market price, relying instead on calculations based on the commodity tax levied upon Japanese manufacturers by the Japanese government. This so-called "Japanese commodity tax formula" consisted of multiplying the retail price in Japan by a fixed factor of .5391 to determine a projected ex-factory wholesale price. No adjustments were made to the figure derived by application of the "Japanese commodity tax formula," although the statute and regulations promulgated thereunder required that many types of adjustments be made in the determination of foreign market price.

Beginning on March 31, 1978, the Customs Service assessed dumping duties based upon the unadjusted foreign market

value calculated by means of the commodity tax formula. The initial assessment, covering imports made through June 30, 1973, totalled approximately $46 million. The Customs Service estimated that the total amount of dumping duties assessed on the basis of the unadjusted commodity tax formula would be approximately $500 million. The customs forms notifying importers of the assessment of duties on the basis of the Japanese commodity tax formula, known as CF29's, are proffered in this litigation as DSS #6. There are literally thousands of CF29's in the record, as a separate form was prepared for each entry of merchandise into the United States during the relevant period.

The duties assessed in 1978 were subject to administrative review as a result of protests filed by the importers. The protest decisions addressed a variety of objections, but primarily consisted of decisions to allow or disallow certain claimed adjustments to the commodity tax formula. As a result of adjustments made by the protest decisions, the $46 million assessed for dumping duties through June 30, 1973 was reduced by more than 80% to less than $8 million.

On January 1, 1980, the responsibility for the administration of antidumping proceedings was shifted from the Treasury Department to the Commerce Department, pursuant to Executive Order No. 12188 and Reorganization Plan No. 3 of 1979. After a review of the Japanese television proceeding, Homer E. Moyer, Jr., General Counsel of the Commerce Department, recommended to the Secretary of Commerce that the proceeding be settled by a compromise of the government claims. The claims were settled on April 28, 1980, for payments of $77 million in return for a release of any liability for antidumping duties resulting from imports made before April 1, 1979. The operation of the settlement agreements has been stayed, however, by order of the United States Court of Appeals for the District of Columbia in litigation brought by an organization which represents the interests of domestic television producers. *Committee to Preserve American Color Television* v. *Miller*, No. 79-1948. Moreover, Zenith has brought

an action in the United States Customs Court to challenge the determinations reflected in the settlement.

If the settlement agreements are invalidated for any reason, or if the proceeding had never been settled, the importers against whom dumping duties had been assessed would have a right to seek judicial review of the proceeding the the United States Customs Court. In fact, Matsushita sought to raise due process objections to the LTFV investigation in the Customs Court in 1971, but its suit was dismissed as premature, since challenges to the LTFV finding could be heard after the liquidation of duties. *Matsushita Electric Industrial Co.* v. *U.S. Treasury Department*, 67 Cust.Ct. 328, 333, C.D. 4292 (1971), *aff'd*, 485 F.2d 1402, 60 C.C.P.A. 85, *cert. denied*, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973). Thus, the scope of review in the Customs Court could potentially include such matters as procedural objections to the LTFV proceedings which were completed in 1970.[26] Any decision of the Customs Court might be appealed to the Court of Customs and Patent Appeals and, if certiorari were granted, to the Supreme Court.

---

[26] The plaintiffs contend that the LTFV and injury findings would not be triable *de novo* in the Customs Court, but would be subjected to a lesser standard of review. The leading decisions of the Court of Customs and Patent Appeals have held at least that those findings must be upheld if they are supported by substantial evidence, and also contain strong indications that the standard of judicial review is even narrower, amounting to an "arbitrariness" standard. *Imbert Imports* v. *United States*, 475 F.2d 1189, 60 C.C.P.A. 123 (1973); *City Lumber Co.* v. *United States*, 457 F.2d 991, 59 C.C.P.A. 89 (C.C.P.A. 1972); *Kleberg & Co.* v. *United States*, 71 F.2d 332 (C.C.P.A. 1933). Some recent decisions of the Customs Court have applied this narrow standard of review. *E.g.*, *Armstrong Bros. Tool Co.* v. *United States*, C.D. 4838 (Cust.Ct. Jan. 28, 1980), *appeal pending*, No. 80-20 (C.C.P.A.); *SCM Corp.* v. *United States*, C.R.D. 80-2 (Cust.Ct. Mar. 7, 1980). However, in *Michelin Tire Corp.* v. *United States*, C.R.D. 79-6 (Cust.Ct. Feb. 26, 1979), Judge Watson of the Customs Court ruled that the line of appellate decisions commencing with *Kleberg* was no longer valid because of intervening developments in the law, and stated in dictum that a *de novo* trial should be available in actions challenging LTFV and injury determinations under the 1921 Act. In its report on the Trade Agreements Act of 1979, which enacted a new antidumping law, the Senate Finance

Committee commented that the law concerning the scope of review of antidumping findings under the 1921 Act, particularly the availability of *de novo* review, was "unclear and conflicting." S.Rep. No. 96-249, 96th Cong., 1st Sess. at 251 (1979), 1979 U.S. Code Cong. & Admin. News p. 381. The Committee added that antidumping findings under the 1979 Act would not be subject to *de novo* review because procedural changes made by the 1979 Act "have eliminated any need for *de novo* review." *Id.* at 251-52, 1979 U.S.Code Cong. & Admin. News p. 637.

We need not determine whether the antidumping findings proffered here are subject to *de novo* review, to review on a substantial evidence standard, or only to review to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Even the narrowest of the standards of review which have been applied to antidumping findings requires the Customs Court to "engage in a 'searching and careful' inquiry into the facts." *SCM Corp., supra, quoting Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-16, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). The pertinent fact is that the findings are still subject to judicial review which is more than cursory, however the standard of review is articulated.

Moreover, in *SCM Corp.*, the Customs Court ordered the International Trade Commission to provide a fuller statement of its subordinate factual findings and the reasons for its finding of non-injury under the 1921 Act, in order to make meaningful judicial review possible. We think that the LTFV finding lacks a sufficient statement of reasons and subordinate factual findings, and this deficiency is a significant factor which has contributed to our decision that the finding is untrustworthy. If the LTFV finding were reviewed by the Customs Court, that court might agree with us that the statement of reasons is deficient, and follow *SCM Corp.* by ordering what is in effect a remand of the entire LTFV investigation to the administering agency.

Whatever the scope of review of the findings may be, there is a separate issue as to whether the defendants' objections to the procedures employed in the LTFV investigation are cognizable in the Customs Court. While we are aware of no customs decision which specifically addresses this question, or indicates what degree of deference should be afforded to agency procedures, the reasoning of the *Matsushita* decision, cited in the text, suggests that such procedural objections could appropriately be considered in the Customs Court after the liquidation of duties.

The plaintiffs concede that appraisements of particular entries of merchandise, including the value determinations which underlie the assessment of antidumping duties in the CF 29's, are subject to a *de novo* trial in the Customs Court. *See F. W. Myers & Co.* v. *United States*, 376 F.Supp. 860 (Cust.Ct. 1974).

C. *The Hearsay Objection—Are the Exceptions Satisfied?*

1. *Introduction*

The seven documents that plaintiffs offer from the 1921 Act proceedings are plainly hearsay and, accordingly, are not admissible in evidence unless they fall within one of the hearsay exceptions. The only exception which appears to be relevant is Rule 803(8)(C). The defendants contend that the documents do not fall within the exception because they are not findings, and because they are not trustworthy.

We turn first to the objection that the documents, or at least some of them, are not findings. DSS #s 1 and 2 may be disposed of quickly; they are mere preliminary notices and not findings. Although they may properly be termed reports setting forth the activities of the Customs Service and/or matters observed pursuant to a duty imposed by law and are therefore admissible under the exceptions of Rule 803(8)(A) and (B), their admissibility as substantive proof of dumping violations is perforce conditioned upon the admissibility of DSS #s 3 to 6. DSS#s 3 through 6 may be fairly characterized as "findings," in the ordinary-language sense. The question nonetheless arises as to whether they are findings within the meaning of 803(8)(C), because they are subject to extensive administrative and judicial review.[27] As we have explained in Part II, *supra*, we think that the effect on admissibility of the fact that a particular finding was made in the "first inning," so to speak, of a protracted process should generally be considered under the rubric of trustworthiness and not, as the defendants contend, as part of the definition of "findings."

We turn then to the trustworthiness issues raised with respect to each document.

---

[27] DSS # 5A is also assailed as a "non-finding" since its publication, as we have noted, is an automatic consequence of the LTFV and injury findings. We view DSS # 5A as a combined report of the results of the LTFV and injury investigations and its ministerial nature therefore does not affect its status as a "finding." Its trustworthiness and relevance can be no greater, of course, than that of the LTFV and injury findings upon which it rests.

2. *The LTFV Findings*

The question of the trustworthiness of the LTFV findings is not free from difficulty. Three of the four factors identified in the Advisory Committee Note do not militate against their admission. The investigation was timely; the investigating officials were professionally responsible for investigations of this sort,[28] and there is no hint of any motivation problems underlying the investigation.[29] However, the answer to the question of whether hearings were held and at what level is unclear. It is plain that no evidentiary hearing was held, although the parties involved had an informal opportunity to be "heard" by conferring *ex parte* with the investigators to tell their side of the story and respond to questions. There also was an opportunity for the lawyers to argue to the investigators at a sort of "hearing." Yet, the ultimate decision-maker, the Assistant Secretary of the Treasury, Mr. Rossides, was not present at any of the hearings and apparently made the ultimate LTFV finding on the basis of staff reports which may have been oral and therefore unrecorded.

Furthermore, significant problems arise from application of the additional criteria that we have posited. First, while the investigation apparently complied with the Treasury Department's applicable regulations and procedures, the finding is undeniably the product of proceedings pervaded by receipt of substantial amounts of material which would not be admissible in evidence: hearsay, confidential communications, and *ex parte* evidence. Second, there appear to have been few if any safeguards, like the opportunity to cross-examine witnesses, attendant to the investigative and "hearing" process. Third,

[28] There is nothing in the record to indicate the personal or professional qualifications of the officials who were responsible for the LTFV Investigation.

[29] While the defendants remind us that the proceedings were not antitrust-oriented, the motivation problems contemplated by the Advisory Committee Note are not of the nature which defendants suggest. *See id.*, citing *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). *But see* additional criterion # 5 and discussion *supra* at 1147.

there is no ascertainable record on which the finding is based. Fourth, the LTFV finding was made at the nascent stage of the investigation, many years before the actual assessment of duties on particular entries of merchandise. Fifth, the finding would still be subject to searching judicial review, probably, though not certainly, on a narrow standard of review, *see* n. 26, *supra*, were it not for the recent settlement of the government's claims.[30] Finally, the LTFV finding contains no statement of the reasons for allowance or disallowance of particular adjustments, a matter which was crucial to the outcome of the LTFV investigation, and no formal statement of these reasons was ever given.

It is of some significance that both Congress and the Treasury Department have made substantial changes in the pro-

[30] The defendants contend that the LTFV finding has already been decisively repudiated by responsible officials of the Commerce Department in connection with the settlement of the Government claims. While we accept the defendant's parallel argument with respect to the CF29's, we do not find an equivalent repudiation of the LTFV finding in the documents upon which the defendants rely. While Homer Moyer, the General Counsel of the Commerce Department, has in our view conceded that the CF29's would probably be overturned upon judicial review because of use of the commodity tax formula, *see* pp. 1157-1158, *infra*, that formula played no part in the LTFV investigation. Although Mr. Moyer expressed some concern about other aspects of the proceedings in his memorandum recommending settlement of the government's claims, those references were merely assessments of litigation risks of the sort that any attorney would undertake in considering settlement of a case. Thus, we do not view any aspect of the proceeding, except the CF29's, which rested on commodity tax formula, as repudiated by the government.

In addition, the defendants contend that a provision of the settlement agreement itself constitutes an official repudiation of the entire 1921 Act proceeding. In one paragraph which appears to have been included in the settlement agreements negotiated with each importer, the government represents that it "knows of no violation" of the antidumping law. While it is common in settlement agreements to recite that the settlement does not constitute an admission of liability, this statement is extraordinary, going far beyond the "boiler plate" practice. However, we do not believe that we can accord the statement or the settlement agreements any effect so long as they are subject to the stay entered by the D.C. Circuit, *see* p. 1153, *supra*.

cedures employed in administrative proceedings under the 1921 Act and its successor legislation in the years since the LTFV investigation of Japanese television receivers in 1968-70. The current procedures not only rectify the long delays under the previous procedures, but also require that an evidentiary hearing be held in all LTFV investigations and permit interested parties to have access to confidential submissions made to the administering authority, under the protection of a confidentiality order limiting public access to the submissions.[31]

[31] The procedures employed in antidumping proceedings have been changed since 1970 to eliminate any questionable and delay causing practices. The first change was an amendment to Treasury regulations, 37 Fed.Reg. 26299 (1972) which imposed a nine-month deadline for LTFV investigations, with an extension to twelve-month deadline in complicated cases. In 1974, Congress incorporated those time limits into the 1921 Act itself, as amended in the Trade Act of 1974, Pub.L.No. 93-618. *See* 19 U.S.C. § 160(b). In the same act, Congress added a new provision to the 1921 Act which required both the Secretary of the Treasury and of the Tariff Commission to publish a "complete statement" of their findings and conclusions and the reasons or bases therefor on all of the material issues of fact or law presented. 19 U.S.C. § 160(d)(2). The Act also, for the first time, imposed a statutory requirement that hearings be conducted by both the Treasury Department and the Commission. In contrast to the absence of a hearing record in the television case, the Trade Act required the Treasury Department as well as the Commission to make a transcript of all hearings conducted. The statute continued to provide for non-disclosure of confidential information. 19 U.S.C. § 160(d)(3). These statutory changes were implemented by the Treasury Department in regulations issued on June 25, 1976, 41 Fed.Reg. 26203. The provisions for hearings are set forth in Section 153.40 of the regulations, 41 Fed. Reg. 26212.

On March 23, 1978, the Customs Service issued a new regulation providing for disclosure conferences wherein customs officials would advise interested parties of the reasons for tentative determinations. 43 Fed.Reg. 11982. The disclosure conferences which were held after publication of tentative LTFV determinations gave interested parties an opportunity to learn the bases for the calculations. This information helped the parties make a meaningful presentation to the Treasury Department in briefs and oral argument, unlike the situation in the television case where the participants at the LTFV "hearing" had no clear idea of the rationale for the decision, according to the uncontroverted affidavits before us.

The law and procedures for the conduct of antidumping investigations were further revised in the Trade Agreements Act of 1979, P.L. 96-39. That statute repealed the Antidumping Act, 1921, and adopted new antidumping provisions, 19 U.S.C. §§ 1673-1673i (1980). While the Trade Agreements Act largely retained the substantive law of the 1921 Act, it made significant changes in the procedures for the conduct of investigations. Of particular interest are the provisions for access to confidential information that is submitted to the International Trade Commission (the successor to the Tariff Commission) and the Commerce Department (which was given jurisdiction over LTFV investigations). The statute provides for the disclosure under protective order of confidential information which is submitted in confidence to the Commission or the administering authority (the Commerce Department) during the course of an investigation. 19 U.S.C. § 1677f(c). Detailed provisions for disclosure under protective order are set forth in Section 353.30 of the new Commerce Department regulations, 45 Fed.Reg. 8182, 9197 (February 6, 1980), and Section 207.7 of the ITC regulations, 44 Fed. Reg. 76458, 76461-2 (December 26, 1979).

For the reasons indicated in Part II, *supra*, we must engage in a balancing procedure, a qualitative analysis of the factors involved in the trustworthiness balance. On balance, we find the defendants to have met the burden of showing the LTFV findings to be untrustworthy. We have commented upon the timeliness of the investigation, the professional responsibility of the investigating officials for this type of matter, the lack of motivation problems, and the apparent compliance with agency rules in force at the time. However, we believe that the weight of the six factors mentioned in the preceding paragraphs is so strong as to outweigh the others. We turn to the trustworthiness of the injury finding.

3. *The Injury Finding*

The defendants' principal objections to the trustworthiness of the injury finding are that it is based on the LTFV finding, and that the Tariff Commission considered confidential sources of evidence, including a confidential submission from the Treasury Department as well as from domestic manufacturers, upon which the defendants were not allowed to cross-examine witnesses at the evidentiary hearing. As our previous discussion suggests, the consideration of confidential sources of evidence does not in and of itself render the Commission's

findings inadmissible. We need not proceed through the balancing process which would be necessary to assess the reasonableness of the Commission's procedures, however, for the Commission's finding of injury "by reason of " LTFV sales logically depends upon the foundation of the LTFV finding and assumes the latter's validity. Accordingly, the injury finding can be no more trustworthy than the LTFV finding upon which it is based.

4. *The Dumping Finding*

The Finding of Dumping, DSS # 5A, is a composite report of the LTFV and injury findings. As such, it is no more or less trustworthy than the two underlying findings. Because, for the reasons we have already articulated, the LTFV finding is not trustworthy, the dumping finding is not either, and cannot be admitted.

5. *The CF29's*

The CF29's, DSS #6, present different issues of trustworthiness. We need not consider any objections to the procedures used to arrive at the CF29's, since they are untrustworthy for a more compelling reason: they have been overturned by subsequent administrative protest decisions, and have been repudiated by high officials of the responsible agency.

The CF29's that plaintiffs offer are those issued *prior* to administrative protest decisions that reduced the total amount of duties assessed for the relevant period from $46 million to $8 million, i.e., by more than 80 percent. Even the post-protest decision assessments were based on the "commodity tax formula," which has been effectively repudiated by responsible officials. Homer E. Moyer, Jr., the General Counsel of the Commerce Department, made that repudiation clear in his memorandum to the Secretary of Commerce dated April 28, 1980, in which he formally recommended settlement of the government's claims. Moyer wrote:

"Although we could defend use of the Commodity tax formula (a considerable amount of work has gone into memoranda arguing that it is lawful), its legal defensibility is, in my judgment, questionable. The Justice Department, which would of course represent the department in any litigation, is of the view that we could sustain the Commodity Tax formula only if we are able to demonstrate that the prices derived from that formula are *identical* to actual sales prices in Japan. It is almost certain that we could not make such a showing.

"If a court were to hold that the Commodity Tax approach could not be employed under the Antidumping Act, the Government's claims for dumping duties would either have to be dropped or recalculated on the traditional basis." Exhibit B to Reply Memorandum of Matsushita Defendants at 6 (emphasis in original).

This statement goes far beyond an assessment of litigation risks and amounts to an admission that the commodity tax formula, and the assessments based thereon, would probably be found invalid on judicial review. Thus, we conclude that the CF29's are untrustworthy and are inadmissible under Rule 803(8)(C).

We turn now to the question of the relevancy of the LTFV, injury, and dumping findings. We need not consider the relevancy of the CF29's since they have been repudiated by the responsible officials as palpably inaccurate.

D. *The Relevancy Objections*

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. "Evidence which is not relevant is not admissible." Rule 402. Although the standard of relevance is a liberal one, we conclude that is not met here. We consider the relevance of DSS #s 3 through 5A in turn.

1. *The LTFV Finding*

The LTFV finding is irrelevant in this litigation for at least two reasons. First, the finding was a comparison of price constructs and not of actual transactional prices. Second, the finding is countrywide, and does not specify that any particular company sold in the United States at LTFV prices.

The basis for the LTFV finding was a comparison between "purchase price or exporter's sales price and adjusted home market price," 35 Fed.Reg. 18549, as defined in the Antidumping Act of 1921, and as calculated with deductions enumerated in the notice. *Id.* As we have noted, the basis was not a comparison of actual transaction prices in the United States or in Japan.

"Purchase price," defined in 19 U.S.C. § 162 "was calculated on the basis of f.o.b. or f.o.r. packed prices with deductions for freight, packing and *other charges* [unspecified] as applicable. The applicable Japanese commodity tax was added to this price." 35 Fed.Reg. 18549 (emphasis added).

"Exporter's sales price," defined in 19 U.S.C. § 163 "was calculated by deducting from the resale prices of the related firms to distributors in the United States any applicable discounts to arrive at a net selling price. From the latter, appropriate deductions were made for inland freight in Japan, ocean freight and insurance, U.S. duty, brokerage charges, U.S. freight, warranty costs, packing, and commissions and other selling expenses incurred in the United States. To this additions were made for any applicable Japanese commodity tax refunded or not paid upon exportation of the merchandise." 35 Fed.Reg. 18549.

"Home market price" was defined in customs regulations as "the price (as defined in section 205, after adjustment as provided for in section 202 of the Antidumping Act, 1921, as amended (19 U.S.C. §§ 164, 161)), at which such or similar merchandise (as defined in section 212(3) of the Antidumping Act, 1921, as amended (19 U.S.C. § 170a(3)) is sold for consumption in the country of exportation on or about the date of

purchase or agreement to purchase of the merchandise imported into the United States if purchase price applies, or on or about the date of exportation thereof if exporter's sales price applies." 19 C.F.R. § 53.3 (1970). In the Japanese television proceeding, home market price "was based on the delivered price to distributors in the home market. Appropriate deductions were made for discounts and rebates granted for cash, quantities, and certain sales promotions. From the net price, adjustments were made for commissions, warranty and installation costs, inland freight, inland insurance, patent fees, bad debts, where applicable, and packing. Adjustments were also made for differences in the merchandise and differences in advertising and credit costs." 35 Fed.Reg. 18549.

The Treasury Department's conclusion that LTFV sales had been made was merely the legal consequence of its finding that "Purchase prices or exporter's sales prices were lower than home market prices by amounts that were more than minimal in relation to the total volume of sales." 35 Fed.Reg. 18549. Because of all the adjustments in unspecified dollar amounts which were made to the three types of prices considered in the LTFV proceeding, that finding is of no probative weight to support any conclusion about price differentials, either between actual transactional prices or between "adjusted" prices. Thus the finding has no tendency to make the existence of such price differentials more probable or less probable than their existence would be without the finding. F.R.E. 401.

The finding is plainly irrelevant to show differentials between actual transactional prices, since it is based on a comparison of price constructs. Nor is the LTFV finding probative of differentials between "adjusted" prices. Nothing in the finding or in the record before us suggests that the adjustment made in the LTFV proceeding are the same as those which the finder of fact might consider in this case. While it might be appropriate for the finder of fact to consider adjustments of the type made by Treasury in the LTFV proceeding, the nature and amounts of any such adjustments would have to be proved at trial. Since nothing in the finding indicates the amount of the

adjustments, the factual circumstances underlying the determination that the adjustments should be made, or even the actual transactional prices to which adjustments were made, there is no basis in the LTFV finding for a jury to conclude that adjustments should be made on account of, *e.g.*, the Japanese commodity tax. Furthermore, the adjustments which are applicable under the Sherman Act may be very different from those made under the 1921 Antidumping Act, a different statute with a different purpose. Accordingly, the finding is not even relevant to proof of "adjusted" price differentials in this Sherman Act litigation.

Of equal importance is the fact that the LTFV finding is country-wide. It does not constitute a finding that any particular defendant made LTFV sales. Nor, consequently, does it constitute a finding that all of them made LTFV sales. Rather, it is an undifferentiated finding that TV receivers "from Japan" were sold at LTFV prices, and is entirely consistent with any particular defendant's having made no LTFV sales. This is especially so for the many defendants who were not investigated in the LTFV proceeding, but it is also true of the five defendants who were investigated since they were not named in the finding.

In *United States* v. *Bycer*, 593 F.2d 549 (3rd Cir. 1979), the Third Circuit reversed a jury verdict finding a pharmacist guilty of distributing controlled substances. The evidence had shown that the defendant's records failed to account for large quantities of controlled drugs, and that he and at least six other persons had access to the drugs. The Third Circuit found that the jury verdict was not supported by substantial evidence because, *inter alia*, others had access to the drugs. The fact that six persons might have distributed the drugs did not provide logical support for the conclusion that one of the six did distribute the drugs. Similarly here, the fact that an industry as a whole was found to have made LTFV sales does not provide logical support for the conclusion that any particular company made LTFV sales. We conclude that the LTFV finding is wholly irrelevant to this litigation, for the reasons stated.

2. *The Injury Finding*

The Tariff Commission finding is also irrelevant for at least two reasons. First, the Commission found that "an industry in the United States is being injured *by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended.*" (Emphasis added). Since for reasons stated above LTFV sales are not relevant to the price differentials which are involved in this case, the finding of injury by reason of LTFV sales is irrelevant on its face.

Second, the Commission defines the injured industry as "facilities in the United States for the production of television receivers," and notes that the industry includes "approximately 20 firms," none of which is named in the Commission's report. Because it is a country-wide determination, the injury finding is not relevant to prove injury to Zenith or NUE. A finding of injury to an industry composed of 20 firms does not render it more probable that NUE or Zenith was injured by reason of LTFV sales. *See Bycer, supra*.

3. *The Dumping Finding*

The dumping finding is not relevant because it is a mere ministerial act which is the automatic consequence of the LTFV and injury findings. Combining the two previous findings and adding the label "dumping" cannot render the injury and LTFV findings more relevant than they are otherwise.

E. *Exclusion of Evidence Under Rule 403*

Even if we were to assume that the documents we have discussed have some probative value, we must consider whether that value is outweighted by the factors enumerated in Rule 403: "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." There is already a fairly well developed Rule 403

jurisprudence in this circuit. *See United States* v. *Long*, 574 F.2d 761 (3rd Cir.), *cert. denied*, 439 U.S. 985, 99 S.Ct. 577, 58 L.Ed.2d 657 (1978); *John McShain, Inc.* v. *Cessna Aircraft Co.*, 563 F.2d 632 (3rd Cir. 1977); *United States* v. *Flenory*, 619 F.2d 301 (3rd Cir. 1980). The sweep of Rule 403 is best demonstrated by *Flenory*, where the court held that even an eyewitness identification of a suspect could under certain circumstances be excluded under 403. For the reasons that follow, we find that even if the documents in fact have some probative value, they would have to be excluded by reason of Rule 403.

1. *Danger of Unfair Prejudice*

Assuming arguendo the relevance of the findings, that relevance is at best minimal, yet because the findings bear the imprimatur of the United States government and use language ("less than fair value" and "dumping") that may unduly influence the jury, they present a substantial danger of unfair prejudice, similar to that presented by the admission of a prior verdict against an antitrust defendant in another case.[32] In *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975), the Third Circuit ordered a new trial specifically because evidence of a prior verdict was admitted. The court commented:

> A jury is likely to give a prior verdict against the same defendant more weight than it warrants. The admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide a case on evidence not before it.

525 F.2d at 1351. Since the plaintiffs' theory of relevance of the 1921 Antidumping Act findings is essentially that it is a prior decision on the same substantive issues, *Coleman* is squarely apposite.

2. *Confusion of the Issues and Misleading the Jury*

Admission of the findings would require a "minitrial" as to their trustworthiness, weight and credibility and as to their correctness under the 1921 Act. This would undoubtedly contribute to confusion of the issues. Moreover, since the findings are at best only marginally relevant, and are based on the specific legal standards of the 1921 Act and the specific adjustments made by Treasury, relating the findings to the issues in this litigation is an inherently confusing task. If the findings were admitted, the defendants would, of course, be entitled to point out to the jury, whether by argument or by bringing in testimony, that the 1921 Act findings were made under the particular standards of that Act.

3. *Considerations of Undue Delay and Waste of Time*

As the defendants have correctly pointed out, if the documents are admitted, defendants would be entitled to raise at trial all the evidentiary matters which support their contention that the documents are not trustworthy. Furthermore, they would be entitled to try to prove that the findings were wrong as a matter of interpretation of the 1921 Act. Finally, they would be entitled to trace the genesis of the findings in order to convince the jury that the documents are, in any event, irrelevant to the legal standards upon which the court would instruct them. These matters would add to the length of the trial, already projected to last a minimum of 12 months, additional time which we conservatively estimate at several

---

[32] In *Carter* v. *Hewitt*, 617 F.2d 961 (3rd Cir. 1980), the Third Circuit discussed the concept of unfair prejudice at some length:

> Evidence is unfairly prejudicial only if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Note, F.R.Evid. 403. It is unfairly prejudicial if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish," or otherwise "may cause a jury to base its decision on something other than the established propositions in the case." 1 J. Weinstein & M. Berger, Weinstein's Evidence 403[03] at 403-15 to 403-17 (1978). A classic example of unfair prejudice is a jury's conclusion, after hearing a recitation of a defendant's prior criminal record, that, since the defendant committed so many other crimes, he must have committed this one too. This is an improper basis of decision, and the law accordingly prohibits introduction of prior convictions to demonstrate a propensity to commit crime. F.R.Evid. 404.

617 F.2d at 972 (footnote omitted).

months. Any probative value which the documents possess is far outweighed by the undue delay that would ensue from their admission. *See John McShain, Inc.* v. *Cessna Aircraft Co., supra.*

4. *Needless Presentation of Cumulative Evidence*

Plaintiffs have argued that the documents are relevant to show (1) that defendants' prices in the United States were lower than prices of comparable models in Japan, and (2) that Zenith and NUE were injured by the price differential. The plaintiffs have developed extensive evidence of alleged price differentials between comparable models in the United States and Japan—the evidence they have prepared on this point fills many volumes of appendices to the FPS. Moreover, the plaintiffs also have ample alternative evidence which, in their contention, shows injury to them. Zenith has submitted detailed damage calculations and has named no less than five Zenith officials who will testify to injury at trial. FPS vol. 19 at 9317. The full list of evidence upon which Zenith relies to prove injury occupies more than 7 pages of the FPS, *id.* at 9317-24, of which only two lines are devoted to a citation of the Tariff Commission Report in the 1921 Act proceeding. Similarly, NUE has submitted detailed damage calculations and has set forth its injury theory at great length, with only minimal reliance on the Tariff Commission findings. FPS vol. 19 at 9325 to vol. 20 at 9686. The documents from the 1921 Act proceeding are at best needlessly cumulative of this other evidence.

In sum, even if we were to conclude that DSS #s 1 through 6 were trustworthy and minimally relevant, we would nevertheless, because of the clear result of the balancing evaluation under F.R.E. 403, be obliged to exclude them at trial.

IV. *Findings Under the Trade Expansion Act of 1962 and the Trade Act of 1974*

A. *Introduction; Overview of Trade Act Proceedings*

The next group of documents with whose admissibility we are concerned consists of records and reports of proceedings

under the Trade Expansion Act of 1962, 19 U.S.C. § 1801, *et seq.*, and its successor statute, the Trade Act of 1974, 19 U.S.C. § 2101, *et seq.*[33] The proceedings are of two general

[33] The documents comprise DSS #s 7 through 24 and are identified as follows:

DSS # 7—Report of the U.S. Tariff Commission to the President on Investigation No. TEA 1 21 under § 301(b)(1) of the Trade Expansion Act of 1962, November, 1971 (Escape Clause proceeding). Dates covered: 1961-1970; January-June, 1971. (Television receivers and certain parts thereof).

DSS # 8—Report of the U.S. Tariff Commission to the President on Worker Investigation No. TEA-W-77 under § 301(c)(2) of the Trade Expansion Act of 1962. April, 1971. [Emerson Television and Radio Co. (NUE) Jersey City].

DSS # 9—Report of the U.S. Tariff Commission to the President on Worker Investigation No. TEA-W-21 under § 301(c)(2) of the 1962 Trade Expansion Act. [F. W. Sickles Division—General Instrument Corp., Chicopee and Ludlow, Mass.] (Electrical components and apparatus and allied products).

DSS # 10—Report of the U.S. Tariff Commission to the President on Worker Investigation TEA-W-144 under § 301(c)(2) of the 1962 Trade Expansion Act. [RCA Indianapolis].

DSS # 11—Report of the U.S. Tariff Commission to the President on Firm Investigation TEA-F-19 under § 301(c)(1) of the 1962 Trade Expansion Act [Bel-Tronics, Inc., Addison, Ill.] (coils and antennas)

DSS # 12—Report of the U.S. Tariff Commission to the President on Worker Investigation TEA-W-70 under § 301(c)(2) of the 1962 Trade Expansion Act [RCA Memphis].

DSS # 13—Report of the U.S. International Trade Commission to the President on Investigation No. TA-201-19 under § 201(b) of the Trade Act of 1974. (Escape Clause proceeding) March, 1977 (examines trend of increasing imports from 1968 through 1976). (Television receivers, color and monochrome, assembled or not assembled, finished or not finished, and sub-assemblies thereof.)

DSS # 14—Certifications Regarding Eligibility for Worker Adjustment Assistance under § 222 of the Trade Act of 1974—electrical components.

DSS # 15—Certifications Regarding Eligibility for Worker Adjustment Assistance under § 222 of the Trade Act of 1974—televisions.

DSS # 16—Certifications Regarding Eligibility for Worker Adjustment Assistance under § 222 of the Trade Act of 1974—radios.

DSS # 17—Federal Register *Notice* of Worker Adjustment Assistance *proceeding* and *investigation* under 1974 Act re Emerson Radio and Phonograph Corp. Jersey City plant. Certifications of various Zenith plants and refusals to certify for various reasons.

DSS # 18—Certifications Regarding Eligibility for Worker Adjustment Assistance under § 222 of the Trade Act—stereos.

types: (1) so-called "Escape Clause" proceedings (§ 301(b)(1) of the 1962 Act and § 201(b) of the 1974 Act),[34] in which relief in the form, for example, of import quotas or increased duties is sought by a domestic industry from what are perceived to be the injurious effects of imports of like or competing products; and (2) trade adjustment assistance proceedings (§§ 301(c)(1) and (c)(2) of the 1962 Act and §§ 221 and 251(c) of the 1974 Act) in which an individual firm or group of workers seeks relief in such forms as trade readjustment, job search, and relocation allowances to alleviate the injurious effects of increased imports.[35]

DSS # 19—U.S. Department of Labor, Bureau of International Labor Affairs Trade Adjustment Assistance System, Report # KG400 RP2. (Computer print out of *all* applications for assistance and actions taken thereon, April 1975 through July, 1979).

DSS # 20—Continuation of 19.

DSS # 21—Department of Labor listing of "Workers employed at U.S. establishments engaged in the production of articles covered in the Japanese Consumer Electronics Products Antitrust Litigation and certified for trade adjustment assistance under the Trade Act of 1974" (April, 1975—September, 1979).

DSS # 22—Department of Labor, Bureau of International Labor Affairs. Report # KG404RP1. Listing of firms engaged in production of consumer electronics products, where trade adjustment assistance was sought and granted.

DSS # 23—Department of Labor, Employment and Training Administration. Report ETA 563. "Trade Readjustment Allowance Activities and Employability Services." Listing of payments made by investigation number. No identification of companies or what they produce.

DSS # 24—Report of the U.S. Tariff Commission to the President on Firm Investigation No. TEA-F-13 under § 301(c)(1) of the Trade Expansion Act of 1962. (Hi-fi and stereo and related equipment. Trade adjustment sought by H. H. Scott, Inc., Maynard, Mass.).

[34] These proceedings are termed "escape clause" proceedings because they provide a means by which the United States government can exercise its rights under Article XIX of the General Agreement on Tariffs and Trade to modify or revoke concessions made to other countries in the course of negotiating trade agreements, thereby providing relief to a domestic industry suffering from the effects of increased imports resulting from those concessions.

[35] There are no firm investigations under § 251(c) of the 1974 Act at issue here.

The documents at issue here include the records of two escape clause proceedings, one under the 1962 Act (DSS # 7) and one under the 1974 Act (DSS # 13). In addition, the plaintiffs offer documents from several trade adjustment assistance proceedings. DSS #s 8, 9, 10, 11, 12, and 24 relate to proceedings under the 1962 Act; and DSS #s 14, 15, 16, 17, and 18 relate to adjustment proceedings under the 1974 Act. The procedures under the 1962 and 1974 Acts are (with some minor differences not germane to the issues before us)[36] essentially the same.

In an escape clause proceeding under § 301(b)(1) of the 1962 Act, the task of the Tariff Commission is to determine whether (1) as a result in major part of concessions granted under trade agreements, (2) an article is being imported into the United States in such increased quantities, (3) as to cause or threaten to cause serious injury to the domestic industry producing like or competitive articles.

In an escape clause proceeding under § 201(b) of the 1974 Act, the International Trade Commission is charged with determining whether (1) the articles under investigation are being imported in increased quantities, (2) the domestic industry producing like or competitive articles is being seriously injured or threatened with serious injury, and (3) increased imports are a substantial cause of the injury or threat. Trade concessions are no longer a concern, and increased imports need only be a substantial (rather than the major) cause of injury.

Trade adjustment proceedings under §§ 301(c)(1) [firms] and 301(c)(2) [workers] of the 1962 Act are conducted to deter-

---

[36] For example, under the 1962 Act both escape clause and trade adjustment assistance investigations were conducted by the United States Tariff Commission; under the 1974 Act, escape clause investigations are conducted by the United States International Trade Commission. Firm investigations and worker investigations are conducted by the Department of Commerce and Labor respectively. For purposes of this section of the opinion, we will, from time to time, refer to both the Tariff Commission and its successor, the International Trade Commission, as the "Commission."

mine whether trade concession agreements have led to increased imports with resulting injury to a particular firm or group of workers. In trade adjustment assistance proceedings under § 221 of the 1974 Act [workers] and § 251(c) [firms] the Department of Labor and the Department of Commerce respectively must determine whether (1) a significant number of workers in a firm have become separated or threatened with separation, (2) sales and/or production have declined absolutely, (3) competitive articles are being imported in increased quantities, and (4) increased imports have contributed importantly to the separation and decline in sales and/or production.

B. *The Escape Clause Proceedings in Question*

The 1962 Act escape clause investigation was instituted on June 8, 1971, upon petition filed with the Commission by three major unions representing workers in the United States television receiver industry. The petitioners alleged that imports of television receivers had seriously injured the domestic industry and that the 1930 rate of duty (35 percent ad valorem) must be restored to remedy the injury. The 1974 Act investigation was initiated in October, 1976, upon petition from eleven unions and five firms representing or employing workers in the television industry.[37] As required by statute, in each case the Commission gave public notice of the investigations and of hearings to be held. At the hearings interested parties were given the opportunity to be present, offer evidence, and be heard. Counsel for certain defendants in this case appeared at the § 201(b) proceeding. While witnesses were available for cross-examination, they were permitted to refuse to answer

[37] The petition filed under the 1974 Act requested an investigation with respect to imports of color television receivers. The Commission, however, instituted proceedings to determine whether television receivers, color or monochrome, assembled or not assembled, finished or not finished and subassemblies thereof, were being imported in such increased quantities as to cause serious injury to a domestic industry. Thus, the investigation conducted was much broader than the investigation sought by petitioners.

questions that called for the disclosure of what the witnesses regarded as confidential business data. In fact, this privilege was invoked numerous times at both proceedings.[38]

Following each of the hearings, the commissioners rendered their decisions, which were based not only on evidence adduced at the hearings but also upon the staff reports prepared following the hearings, which in turn relied upon data and information obtained from various sources including the Commission's own files and those of other governmental agencies. More important from defendants' point of view is the fact that in both proceedings the Commission and staff elicited (and presumably relied upon) information from domestic producers and importers through field investigation and questionnaires. This information was submitted in confidence and has never been disclosed.

At the conclusion of each of the escape clause proceedings, the staff reports, together with the decisions of the Commission, (and the separate concurring and dissenting views of the various commissioners) were sent to the President, along with copies of the transcripts of the hearings and briefs submitted by interested parties. The decisions and the reports were made public, but with the confidential data deleted.

In the 1962 Act (§ 301) proceeding, the results of which were submitted to the President in November, 1971, the Commission made a negative determination—that is, while the Commission found that imports were increasing, it did not agree that such increase was the result in major part of trade concessions.[39] The question of injury to a domestic industry was

[38] *See* n. 24 *supra*. The Walders affidavit, which as we have noted is uncontroverted, includes excerpts from the transcripts of both escape clause proceedings, in which the "business privilege" was invoked several times.

[39] The majority view (3 commissioners) was that a number of factors other than trade concessions had brought pressure to bear on the American television receiver industry. Among the factors identified by these commissioners were the dumping of television receivers by Japanese producers, a variety of export incentives provided by the Japanese government and television industry, a rapid increase in Japanese labor productivity and the substantially

not reached. In the 1974 Act (§ 201) proceeding which concluded in March, 1977, the Commission found that imports were increasing and that such increased imports were a substantial cause of serious injury or threat of serious injury to the domestic industry producing like or competitive goods.

C. *The Trade Adjustment Assistance Proceedings*

The plaintiffs also seek to introduce into evidence a large number of documents relating to proceedings brought under §§ 301(c)(1) and (2) of the 1962 Act and § 221 of the 1974 Act. With the exception of DSS # 8, which relates to an investigation instituted on behalf of Emerson (NUE) workers in Jersey City, New Jersey, and DSS # 17 which relates to proceedings on behalf of NUE and Zenith workers, these documents concern workers or firms in the electronics industry other than plaintiffs.

The procedures governing trade adjustment investigations are essentially the same as those governing escape clause proceedings with one important exception—no hearing is held unless requested by an interested party. In none of the proceedings involving either plaintiff here was a hearing held. Like the investigations under the escape clause provisions, these investigations permit ex parte communications and involve receipt of confidential data.

D. *Statistical Data*

In addition to the records made and decisions rendered in escape clause and trade adjustment proceedings, plaintiffs

lower wages there, exchange rates favorable to the yen, and the joint sharing of research and development work and costs by Japanese producers. One commissioner found that trade concessions could not have been the cause of the increase in imports since they had been granted some years before the increase. This commissioner also found that dumping by Japanese producers and the duty saving provision in the U.S. tariff schedules had contributed to the increase in imports. One commissioner found the "operating environment" of the Japanese television industry to have contributed to the increase. One commissioner found that the statutory criteria had been satisfied and that relief should have been granted.

seek to introduce various computer printouts and lists supplied by the Department of Labor (DSS #s 19 through 23). These documents will be described and discussed *infra*.

E. *The Hearsay Objection*

Like the documents offered from the 1921 Act proceedings, the materials described above constitute hearsay. Defendants object to their admission, which is sought under the 803(8)(C) exception, on the grounds that they do not constitute findings within the meaning of the rule and are not trustworthy.

1. *The Escape Clause Proceedings*

a. *Did the Commission Make 803(8)(C) Findings*

The investigations conducted under § 301(b)(1) of the 1962 Trade Expansion Act and § 201(b) of the 1974 Trade Act and § 201(b) of the 1974 Trade Act produced what we term formal or ultimate findings by the Commission: in the former case that the statutory criteria for relief had not been met—in essence a negative finding (although all commissioners agreed that imports were increasing), *see* n. 39 *supra;* and in the latter case a finding that the U.S. industry producing color and monochrome television receivers, assembled or unassembled, finished or unfinished, and subassemblies thereof was being seriously injured or threatened with serious injury and that increased imports were a substantial cause of that injury or threat. These are findings within the meaning of 803(8)(C).

In addition to these "ultimate" findings plaintiffs seek to introduce as findings various excerpts from the opinions of individual commissioners in each proceeding. In our view, these opinions do not constitute "findings" within the meaning of Rule 803(8)(C) and may not be introduced under that exception, even though the commissioner's individual remarks quite literally constitute conclusions made by officers of a public agency following an investigation. Each commissioner was provided with the same data; the conclusions they reached individually, however, range from slightly divergent to com-

pletely at odds.[40] Even in the 201(b) proceeding under the 1974 Act, where the commissioners were unanimous in their finding that increased imports had caused injury to a U.S. industry, they did not agree on the definition of the affected industry (the majority found injury to producers of "color and monochrome receivers, assembled or unassembled, finished or unfinished, and subassemblies thereof"; the concurring members found injury only as to color television receivers, and differed among themselves as to the further definitions (assembled v. unassembled, finished v. unfinished, etc.). To give the individual opinions to the jury and let its members decide which are correct and which are not would be to permit the purest speculation, for the jury members would be considering the opinions in a vacuum. The process would be similar to that required when a jury must decide which of two experts in a personal injury case is the correct one, but here the fact-finder would not have the benefit of information elicited on cross examination.

Were these opinions to be admitted, it would be essential that the staff reports be admitted as well, so that the jury could review the data and conclusions upon which the opinions were based. However, even though the staff reports set forth a multitude of declarative sentences stated as fact and may thus be said to include "findings," we have already concluded that only the staff findings that are adopted by the public agency are admissible under 803(8)(C). See p. 1145 *supra*. In addition, the staff reports present problems in terms of trustworthiness.

b. *Trustworthiness*

In determining whether these reports and the findings contained therein are trustworthy within the meaning of Rule

[40] Although in both proceedings there are factual conclusions that are agreed upon by some or all of the commissioners, plaintiffs have insisted upon offering the entire records of these investigations, including the dissenting views. While we could no doubt ferret out the areas of agreement and term them findings within what we perceive to be the meaning of 803(8)(C), we are somewhat reluctant to undertake what would be a lengthy exercise in light of our conclusions regarding the trustworthiness of these proceedings.

803(8)(C), we have considered in addition to the factors identified by the Advisory Committee as bearing upon the question, certain of the factors we have described *supra* that seem to us to have relevance to a trustworthiness determination. We note that defendants have not contended that the investigations were untimely, and indeed the statutory mechanism governing an escape clause proceeding requires that a decision be rendered within six months after the petition seeking relief is filed. We note further that a hearing was held in each of the escape clause proceedings at issue here again as required by statute. The agency conducting the investigations (the Tariff Commission and International Trade Commission respectively) has expertise in the areas of imports and foreign trade, and there has been no suggestion that the commissioners or their staffs were not acting impartially in discharging their duties.[41] Other factors that we have identified have given us some pause, however, and have led us to conclude that these reports and findings are not trustworthy for purposes of this lawsuit.

Of major importance to this conclusion is the extent to which these findings are based upon or are the product of proceedings pervaded by the receipt of substantial amounts of material that would not be admissible in evidence. (Criterion # 2, *supra*). As noted above, in conducting an escape clause investigation, the Commission relies not only upon evidence adduced at the hearings (which themselves permit the admission of hearsay) but also upon confidential data supplied by domestic producers

[41] In this connection, it is worth noting, however, the remark of one of plaintiffs' expert witnesses, Stanley Nehmer, in an address delivered to the symposium "Understanding What's 'Fair' and 'Unfair' in International Trade," in March, 1979: "In agencies which exercise a considerable influence on U.S. trade policy, such as the State Department and the Treasury Department, the prevailing view all too often is that trade issues must be subordinated to larger U.S. foreign policy objectives." This statement suggests that governmental agencies, however objective we might presume them to be in discharging their various tasks, must nonetheless be aware of and responsive to the large policy concerns that must necessarily inform the conduct of a world power. The escape clause findings may thus be subject to a trustworthiness attack under our criterion # 5. See discussion *infra* at 1167.

either in response to questionnaires or in interviews. There are three serious problems raised by this procedure. First, the data and information submitted in confidence is not made a part of the public record so that its accuracy and trustworthiness has never been and can never be explored. Second, this data is critical to a determination by the Commission, relating as it does to such matters as domestic production figures and prices, yet, since it is submitted in confidence and is deleted from the public record, there is no way to determine the extent to which it was relied upon by the Commission in rendering its decision or by the staff in preparing its report. Since the record is incomplete (*see* criterion # 4), the reasonableness of the ultimate findings by the Commission or of the views of individual commissioners cannot be ascertained. Third, while the Commission and its staff do manage to qualify as disinterested investigators, *but see* p. 1167 *infra*, many of the suppliers of the confidential information do not, since they were domestic producers for whose benefit the escape clause proceedings were initiated. Because they had a stake in the outcome of the proceedings and knew that the information they supplied was confidential, we feel less inclined to assume the data they supplied was complete and correct than we otherwise might be.

The consideration of such confidential data as is described above implicates the validity of the agency's expression of expertise as well. (Criterion # 7, *supra*). To the extent that the Commission was functioning as an expert, the provisions of the rules of evidence governing the receipt of expert opinion are useful in analyzing the trustworthiness question here. Even assuming that the confidential facts and data employed by the Commission were of a type reasonably relied on by experts in the particular field (Rule 703) and, therefore, that they need not themselves be admissible into evidence, Rule 705 provides that the expert may be required to disclose the underlying facts or data on cross examination. Here, not only are the commissioners not available for cross examination, but the trustworthiness of the underlying data can in no other way be explored since the data itself is confidential.

In addition to the fact that the Commission received and considered confidential data, it is clear that other hearsay was the basis of many of the "factual" or declarative statements made in the staff reports and in the opinions of the individual commissioners. The sources of those declarative statements are rarely disclosed. In many instances where they are disclosed, it is clear that the sources are or may be unreliable, *e.g.*, Fairchild News Service, *T.V. Digest*, Report of U.S. Embassy in Tokyo. Moreover, in the escape clause proceeding conducted under the 1962 Act, the staff and the individual commissioners relied in great part on the dumping proceedings discussed *supra*. Indeed, it appears that the Commission's inability to decide that imports were increasing as a result in major part of trade concessions rests largely on the dumping determinations, which we have found to be both untrustworthy and irrelevant to these proceedings. Since we have concluded that the 1921 Act materials cannot be admitted in their own right, the conclusion that they cannot be admitted as part of the record of another proceeding is inescapable. (Criterion # 6, *supra*).

Finally, we note that the findings made in the escape clause proceedings were made in the context of a protectionist statute, which reflects purposes and policies different from those reflected in the antitrust laws and at least potentially at odds with them, since protectionism shelters U.S. industry from competition, fair or not. Because there appear to be policy as well as investigative and adjudicative considerations involved in these proceedings, *see* n. 41 *supra*, it is our view that the findings are at least in part a function of those policy considerations, which underlie the statutes defining the charter of an escape clause investigation, and in this sense the findings may not be trustworthy for purposes of an antitrust proceeding (criterion # 5 *supra*), though the fact that the issues before the Tariff Commission differed from those before us also bears, and perhaps more directly, on the question of relevance.

In sum, we conclude that the findings made in the escape clause proceedings, even if construed broadly to include state-

ments of fact made by individual commissioners and their staffs, must be excluded as untrustworthy. This conclusion stems largely from the fact that the proceedings are pervaded by the receipt and consideration of confidential data, the validity of which has never been and can never be explored or tested. What is before us is an incomplete record with salient information deleted. In addition, we are troubled by the Commission's apparent use of other unreliable hearsay and by the extent to which the 1921 Dumping Act findings infiltrate the record of the § 301(b) proceeding. These considerations coupled with the fact that the escape clause investigations were conducted under statutes whose aims and purposes are different from those of the antitrust laws, force us to conclude that the records of the escape clause proceedings are not trustworthy for purposes of this action.

2. *The Trade Adjustment Assistance Proceedings*

We also have before us the results of trade adjustment assistance proceedings conducted under both the 1962 and the 1974 Acts. The proceedings under the 1962 Act produced records similar to those produced in the escape clause proceedings, consisting of: (1) a determination by the Commission of whether the statutory requirements for relief had been met, *i.e.*, whether as a result in major part of trade concessions, articles were being imported in such increased quantities as to cause or threaten to cause serious unemployment or underemployment to workers in a domestic industry (§ 301(c)(2)) or to a firm (§ 301(c)(1)); (2) the views of the individual commissioners; and (3) the staff reports. The documents submitted in connection with proceedings under the 1974 Act consist only of the determination by the Secretary of Labor that the statutory criteria for eligibility for relief had or had not been met and a summary of the reasons for so concluding. We deal with the proceedings under each of the Acts separately, since they raise somewhat different problems as to whether they contain findings, what the findings consist of, and whether they are trustworthy.

a. *Were 803(8)(C) Findings Made*

The 1962 Act proceedings at issue here comprise DSS #s 8, 9, 10, 11, 12 and 24 and include both worker and firm investigations. In all but one of the investigations, the Commission could not agree upon a result, the commissioners being equally divided as to whether the statutory criteria had been met, so that the reports issued to the President contained no formal or ultimate findings under §§ 301(c)(1) or (c)(2) and concomitantly no recommendations.[42] In Worker Investigation No. TEA-W-144 (DSS # 10), which was instituted by a petition filed on behalf of workers at the RCA Corporation plant at Indianapolis, Indiana, the Commission unanimously found that articles like or directly competitive with unrecorded magnetic tape were not as a result in major part of trade concessions being imported in such increased quantities as to cause or threaten unemployment or underemployment of a significant number of workers. As to other products manufactured at the plant (television yokes, tuners and horizontal output transformers), the Commission was equally divided and made no finding.

Thus, in all but one of these proceedings, there are no formal findings at all. Furthermore, for the reasons set forth above, we conclude that the views of the individual commissioners and the statements of fact in the staff reports cannot be termed 803(8)(C) "findings."

Worker trade adjustment assistance proceedings brought under the 1974 Act are the subject of DSS #s 14, 15, 16, 17, and 18. With the exception of DSS # 17, which relates specifically to proceedings on behalf of NUE workers in Jersey City and Zenith workers at various locations across the country, each DSS contains the results of several individual worker adjustment investigations in a particular industry, *e.g.*, stereos,

---

[42] Although there is nothing in the record to indicate what action, if any, the President took upon receiving these reports, plaintiffs have represented to us that in each case where the Commission split, the President granted relief. We do not believe such action converts a nonfinding into a finding.

televisions, all as summarized in the *Federal Register* "Notices of Certification Regarding Eligibility to Apply for Worker Adjustment Assistance." Each summary offered here (except for those in DSS # 17 discussed *infra*) contains an affirmative finding—that a significant number of workers at a particular firm or subdivision thereof have become totally or partially separated (or are threatened with total or partial separation); that sales or production or both of such firm have decreased absolutely; and that increased imports of like or competitive products contributed importantly to such separation, or threat, and to such decline in sales and/or production. In addition, each summary contains what may be termed subsidiary findings, that is, declarative statements containing statistical data supporting the various ultimate findings of increased imports, declines in production, etc.[43] Because the findings are those of a single employee of the Department of Labor, these summaries do not present the conflicting views and conclusions that characterized proceedings conducted by the Tariff Commission.

Unlike the other groups of documents relating to trade adjustment proceedings under the 1974 Act, DSS #17 contains both certifications and denials of certification of eligibility for worker assistance. These documents relate specifically to workers employed by plaintiffs. The only document offered that relates to NUE workers is a *Federal Register* notice that a proceeding has been instituted on behalf of workers at Emerson's Jersey City plant. This notice does not, of course, constitute a finding.

Plaintiffs have also offered *Federal Register* summaries of nine proceedings on behalf of Zenith workers at various plants throughout the United States. Of these, five resulted in a negative determination, *i.e.*, that the statutory criteria for relief had not been met. In addition to such "ultimate findings,"

---

[43] These "subsidiary findings" are essentially equivalent to the statements in the staff reports submitted in connection with worker and firm investigations under the 1962 Act.

these summaries include subsidiary findings in the form of discussions of the reasons why a particular requirement is deemed not to have been fulfilled (e.g., sales or production have not declined absolutely). There is a disclaimer of any findings as to the other criteria.

In three Zenith investigations, the petitioning workers were certified as eligible to apply for relief. These proceedings thus contain the ultimate finding that each of the statutory requirements has been fulfilled, as well as subsidiary statistical findings in support of these conclusions. One investigation resulted in a negative determination as to workers in a certain division of two different Zenith plants and a positive determination as to workers in other divisions of these plants.

We conclude that the ultimate and subsidiary findings contained in these summaries of worker adjustment proceedings under the 1974 Act qualify as findings within the meaning of 803(8)(C).

b. *Trustworthiness*

The documents offered from the trade adjustment assistance proceedings present problems of trustworthiness like those we found in analyzing the escape clause proceedings. All of these investigations, whether conducted by the Tariff Commission under the 1962 Act of the Department of Labor under the 1974 Act, are pervaded by confidential and hearsay data elicited from parties with a stake in the outcome. The records submitted from the 1962 Act proceedings contain large gaps where confidential (and critical) material was deleted. The documents submitted from the 1974 Act proceedings are summaries only and contain no citations to sources. Moreover, in none of these proceedings was a hearing required and in the great majority of them no hearing was held. Finally, we note the task before the various agencies in these investigations was defined and limited by the scope of trade acts whose purposes are protectionist, and thus the issues considered diverge sharply from those before us, and have policy overtones.

For all the foregoing reasons, we do not believe that conclusions in the trade adjustment assistance proceedings can be deemed trustworthy for purposes of this case.

F. *The Relevancy Objection*

1. *The Escape Clause Proceedings*

Even if deemed trustworthy, the findings made by the Tariff and International Trade Commissions in their respective investigations are not relevant to the issues in this case for the following reasons.[44]

First, the finding of the Tariff Commission in the 1962 Act proceeding was essentially a negative finding and could be offered to prove no more than that trade concessions did not contribute to an increase in imports which in turn threatened or caused serious injury to a domestic industry, a fact that bears no relationship to any of the issues before us in this antitrust action.

Second, the finding of injury to the domestic industry producing television receivers in the 1974 Act escape clause proceeding was an industry-wide finding that considered imports from all sources and did not specifically or necessarily include a finding of injury to these plaintiffs[45] or imports from these defendants. As we have noted, *supra* at 1157-1158, the fact that an industry as a whole is found to have suffered injury or that export activity world-wide is found to have been a substantial cause of that injury does not provide logical sup-

[44] We make no rulings as to the admissibility of these documents in connection with the defendants' "sham litigation" counterclaim. *See* discussion *supra* at 1139.

[45] In making its determinations with respect to injury, the Commission must consider "the inability of a significant number of firms to operate at a reasonable level of profit." 19 U.S.C. § 2251(b)(2). The Commission's report states that in 1976 the domestic television receiver industry comprised twelve firms. A finding of injury to that industry is thus a finding of injury to a significant number of firms, but not necessarily to all of them. In any event, the injured firms are not identified.

port for the conclusion that any particular domestic firm has been injured or that imports from any particular country or foreign producer have been the cause of that injury. Even more attenuated is plaintiffs' argument that the industry-wide injury determination can support a finding of a causal connection between the putative anti-competitive acts of these defendants and the injury these plaintiffs are said to have suffered, for not only are these parties not identified in the escape clause findings, but the means by which the increase in imports had been effected was not considered or discussed by the Commission. Thus, the injury could as easily have resulted from fair as from unfair competition.[46] The inference that the injury resulted from antitrust violations simply cannot be drawn from these materials.

Similarly, though plaintiffs have argued to the contrary, the escape clause findings are not relevant as proof of intent to affect United States commerce and of actual effect on that commerce for purposes of subject matter jurisdiction,[47] or as proof of predatory intent and anticompetitive effects for purposes of the substantive violations alleged here. As we have observed, a finding that imports from all sources have injured a domestic industry does not logically support the inference that imports from these defendants have had that effect or that these defendants intended that effect. We note further that even if we were to assume that some inferences could be drawn about these parties from the documents at issue here, those inferences are not nearly so sweeping as plaintiffs would claim.

Seizing upon the legal maxim that a party is deemed to intend the natural and probable consequences of his acts[48]

[46] The Commission specifically declined to make any findings regarding the antitrust violations at issue in this litigation.

[47] *See* Opinion (Introduction to Summary Judgment Motions; Subject Matter Jurisdiction), *Zenith Radio Corp., et al.* v. *Matsushita Electric Industrial Co., Ltd., et al.*, 494 F.Supp. 1161 (E.D.Pa. 1980).

[48] In a criminal proceeding, the jury may not be instructed that the law *presumes* that a party intends the natural and probable consequences of his voluntary acts, though the jury may infer that a person so intends. *United*

(rescribed in our opinion on subject matter jurisdiction, *supra*, n. 66), plaintiffs posit that defendants' anticompetitive intent can be inferred from the finding of injury. This argument ignores that such an inference could be drawn only if plaintiffs also produced proof of anitcompetitive acts. Intent cannot be inferred from consequences (effects) alone. The escape clause proceedings do not implicate any conduct other than the act of exporting.[49] In fact, as we have noted *supra* n. 46, in the § 201 proceeding the Commission specifically made no findings regarding the antitrust issues in this litigation.

For all of the above reasons, we have concluded that the escape clause proceedings are not relevant in the litigation before us.

2. *Trade Adjustment Assistance Proceedings*

As we earlier observed, the trade adjustment assistance proceedings conducted under the 1962 Act in all cases but one resulted in a split of opinion among the commissioners and, therefore, in no formal findings. Even if we were to glean proper 803(8)(C) findings from these records, however, we would nevertheless be moved to exclude them on grounds of relevancy, since they do not tend to make more or less probable the existence of any fact of consequence to the determination of the action. F.R.E. 401. Like the escape clause proceedings, these investigations considered imports from all sources, not just from Japan or from these defendants. Furthermore, only one of these investigations involved a plaintiff in this lawsuit (DSS # 8-Emerson [NUE] workers). The probative value here of a nonfinding as to nonplaintiffs is nil. The Emerson proceed-

States v. *United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Whether this standard would apply in a civil action is doubtful, but in neither the criminal nor civil context could the acts themselves be presumed or inferred from proof of the consequences or effects alone.

[49] Of course, the report of the § 301(b) proceeding refers at some length to the 1921 Act dumping investigations the results of which we have previously concluded are inadmissible in their own right. See Part III *supra*.

ing is of no probative value since it is one of the split decisions and, again, involved imports from all sources.

Similarly, we have concluded that the trade adjustment assistance investigations under the 1974 Act that relate to workers at plants other than those of plaintiffs must be excluded as irrelevant to this proceeding. In addition to bearing not at all on any injury these plaintiffs might have suffered, they relate to imports from all sources and consider an injury that could have resulted from fair competition. Thus they do not advance the proof of injury to competition required by the antitrust laws or of injury to these plaintiffs, required in a private treble damage action. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

As to the nine proceedings involving Zenith workers, we find that they suffer from some of the same relevancy problems as the other trade adjustment assistance investigations and from some additional problems of their own.

First, as we have already noted, in five of the proceedings, the only findings were negative findings—that the statutory criteria for relief had not been met. The discussion of which criterion had not been fulfilled, *e.g.*, production had not declined or increased imports did not contribute importantly to layoffs, is in each case wholly unrelated to any allegation Zenith would seek to prove in this case. In the proceedings in which affirmative determinations were made, those determinations were based on a consideration of imports from all sources and include a finding of injury from competition that may or may not have been unfair. Furthermore, as defendants have pointed out, the injury found is injury to Zenith *workers*, not to Zenith, who is, after all, the plaintiff here. In fact, in two instances Zenith's own imports from Taiwan and Mexico were specifically cited as contributing to the increase in imports that led to the injury. Under these circumstances, we conclude that these injury determinations are not relevant to this proceeding.

G. *Exclusion of Evidence Under Rule 403*

The Rule 403 considerations that informed our discussion of the Antidumping Act materials are equally relevant here, and so we need but summarize them as applied in the present context. For purposes of analysis we must and do assume that the proffered materials pass the minimal relevancy threshold of Rule 401.

Even given this assumption, however, we conclude that the probative value of the results of the escape clause and trade adjustment assistance proceedings is very low and is far outweighed by the unfair prejudice of introducing findings by governmental agencies that domestic industries, workers, and firms have been injured as a result of increased imports. *Cf., Coleman Motor v. Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975) (error to admit prior jury verdict that defendant had committed antitrust violation). Furthermore, there is the added danger of misleading the jury into thinking that the injury found by the International Trade Commission and the Department of Labor is coterminous with the injury that must be shown in an antitrust case.

Just as we noted in our discussion of the Antidumping Act materials, if these documents are admitted, defendants would be entitled to launch an attack on both their trustworthiness and their probative value—a process that could potentially entail exploring each of the trade adjustment and escape clause proceedings and the significance of the evidence upon which the determinations were based. Given what we have deemed to be at best the limited probative value of these documents, and given the prospect of enormous delay, waste of time, and confusion of the issues such a process would inevitably entail, we can conceive of no circumstances under which we would admit the proffered proceedings at trial.

Finally, we note that these documents are needlessly cumulative of other evidence on the issue of injury to these plaintiffs and to competition in general. *See* discussion *supra* at 1184.

H. *Miscellaneous Documents*

In addition to the documents discussed at length above, plaintiffs have submitted in DSS #s 19 through 23 lists of various kinds supplied by the Department of Labor that provide summaries of activities of that agency in connection with its involvement in trade adjustment assistance proceedings. These data compilations are more properly characterized as 803(8)(A) or perhaps 803(8)(B) materials than as 803(8)(C) documents.

DSS #s 19 and 20 are made up of a computer print-out that lists *all* applications for adjustment assistance and actions taken thereon, filed with the Department of Labor from April 4, 1975, through July 31, 1979. While we have no doubt that this list provides an accurate survey of Department of Labor activities and therefore may be deemed trustworthy as proof that the petitions and actions listed therein were in fact filed and did in fact occur, we question its relevance since it contains applications from workers in all kinds of domestic industries (*e.g.*, shoes, clothing). To the extent that it includes worker applications relating to products at issue in this case, it would appear to be cumulative in light of DSS #s 21 and 22 which list firms producing consumer electonics products whose workers applied for and were certified as eligible to receive trade adjustment assistance benefits under the 1974 Act. The problem with DSS #s 21 and 22 is that the data compilations merely reflect the results of the § 221 proceedings described above and the actions taken in connection therewith, so to the extent that the results of the proceedings are either untrustworthy or irrelevant to issues here, so too would be any substantive inferences that might be drawn from the reports, although as noted, the reports themselves may accurately reflect the actions taken by the Department of Labor.

DSS # 23 is a Department of Labor report summarizing trade readjustment allowance activities and employability services. The data is compiled geographically and then subdivided by investigation number. There is no way to determine what industry each investigation relates to, though if this list

were matched with others, identifying both the firm and the investigation number, it would be possible to do so. Standing alone, the list is useless. Like the other listings submitted here, this document can be deemed to accurately reflect only the data recorded and could not in any event be used for substantive proof of any issue here. Thus the miscellaneous documents are inadmissible.

V. *The Records and Findings of the Japanese Fair Trade Commission (JFTC)*

A. *Nature of the Proceedings Before the JFTC*

DSS #s 25 and 26 pertain to proceedings before the Japanese Fair Trade Commission (JFTC). In order to understand the nature of those documents, a description of the Law Concerning the Prohibition of Private Monopoly and the Maintenance of Fair Trade, Act No. 54 of 1947 (the "Anti-Monopoly Law"), which is enforced by the JFTC, is necessary. Our information is gleaned from numerous affidavits filed by expert witnesses from both sides, as well as from the testimony of plaintiffs' expert, Professor John Owen Haley of the University of Washington Law School, and from our independent reading of the Japanese Anti-Monopoly Law and the regulations promulgated thereunder.[50]

[50] Professor Haley specializes in Japanese law, teaching courses on the Japanese legal system, U.S. Japanese contract and sales problems, Japanese administrative law, and Japanese business relations in Japan, which includes work in Japanese antitrust law. He speaks and writes Japanese, and was for over two years employed in Japanese law offices in Osaka and Tokyo. He is editor of the principal English language periodical on Japanese law, and is a member of various committees and organizations related to Japanese and East Asian law.

Professor Haley submitted a series of affidavits, two of which, those of February 1, 1979 and May 27, 1980, are relevant to the Japanese Fair Trade Commission issues. Additionally, Professor Haley testified before us on June 24, 1980. We have also considered a number of affidavits submitted by experts on behalf of defendants, principally those of Professor Mitsuo Matsushita, signed on March 25, 1980 and June 10, 1980, and those of Dr. Michigo Ariga, signed April 17, 1979, June 15, 1980, and June 16, 1980.

The Japanese Anti-Monopoly Law is similar in purpose to the U.S. antitrust laws. As described in Sec. 1,

> This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of economic power and by eliminating unreasonable restraint on production, sale, price, technology, and the like, and all

Professor Matsushita is Associate Professor of Law at Sophia University, Tokyo, Japan, where he teaches Japanese antimonopoly law. He is fluent in English, and has lectured as a visiting professor on Japanese antimonopoly law at American law schools. He is the author of over 100 articles in both Japanese and English, as well as numerous books, dealing with Japanese antimonopoly law. He has been appointed to several task forces created by the JFTC to study various antimonopoly law problems, and is at present a member of two such task forces studying Japanese antimonopoly law and international trade. He has no family relationship to any present or former employee, officer, or principal of any of the Matsushita defendants in this litigation.

Dr. Ariga is advisor to the law firm of Shimoda and Sakamoto in Tokyo and serves as the Head Representative of the Japanese government at plenary meetings of the Transnational Corporation Committee of the United Nations. She is proficient in both written and spoken English, has taught courses in Japanese antimonopoly law both in Japan and in the United States, and has written articles in both Japanese and English on the Japanese Anti-Monopoly Law. She served with the Japanese Fair Trade Commission for approximately twenty-five years in various capacities, culminated by five years as a Commissioner.

There are a number of instances in which the views of Professor Haley conflict with those of Drs. Matsushita and Ariga. In these instances we have followed the views of Drs. Matsushita and Ariga, believing these individuals to have greater understanding of the Japanese Antimonopoly Law and JFTC procedures. While we have a high regard for Prof. Haley, because he lacked actual knowledge of the workings of the JFTC, we found his views to be less persuasive than those of Drs. Matsushita and Ariga. Prof. Haley did not contradict any factual statements made in the affidavits of Drs. Matsushita and Ariga, admitting they were "essentially correct" and stating that the "rumors of disagreement between us are greatly exaggerated." Pretrial Order No. 264 at 269. Instead, the differences are in the experts' respective conclusions and characterizations; it is in this area that the personal knowledge of Drs. Matsushita and Ariga becomes vital. It should be noted that such judgments are plainly within the province of the court as proof of foreign law. *See* Fed.R.Civ.P. 44.1.

other undue restrictions of business activities through combination, agreements, etc., aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and peoples' real income, and thereby to promote the democratic and wholesome development of the national economy as well as to insure the interests of consumers in general.

The Anti-Monopoly Law includes among its provisions a prohibition against private monopolization and unreasonable restraints of trade (§ 3); a prohibition against unfair methods of competition (§ 19); a prohibition against undue disparity of economic power (§ 8); a prohibition against the formation of holding companies (§ 9); and a prohibition against certain interlocking directorships (§ 13).

The JFTC, similar to our Federal Trade Commission, was established by the Anti-Monopoly Law in order to effectuate the Act's purposes. While private actions are cognizable under Japanese law, they are extremely rare[51] and, for practical purposes, the JFTC is the sole enforcement mechanism of Japanese antitrust law.

The JFTC is an independent governmental agency, composed of a Chairman and four Commissioners, appointed by the Prime Minister, with the consent of both houses of the Diet. The staff of the JFTC, which is broken down into an economic division, a trade practices division, and an investigation division, includes trial examiners selected from staff office personnel, "whose duty it [is] to handle the proceedings," but who are expressly denied the authority to render any actual decision. Anti-Monopoly Law, Art. 35.

Under the Anti-Monopoly Act and the JFTC's "Regulation Concerning Investigation and Hearing by the Fair Trade Com-

[51] According to Dr. Ariga, there have been only two private suits for damages under the Japanese Anti-Monopoly Act since its adoption in 1947. While others have suggested that there may have been four or five such suit[illegible] clear that whatever the actual number, such suits are unusual.

mission, Fair Trade Commission Regulation No. 5, Oct. 19, 1953, as amended ("Regulations"), JFTC proceedings comprise two principal stages. The first, or investigative, stage culminates in the initiation of a formal action. Under Sec. 45 of the Act and Art. 9 of the Regulations, an investigation conducted by members of the Commission staff may commence either upon the request of an outside party or by the Commission on its own authority. During this preliminary investigation, the staff can move from a highly unstructured initial screening process to a slightly less informal one by invoking certain legal processes to obtain information, including compulsory process, spot inspections, the interrogation of witnesses, the taking of statements, and the use of expert testimony. While the Act provides for notice to be forwarded to a suspected violator and while a respondent can object to a demand for certain information upon an appropriate motion, for the most part the rights accorded a respondent during the investigation stage are limit[illegible]. There is, for example, no right to cross examination.

At the close of the investigation, a staff report, setting forth the "incipiency" of the violation, the investigative process, a synopsis of the facts of the case, applicable legal provisions, and the opinion of the investigator is transmitted to the Commission. *Regulations*, Art. 18(2). If the Commission deems a violation to be likely, it issues a "Recommendation" to the respondent. Such a Recommendation includes facts and application of the law, as well as measures to be taken to eliminate the violation. As described in the affidavit of Dr. Ariga, *see* note 50, *supra*, the facts set forth in the Recommendation are those which had been set forth in the staff report, and the Commission relies upon that report rather than inquire into the evidence at that preliminary stage. The purpose of the factual recitation is to preclude initiation in the future of any proceedings based upon the same facts, and to provide a context within which the respondent is to take measures to eliminate the suspected violation.

The respondent may either accept or reject the Recommendation. If the Recommendation is accepted, the Commission

issues a "Recommendation Decision" without resorting to a hearing. According to the affidavits of both Drs. Matsushita, *see* note 50, *supra*, and Ariga, the description of the alleged violation as outlined in the Recommendation Decision is identical to that of the original Recommendation, as required by Sec. 48(4) of the Anti-Monopoly Law. The purpose of this system is to obtain early settlement of disputes.

Should the respondent reject the Commission's recommendation, the Commission serves a Complaint upon the respondent, thus initiating the second, or hearing, stage of the JFTC's investigative proceedings. This Complaint sets forth the suggested violation in a manner identical to that of the previously issued Recommendation. At this point, the Commission may appoint a hearing examiner to conduct formal hearings. Unlike the preliminary investigation phase, the respondent is now afforded many legal rights such as counsel, cross-examination, and the presentation of a defense.

At any time after the Complaint is served, but before the Commission renders a final decision, the respondent may agree to entry of a "Consent Decision" by submitting

> to the Fair Trade Commission a written statement setting forth that he admits the findings of fact and the application of law in the said complaint, and that he will rather accept a decision without resorting to the subsequent proceedings and [filing] therewith a plan regarding concrete measures to be taken by him in order to eliminate such violation.

Japanese Anti-Monopoly Act, § 53-3. Further proceedings are then aborted, and the Commission enters a Consent Decision. We credit the affidavit testimony of Drs. Matsushita and Ariga to the effect that no negotiation is permitted at this juncture. As with the Recommendation Decision, if a respondent wishes to end the proceedings, he is faced with a "take it or leave it" proposition. Section 53-3, quoted above, requires respondent to admit the allegations of the Complaint and does not permit modification. In fact, in Mrs. Ariga's lengthy experience with the Commission, each Consent Decision has repeated *verbatim*

the allegations of the Complaint, and does not take into consideration any evidence adduced during hearings which may have been held in the interim. As with the Recommendation Decision, the purpose of this requirement is to expedite resolution of the matter.

If no Consent Decision has been entered, the examiner, following the conclusion of the hearings, submits a report, together with the entire record of the case, to the full Commission. This report, which defendants translate as "Draft of Decision," but which plaintiffs translate as "Initial Decision," contains a statement of the facts, evidence, application of the law, and a proposed order. Subsequently, the full Commission reviews the document and, after consideration of the entire record, issues its Decision in the proceedings. The Commission may issue a decision identical to the examiner's report, remand the case to the examiners, initiate its own hearings, or decide to terminate the proceedings.

It should be noted again that the hearing examiner has no authority to issue a decision that is legally binding upon the respondents. Under Sec. 35(2) of the Anti-Monopoly Act, the hearing examiner is expressly precluded from issuing a decision. He does have authority under the accompanying Regulations to submit to the Commission a report of the hearings in the form of a draft of decision, or initial decision, providing the Commission with materials for its consideration in its ultimate decision-making role. The Commission may not rely upon the judgment of the hearing examiner in rendering its decision; rather it must, pursuant to Article 69 of the Regulations under the Act, examine the entire record itself, including all testimony and evidence taken. The Commission then renders its Formal Decision, stating findings of fact and application of the law.

In summary, there are three types of decisions which the Commission may make: a Recommendation Decision based upon the initial informal investigative report; a Consent Decision, based upon the allegations of the Complaint which is in

turn based upon the Recommendation; and a Formal Decision following hearings and submission of a report by the Hearing Examiner. Alternatively, the Commission may issue an Order to Terminate the proceedings.

B. *The JFTC Documents at Issue*

We have before us documents pertaining to two separate cases before the JFTC.[52] For the sake of clarity, we will discuss these cases in chronological order, which will allow us to discuss the simpler case first, although plaintiffs have reversed that order in their document submissions.

1. *The Market Stabilization Case*

In DSS 26, plaintiffs seek to introduce a single document: a Recommendation Decision entered into in JFTC Case No. 5 of 1957, which was brought against the Home Electric Appliance Market Stabilization Council, six of whose members are defendants in this action, *see* n. 5, *supra*, and the National Federation of the Associations of Radio and Electric Appliance Dealers (NFA). The Council was an industry-wide group formed, in plaintiffs' submission, to "stabilize" the domestic market in consumer electronic products by setting and maintaining artifically high prices and by policing the agreements reached by its members. On September 30, 1957, presumably after a preliminary informal investigation, the JFTC served a Recommendation upon the Council and the NFA alleging various violations of the Anti-Monopoly Act and proposing a cease and desist order.

The Council and the NFA decided to accept the Recommendation. Accordingly, only two and one-half weeks after

[52] Documents pertaining to a third JFTC case, the so-called "Six Company Case," *see* p. 1138, *supra*, have also been tendered for admission in this proceeding. While some documents originally offered, such as the "Draft of Decision" (or "Initial Decision"), have since been withdrawn by the plaintiffs, others, primarily notes of testimony and protocols, *see* p. 1138, *supra*, remain in the case and will be considered in a subsequent opinion.

issuance of the Recommendation, on October 17, 1957, a Recommendation Decision was issued. As indicated *supra*, the Recommendation Decision was identical to the Recommendation. It is the Recommendation Decision which plaintiffs seek to introduce in DSS 26. The record contains no information as to the actual investigative steps taken, *i.e.*, what if any of the measures available to the investigators were in fact used. Professor Haley agreed that there was no mandate under the JFTC statute or regulations which required any particular steps to be taken in any particular case. See n. 62, *infra*.

2. *The Matsushita Resale Price Maintenance Case*

DSS 25 consists of a series of documents related to JFTC Case No. 4 of 1967, brought against Matsushita Electric Industrial Co., Ltd. (MEI) charging certain resale price maintenance practices directed towards MEI's Japanese wholesalers. Plaintiffs contend that MEI's supposed resale price maintenance activities were an implementation by that company of all defendants' conspiracy to stabilize the Japanese domestic market at artificially high prices, one of twin foci of plaintiffs' theory of the case. On July 21, 1967, presumably following the initial informal investigatory activities outlined above (there is again nothing in the record regarding the actual investigative steps taken), the JFTC began formal proceedings against MEI by issuing a Recommendation seeking to require the elimination of MEI's alleged resale price maintenance activities (DSS 25-A). The text of the factual recitation and application of the law which accompanied the Commission's Recommendation is set out in the margin.[53] Unlike the Market Stabilization Coun-

[53] Matsushita Electric Industrial Co., Ltd. (hereinafter referred to as "Matsushita Electric") is located at the address listed on this document as the Main Office, and is engaged in manufacturing of home electrical appliances. It ranks first in the business industry in domestic sales of TVs, radios, vacuum cleaners, refrigerators, fans, and heating appliances, as of 1966. Matsushita Electric sells most of its domestic electrical appliances (hereinafter referred to as 'National products') to the wholesalers (hereinafter referred to as 'Agency') who deal mostly in National products.

cil, on August 3, 1967, MEI rejected the Recommendation, outlining its reasoning in an accompanying letter (DSS 25-B & C). Therefore, on August 14, 1967, the JFTC notified MEI that a hearing date had been set and issued a Complaint, labelled "Opening Statement of the Hearing." (DSS 25-D & E).[54] This Complaint was identical to the previously issued Recommendation.[55] MEI denied the primary allegations, setting forth its position in a brief-like "Surrogate's Preparatory Document" (DSS 25-F) dated November 22, 1967, after the commencement of the hearings.

Between September 8, 1967 and May 8, 1969, 28 hearings were held, during which 48 witnesses either testified, sub-

(1) Matsushita Electric has instructed its agencies in order to maintain the retail price of National products at the time of sale of National products, in or around September, 1964, that agencies were not allowed to sell the National products to retailers who sold home electrical appliances at bargain prices and were not to let their retailers engage in transactions with the above. Matsushita Electric has been doing business with agencies only if they follow this practice.

(2) And also Matsushita Electric has instructed its agencies (excluding special agencies) in order to maintain the agencies' selling price of National products at the time of the sale of National products, in or around February, 1965, that the agencies have to sell to their retailers at the wholesale price which the above company provided and that the rebate to their retailers had to be paid on the basis of the standard provided by the above company, and payment of their own rebate is prohibited with regards to most National products, except seasonal products. Matsushita Electric has been doing business with agencies only if they follow this practice. On the basis of each fact of No. 2, Matsushita Electric has been doing business with agencies under conditions which restrict business transactions between the agencies and their retailers.

[54] The document submitted to us as the Complaint, the "Opening Statement of the Hearing" (DSS 25-E) appears to be exactly what it purports to be—the government's opening statement at the hearing. We suspect that the actual Complaint is the document appended to the Consent Decision discussed *infra*, which is labelled "Written Decision to Open the Hearing." Since these documents are in essence identical, and identical to the Recommendation as well, their nomenclature is of no importance here.

[55] We note that the translations provided us differ somewhat in the placement of phrases, and we are of course not qualified to compare the original documents. Nonetheless, it is plain from a study of these documents that they are indeed identical in all pertinent respects.

mitted statements, or both, and 214 exhibits were introduced. At the conclusion of the hearings, the hearing examiner prepared, pursuant to the procedures outlined *supra*, his initial, or draft, decision (DSS 25-G), recommending a finding that MEI had violated the Anti-Monopoly Law. MEI objected to the Draft, DSS 25-H & I, but ultimately, before the Commission itself acted on the Draft, agreed to entry of a Consent Decision on March 13, 1967 (DSS 25-J). In order to agree to the Consent Decision, it was necessary for MEI to withdraw its statement of objections (DSS 25-K) and submit a proposal for compliance with the Decision (DSS 25-L), and subsequently to report on measures taken pursuant to the Decision (DSS 25-M).

It is noteworthy that, in accordance with the procedures outlined *supra*, the facts recited in the Consent Decision are identical to those in the Complaint; in fact, the Commission, in entering the judgment, merely appended the Complaint in support of the Consent Decision.

C. *The Evidentiary Contentions*

1. *Introduction*

Plaintiffs seek to introduce all of the aforementioned JFTC documents as public records and reports under F.R.E. 803(8)(C); in addition, they contend that the documents constitute admissions of a party, rendering them admissible under Rule 801(d)(2) as well.

Defendants contend that the documents in both cases are analogous to unlitigated consent decrees, and are therefore inadmissible under Rule 408, which excludes evidence adduced in settlement negotiations, or alternatively under Rule 410, which excludes withdrawn guilty pleas, pleas of nolo contendere, and offers to plead guilty or nolo contendere, as well as statements made in plea negotiations. Similarly, defendants argue that the documents are inadmissible under the proviso to § 5(a) of the Clayton Act, 15 U.S.C. § 16(a). Sec. 5(a) gives

prima facie evidentiary effect to a previous antitrust judgment against a given defendant in an action brought by the United States when that judgment is introduced in a subsequent private action, but the proviso specifies that the section does not apply to consent judgments or decrees. *See* n. 67 *infra*.

Even if the documents are not excluded under Rule 408 or 410 or § 5(a) of the Clayton Act, defendants argue that they do not constitute admissions, and further, that they are hearsay and not public records within the meaning of the 803(8)(C) exception to the hearsay rule because they are not "findings." While they do not maintain that the JFTC proceedings were untrustworthy in the same way that they argue the Treasury and Tariff Commission proceedings were flawed, defendants do call our attention to a number of factors which might render the JFTC documents untrustworthy under the criteria we have developed in Part II, *supra*. Thus, although there was some confusion at oral argument as to whether a trustworthiness objection was being pressed, *see* transcript, Pretrial Order No. 260 at 228-29, 245, and 250-51, it is clear that the trustworthiness of the JFTC documents as proof of the truth of the statements therein contained is at issue.

Finally, defendants argue that the documents are totally irrelevant to this case, in that they deal solely with an alleged domestic market conspiracy, and that, even if there were some limited probative value, it would be overwhelmingly outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" so as to be excludable under F.R.E. 403.[56]

---

[56] Defendants also argue that plaintiffs are attempting to utilize this evidence to portray defendants as having a proclivity to conspire—a form of character evidence which defendants maintain would be excludable under F.R.E. 404(b) as constituting "other bad acts." Plaintiffs assure us that they do not offer the evidence to prove character, however, so we need not address the 404(b) arguments. *See* transcript of argument, Pretrial Order No. 261 at 25.

Consistent with the earlier segments of this opinion, we will first address the hearsay question, and then turn to defendants' contentions regarding Rules 408 and 410 and § 5(a) of the Clayton Act, and finally to the other relevancy objections.

2. *The Hearsay Question: Admissibility Under 803(8)(C)*

For the reasons which follow, we hold that the documents of the proceedings before the Japanese Fair Trade Commission are not admissible under the exception for public records and reports. Just like the documents discussed in Parts III and IV, *supra*, these documents are plainly hearsay, and therefore not admissible unless they fall into one of the hearsay exceptions. Again, the only relevant exception appears to be 803(8)(C); and again, defendants argue that the documents are not findings within the meaning of 803(8)(C), and that they are not trustworthy under the principles governing that section.

a. *Findings*

We explained in Part II, *supra*, why the public records and reports that are admissible under 803(8)(C) are limited to "findings," and why other items in the record of an administrative proceeding are not included under that rubric. The only documents before us which are even arguably findings are the Recommendation Decision in the Market Stabilization Council case, DSS 26, and, with respect to the resale price maintenance case against MEI, the Recommendation, DSS 25-A, the Opening Statement of the Hearing, or Complaint, DSS 25-E,[57] the Initial Decision (or Draft of Decision), DSS 26-G; and the Consent Decision, DSS 25-L.[58] We discussed in both Parts II and III the problem of defining a finding for purposes of

---

[57] *See* note 54, *supra*.

[58] The remaining documents in DSS 25, *see* p. 1177, *supra*, because they cannot be construed as findings and therefore cannot come in as public records under the 803(8)(A) exception to the hearsay rule, are plainly inadmissible hearsay.

803(8)(C) when a document represents a step in a process which is subject to further review, and concluded that generally it was preferable to treat it as a finding subject to review in terms of the trustworthiness criteria which we have developed.

The factual recitation set forth in the Recommendation Decision in the Market Stabilization Council case, DSS-26, was based entirely upon the initial informal investigation of the Commission's staff. The affidavits make plain that the Commission makes no review of the evidence at this stage of the proceedings. No hearings were held. The text of the Recommendation prepared by the investigative staff automatically became the text of the Recommendation Decision, as required by Sec. 48(4) of the Anti-Monopoly Law.[59] Moreover, a number of decisions by the Japanese Supreme Court state that the Recommendation Decision does not conclusively determine the existence of a violation, that a formal finding by the Commission that a violation exists is not a prerequisite for a Recommendation Decision, and that whether or not violations did in fact exist does not affect whether or not the Recommendation Decision is appropriate. *See, e.g., Idemitsu Kosan K.K.* v. *Kosei Torihiki I'Inkai*, 32 Minshu 515 (April 4, 1978)(Supreme Court of Japan, 3d P.B.).[60] Furthermore, the Japanese Supreme Court decisions make plain that a Recommendation Decision in no way constitutes formal findings of fact by the

[59] There was some dispute as to whether this section is permissive or mandatory. We accept the position set forth in Dr. Ariga's June 15, 1980 affidavit, in which she states that not only is the statute mandatory, but in her experience Recommendation Decisions are always identical to the Recommendation.

[60] Translations of seven Japanese cases were provided us by the parties. The Japanese cases do not say, as defendants maintain they do, that Recommendation Decisions have no evidentiary weight whatsoever. They merely state they are not conclusive. Whether a Recommendation Decision would be admissible in a subsequent Japanese proceeding is irrelevant, for we are concerned here only with admissibility under U.S. law. The Japanese cases are helpful, however, to an understanding of the weight accorded such decrees, as well as to a general understanding of JFTC procedures.

Commission. At most, the document represents factual findings of the staff, and not of the Commission.[61]

As we have observed in Part II, however, we agree with plaintiffs that 803(8)(C) findings need not be limited to those of the formal body, but that staff findings, "resulting from an investigation made pursuant to authority granted by law," may also be included. *Cf. United States* v. *Corr*, 543 F.2d 1042, 1051 (2nd Cir. 1976). Therefore, consistent with the approach outlined in Part II, we will examine the "findings" according to the trustworthiness criteria we have developed *supra*.

b. *Trustworthiness*

With respect to the Advisory Committee's four criteria, we have no reason to question the timeliness of the investigation or the skill and experience of the staff members involved. However, as to the third criterion, no hearing was held. Moreover, serious questions of motivation, the fourth criterion, arise from the fact that the factual "findings" of the Recommendation, which are copied verbatim without review into the Recommendation Decision, are the precursor to the charging document which initiates the prosecution, much as the facts gathered in a grand jury investigation are those resulting in an indictment. The factual findings in both cases are then memorialized in documents whose purpose is not to "find" facts but to accuse. Additionally, the administrative or judicial process which these documents initiate is predicated upon the notion that these accusatory findings are preliminary and likely to be

[61] Plaintiffs rely heavily upon the contention that § 48 of the Anti-Monopoly Act and § 20 of the Regulations, both of which apply to Recommendations, use the words "find" or "finding." While it is true that the translation of the Japanese word at issue, "mitomeru," is to "recognize" or "acknowledge," both of these renditions connote something quite different from "find." Furthermore, as we have noted previously, even if "find" were the only possible translation, such language would not have talismanic significance in those proceedings.

revised in the *de novo* proceedings to follow. In this latter regard, we note that: (1) the "findings" are made at the earliest possible stage of the proceedings, at which the respondent has enjoyed few procedural rights; (2) the "findings" are based upon an informal investigation in which hearsay and ex parte information play a substantial and apparently dominant role; and (3) there is no record of the proceedings.[62]

We find that the preliminary investigation leading up to a Recommendation, *after* which formal proceedings are to commence, is simply too preliminary to be trustworthy within the meaning of 803(8)(C), and that the document relied upon as the distillation of the investigation, because it is accusatory in nature, cannot be deemed a trustworthy finding. The fact that the Commission converts the Recommendation into a Recommendation Decision following acceptance by the respondent does not alter the analysis, for it has been thoroughly documented that the Recommendation Decision does not constitute fact-finding by the Commission. *See* p. 1179, *supra*.

If the Recommendation Decision in the Market Stabilization Council case is not trustworthy enough to be admissible, then neither is the Recommendation in the MEI case. The Complaint in the MEI case is identical to the Recommendation, was in fact copied directly from the Recommendation without additional review, and therefore suffers from exactly the same weaknesses. While based upon staff findings, it is nonetheless an accusatory document, and given its etiology, is still too preliminary in nature to be 803(8)(C) material.

[62] Plaintiffs make much of the formal procedural mechanisms set forth in the Anti-Monopoly Law and its Regulations, asserting that the procedural regularity and thoroughness of the investigation render it trustworthy. However, as suggested in note 50, *supra*, Professor Haley had no knowledge as to what investigators actually did; his testimony made clear that he relied solely on the statute as written and that his testimony as to actual operations was entirely speculative. In addition, he agreed that the investigatory powers and procedures set forth in the Act are not necessarily exercised in any given case. *See* Pretrial Order No. 264 at 47 48. Moreover, the procedural regularity of the proceedings has no bearing on our holding that the investigation is too preliminary to be trustworthy.

The Consent Decision is also identical to the Complaint. As is discussed in detail in connection with our analysis under Rule 410, *infra*, the Consent Decision does not take into account any evidence adduced during the hearings. Rather, the respondent must consent to entry of a decision based solely upon the allegations of the Complaint, as required by Sec. 53(3) of the Anti-Monopoly Law; negotiation is not permitted. *See* p. 1176, *supra*. Thus, the fact that the decision was entered after hearings were held is irrelevant to the analysis, for the "facts found" are identical to and are rooted in the preliminary facts set forth in the Complaint. Therefore, the Consent Decision too is inadmissible.

The Draft of Decision is the only document which includes facts found after hearings, based upon evidence adduced at the hearing. We need not extend this very long opinion by explaining its status within the meaning of 803(8)(C), given its ultimate reviewability by the Commission itself, for the Draft Decision was superseded in this case by the Consent Decision. Consistent with the conclusions set forth in Part II, we do not believe that Rule 803(8)(C) contemplates receipt in evidence of what is essentially a staff report which has no legal effect because of the subsequent entry of the Consent Decision.

Thus, we find that defendants have met their burden of showing that the documents offered in DSS #s 25 and 26 are untrustworthy. Accordingly the documents do not meet the requirements of Rule 803(8)(C) and constitute inadmissible hearsay.

3. *F.R.E. 408, 410, and § 5(a) of the Clayton Act*

F.R.E. 408 excludes from evidence matters pertaining to settlement negotiations and agreements;[63] F.R.E. 410 ex-

[63] Rule 408 reads:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements

cludes from evidence withdrawn pleas of guilty, pleas of nolo contendere, and offers to plead guilty or nolo contendere, as well as statements made during plea negotiations.[64] Defendants maintain that both the Recommendation Decision entered into in the Market Stabilization case and the Consent Decision in the case against MEI are consent agreements which are analogous to nolo contendere pleas, and are therefore inadmissible under Rule 410. We agree.

It is well-established that unlitigated consent decrees are equivalent to pleas of nolo contendere. *See, e.g., Lipsky* v. *Commonwealth United Corp.*, 551 F.2d 887, 893-94 (2nd Cir. 1976); *City of Burbank* v. *General Electric Co.*, 329 F.2d 825, 833-34 (9th Cir. 1964); *Simco Sales Service Inc.* v. *Air Reduction Co.*, 213 F.Supp. 505 (E.D.Pa. 1963).[65] Because such con-

> made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such a proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The argument under Rule 408 has not been pressed by defendants, nor has it been briefed. Because Rules 408 and 410 are based on similar policies, namely, encouraging expeditious settlement of disputed cases, and because the case at bar fits more neatly into Rule 410, we will address it primarily in the Rule 410 context.

[64] F.R.E. 410 provides in full:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

[65] The Second Circuit explained, for example that:

> Nolo pleas have been equated with "consent decrees" for purposes of the proviso to § 5(a) of the Clayton Act. . . . The reason for this equivalence is that both consent decrees and pleas of nolo contendere are not

sent decrees are not decisions on the merits, they are not admissible to prove that any violation occurred. *See Beatrice Foods Co.* v. *F.T.C.*, 540 F.2d 303 (7th Cir. 1976). Therefore, if the Japanese decisions at issue are analogous to an American consent decree, they are clearly inadmissible.

In the Market Stabilization Council case, the Council accepted the original JFTC Recommendation. As discussed above, that Recommendation was not based on formal fact finding by the Commission, but was in the nature of a preliminary accusatorial document. No hearings were held. The text of the Recommendation automatically became the text of the Recommendation Decision, as required by Sec. 48(4) of the Anti-Monopoly Law. The policy of Sec. 48 is to promote compliance with the Anti-Monopoly Law by encouraging respondents to consent expeditiously to a Recommendation, thereby achieving the elimination of certain practices without the expense of litigating their legality. That is the identical policy underlying both Rules 408 and 410.

Our conclusion that the Recommendation Decision is analogous to a consent decree, hence a *nolo* plea and inadmissible under Rule 410, is reinforced by the decisions of the Japanese Supreme Court discussed at p. 1179, *supra*, all of which state that the Recommendation Decision does not conclusively determine the existence of a violation and that whether or not violations did in fact exist does not affect whether or not the Recommendation Decision is appropriate.

The Consent Decision in the resale price maintenance case against MEI presents a more difficult problem, but we nevertheless reach the same conclusion. The Consent Decision was entered at a later stage of the proceedings, after hearings, and after preparation of a draft of decision, or initial decision, by

> true adjudications of the underlying issues; a prior judgment can only be introduced in a later trial for collateral estoppel purposes if the issues sought to be precluded were actually adjudicated in the prior trial.

Lipsky v. *Commonwealth United Corp.*, 551 F.2d 887, 893-94 (2nd Cir. 1976) (citations and footnote omitted).

the hearing examiner, but before final action by the Commission. Furthermore, Sec. 53(3) of the Anti-Monopoly Law, quoted at p. 1180, *supra*, requires that a respondent submit "a written statement setting forth that he admits the findings of fact and the application of law." Thus plaintiffs contend the Consent Decree is more in the nature of a guilty plea, which might well be admissible as an admission under Rules 801(d)(2) and 804(b)(3). *See 2 Weinstein on Evidence*, ¶ 410[05], at 410-31.

However, as we explained *supra*, a respondent who decides to enter into a Consent Decision is no more able to negotiate with the Commission than if he were agreeing to a Recommendation Decision. It has been persuasively demonstrated in the affidavits of Drs. Matsushita and Ariga that a Consent Decision merely repeats verbatim the allegations of the Complaint and bears no relationship whatever to evidence adduced during the hearings. The admission is for the purpose of terminating the proceedings and does not necessarily imply that the respondent verifies that the facts alleged in the Complaint are indeed true. Rather, if a respondent wishes for any reason whatever to terminate the proceedings once they have begun,[66] his only route is to request entry of a Consent Decision by way of the legal fiction of admitting the facts as they are set forth in the Complaint. The Commission does not make a detailed analysis of the information gathered by the investigative staff; rather, the Consent Decision is prepared in a rote, mechanical manner, copied from the Complaint. There is thus no adjudication of the facts at issue.

What we have here is a sort of hybrid unknown in American law-not exactly a *nolo* plea; not exactly a guilty plea, for this is a civil action; and not exactly a settlement agreement as con-

[66] Possible motivations for submitting to a consent decision are easily imaginable. In this case, MEI maintains that it was being economically harmed by a consumer boycott which was instigated because of publicity over the JFTC action against it, and that it quite plausibly consented to entry of the Consent Decree in order to deflect public attention and thwart the boycott.

templated by Rule 408, for there can be no compromise or negotiation. Plaintiffs suggest, then, that this hybrid "falls between the cracks" of the exclusionary Rules, and therefore is admissible as an admission under 801(d)(2). While this argument has appeal, we must ultimately disagree. Against the background of Japanese law, we find instead that this document is akin to an American consent agreement, and, therefore, inadmissible under Rule 410 on the same basis as is the Recommendation Decision.

The policies which underlie Rules 408 and 410, as well as Section 5(a) of the Clayton Act,[67] are clear and support the

[67] Section 5(a) of the Clayton Act, 15 U.S.C. § 16, reads:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

Plaintiffs suggest that because this section was enacted to aid the private plaintiff by freeing him from the requirement of relitigating an already litigated violation, the section cannot be applied to exclude evidence. The section has, however, been consistently construed to exclude evidence of both consent decrees and pleas of nolo contendere. *See, e.g., City of Burbank v. General Electric Corp.*, 329 F.2d 825 (9th Cir. 1964); *Commonwealth Edison v. Allis-Chalmers Mfg. Co.*, 323 F.2d 412, 415 (7th Cir. 1963), *cert. denied*, 376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659 (1964); *Do[illegible]ld Co. v. Westinghouse Elec. Corp.*, 252 F.Supp. 939, 941 (S.D.N.Y. [illegible]6); *Simco Sales Service, Inc. v. Air Reduction Co.*, 213 F.Supp. 505 (E.D.Pa. 1963). *Cf., Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 n. 12 (3rd Cir. 1973).

In essence, the proviso to section 5(a) makes it clear that section 5(a) is not to be read to change the common law principle that consent agreements are inadmissible. Thus, in the antitrust context, it presages Rule 410, which, since pleas of nolo contendere have been equated with consent agreements, essentially duplicates 5(a) for all federal actions.

We need not discuss 5(a) in detail, for it applies only to previous actions brought by the United States under American law. Nonetheless, its underly-

result we have reached. First, these policies encourage expeditious settlement of disputed claims. But more important, once that initial policy is articulated, the fundamental nature of the consent agreement process makes the agreement untrustworthy as an indicator of the truth. *See* Advisory Committee Notes to Rules 408 and 410. This final factor is influential and persuades us that the Consent Decision here should not be admitted, for it is plain from the affidavits we have considered that, despite the language of the Japanese statute, a respondent does not, by "admitting" the fact and thereby agreeing to entry of a Consent Decision, verify that the facts are indeed true. While the Japanese Supreme Court has apparently not addressed the meaning of such an "admission," for the cases with which we have been provided deal only with Recommendation Decisions, the Commission, as explained by Professor Ariga, does not view the underlying facts as proved. Moreover, Professor Haley conceded that a Consent Decision should be accorded the same weight as a Recommendation Decision. Pretrial Order No. 264 at 98. Thus, unlike the situation where there has been a guilty plea, there has been no adjudication on the merits.[68] In sum, we find the Consent

ing policies—the same as those underlying Rules 408 and 410, *see supra*,—are relevant to this action. We therefore need not discuss whether the proviso is inapplicable to the MEI case because of its restriction to "decrees entered before any testimony has been taken." In addition, we note only that the MEI Consent Decision, entered after testimony was taken, is distinguishable from the normal situation under U.S. law, in that the Consent Decision does not in any way take into consideration evidence adduced at the hearings.

[68] We have addressed in this section only the actual decisions tendered by plaintiffs. The additional documents submitted under DSS 25 relating to the resale price maintenance case cannot fairly be called consent agreements. The Recommendation, the Opening Statement of the Hearing, and the Initial Decision were all disposed of *supra* on hearsay grounds. Plaintiffs argue that those of the documents in DSS 25, see pp. 1177-1178, *supra*, which originated with Matsushita are admissions and therefore admissible independently under 801(d)(2). We disagree, for we view these documents as essential steps to the Consent Decision, so inextricably intertwined as to be logically inseparable.

Decision to be analogous to an American consent decree, and inadmissible under F.R.E. 410 to prove the fact of the violations recited therein.

4. *Other Relevancy Objections*

Defendants contend that the JFTC materials are also easily disposed of on conventional (F.R.E. 402) relevancy grounds. That contention, however, embroils us in one of the primary disputed legal issues in this case, *i.e.*, whether a home market price fixing conspiracy in Japan, if it existed, is relevant to the existence of an export conspiracy. Plaintiffs have posited a single, unitary, long-lasting conspiracy which they urge may not be fragmented for analytic purposes; defendants counter that nothing they may have done in Japan has any bearing whatever on activities in the U.S. market, and that in any event there is no evidence of any violation subsequent to the 1957 Market Stabilization Council case, or in the case of MEI, subsequent to the 1967 case. We do not see this as a question of the law of evidence, but of the substantive law of antitrust conspiracy. Accordingly, we will address this question when we take up the defendants' motion for summary judgment addressed to the conspiracy claims.[69]

Without determining the probative weight to be given the JFTC materials, we are equally unable to strike the balance required to make a determination under the last ground of defendants' objection to the JFTC proceedings, Rule 403. We note, however, that the possibility of unfair prejudice from use of these materials is enormous. The same factors which led to our determination that the decisions at issue are in actuality consent agreements and untrustworthy as evidence of the fact of any actual violation suggests that a jury could be easily misled. Furthermore, we note that if the evidence were to be admitted, defendants would inevitably bring in considerable

[69] Moreover, if the evidence were to be deemed relevant, it would be necessary to decide which parties it would be admissible against. This too is a matter for consideration in conjunction with the conspiracy motion.

testimony and exhibits to explain, or in essence relitigate, the issues in dispute before the JFTC. We express no view at this time, however, as to the ultimate weight to be accorded these factors.

VI. *Admissibility of Judge Higginbotham's Findings of Fact*

On January 2, 1975, eight defendants in the Zenith case and three defendants in the NUE case filed identical motions to dismiss based upon (1) lack of personal jurisdiction; (2) improper venue; and (3) insufficient service of process.[70] The issues raised by defendants' motions were briefed extensively by the parties, and an extensive record was compiled. In addition, the moving defendants responded to interrogatories propounded by the court for the purpose of eliciting additional facts relevant to the matters placed in issue by those defendants. Following four days of oral argument, Judge Higginbotham, see n. 6 *supra*, filed an opinion in which he concluded that "this Court may exercise jurisdiction over each of the moving defendants, that venue is proper for each of them in this district, and that each of them has been adequately served with process." *Zenith Radio Corporation* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 262, 267 (E.D.Pa.1975). In reaching his decision, Judge Higginbotham made extensive findings of fact based upon:

> (1) defendants' answers to the Court's interrogatories in the Zenith and NUE actions; (2) those of plaintiff's proposed findings of fact in the NUE action that are reasonably supported by the evidence; and (3) other factual submissions of the plaintiffs that are relevant to the issues raised by the moving defendants.

Id. at 268 (footnote omitted).

---

[70] In the Zenith case, the moving parties were Matsushita Electric Industrial Co., Ltd. (MEI), Matsushita Electronics Corporation (MEC), Matsushita Electric Trading Co., Ltd. (MET), Sharp Corporation (SHARP), Hitachi, Ltd. (HITACHI), Mitsubishi Electric Corporation (MELCO), and Sanyo Electric Co., Ltd. (DENKI). KADEN, MELCO and DENKI were the movants in the NUE case.

Plaintiffs contend that Judge Higginbotham's findings represent the "law of the case" and that defendants are thus precluded from relitigating these findings in connection with the summary judgment motions or at trial; they argue further that the findings are admissible now and at trial for all purposes under F.R.E. 803(8)(C). We shall not dwell upon the "law of the case" point, for it is clear beyond cavil that Judge Higginbotham's findings, which were addressed to the preliminary motion to dismiss, are not "the law of the case" as to any legal issues beyond personal jurisdiction and venue[71] and do not control the issues now before us and upcoming in connection with the motions for summary judgment. We shall, however, address, albeit briefly, plaintiffs' contentions that Judge Higginbotham's findings are somehow admissible as a public record or report. This contention is plainly incorrect for the following reasons.

First, a reading of the text of § 803(8)(C) makes it plain that the drafters were not talking about judicial findings; rather, the rule speaks of factual findings resulting from "an investigation made pursuant to authority granted by law." Surely, Judge Higginbotham was not engaged in that pursuit. Second, a review of the advisory committee note makes it clear that judicial findings are not encompassed; not only is there not the remotest reference to judicial findings, but there is a specific focus on the findings of officials and agencies within the executive branch.

Our conclusion, however, does not rest solely upon the text of § 803(8)(C) and its legislative history. Additionally, we find that the construction opted for by plaintiffs would create a conflict with other sections of the F.R.E. Accordingly, a third

---

[71] The "law of the case" doctrine operates to call a halt to attempted relitigation of issues once they have been decided. *See, e.g., White* v. *Murtha*, 377 F.2d 428 (5th Cir. 1967); *Swietlowich* v. *County of Bucks*, 610 F.2d 1157 (3rd Cir. 1979). The authorities are clear that it is legal issues which cannot be readdressed; preliminary factual findings made for one purpose are plainly not the law of the case with respect to issues of substantive liability.

basis for our rejection of plaintiffs' position is that the trustworthiness evaluation which we have discussed at length *supra* would be totally unsuited to evaluating judicial findings. Indeed, such evaluation might well conflict with Rule 605, which makes the judge incompetent as a witness. This result follows because the process of determining trustworthiness, either *in limine* or by way of defense at trial (if a preliminary determination of trustworthiness were made), cognizes the possibility of calling the author of the fact-finding, or his staff members, as witnesses so as to impeach their work. That just cannot be done under the F.R.E. with respect to a judge.

Another conflict, and the fourth reason for our rejection of plaintiffs' argument is that where the drafters wished to make judicially found facts admissible, they did so expressly. *See* Rule 803(22) pertaining to judgments of previous conviction and Rule 803(23) pertaining to judgments as to personal, family, or general history, or boundaries.[72] The drafters did not so provide with respect to other judicial findings or judgments. Finally, even if Judge Higginbotham's findings were otherwise admissible, they would have to be excluded under Rule 403. This is because such findings would present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice. There would also be a prospect of confusing the issues and causing undue delay because of the time necessary to explain to the jury that the

[72] F.R.E. 803(22) excepts from the hearsay rule:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Similarly, 803(23) excepts:

> Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

findings were made only as they relate to the preliminary matters of personal jurisdiction, venue, and service of process, all of which, of course, implicate different legal issues than are involved at trial. This would in turn require a veritable exegesis of abstruse areas of the law.

VII. *Materials from the Organization for Economic Cooperation and Development and the United Nations*

A. *Introduction*

The last two documents with whose admissibility we are here concerned are contained in DSS #s 46 and 47. DSS #s 46 consists of an excerpt from a report of the Organization for Economic Cooperation and Development (OECD) prepared in 1968 and entitled "Electronic Components—Gaps in Technology." The excerpt sought to be introduced is a part of a section of the report captioned "The Main Inventions and New Technologies in the Industry" and includes a discussion and data indicating that most technological advances in the post World War II semiconductor industry were made by American firms. DSS #47 is a table taken from a publication of the Statistical Office of the United Nations entitled *The Growth of World Industry, 1967 Edition, Volume II, Commodity Production Data*, 1953-1966 (1968). The table sets forth television production figures of member countries for the years 1953-1966.

Admission is sought primarily under 803(8)(A) and/or (B), although presumably at least the narrative portions of the OECD report are the sort of material covered by 803(8)(C). Although the parties have agreed (for 803(8) purposes) on the admissibility of many statistical documents, defendants have objected to DSS #s 46 and 47 primarily on the ground that they are not the product of "public offices or agencies" within the meaning of 803(8). They also raise trustworthiness objections.

The organization for Economic Cooperation and Development is an international organization made up of nation

states.[73] It was established by convention and protocols signed in Paris in December, 1960. The convention was ratified by President Kennedy in March, 1961, with the advice and consent of the United States Senate. It was entered into force in September, 1961, and proclaimed by the President in November, 1961. Its purpose is to "promote the highest sustainable growth [of the economies of member countries] and improve the economic and social well-being of their peoples," through economic cooperation. 12 U.S.T. 1728, 1731, T.I.A.S. 4801. To this end, the organization may make decisions that are binding on all its members, make recommendations to its members, and enter into agreements with members, non-member states, and international organizations. 12 U.S.T. at 1734.

The report at issue here was presented for information at the Third Ministerial Meeting on Science of OECD countries, held in March, 1968. It was prepared by a group of experts nominated by the countries that wished to participate in the work of the sector concerned and by experts from universities and industry.

A questionnaire was prepared and sent to each of the participating countries, and the experts collected and coordinated national replies. The data submitted by member countries were supplemented by visits to firms, discussions with experts, and analysis of available statistical data by the OECD Secretariat. On the basis of this information, the Secretariat prepared a first draft of a report, which was discussed and ultimately agreed to by the experts.

The Statistical Office of the United Nations is a part of the U.N.'s Department of International Economic and Social Affairs and is granted authority to compile statistical data by

[73] At present member countries are Australia, Austria, Belgium, Canada, Denmark, Finland, France, The Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, The United Kingdom, and the United States. Yugoslavia participates with special status.

the Statistical Commission of the U.N.'s Economic and Social Council. The Statistical Office compiled the data set forth in *The Growth of World Industry, Volume II*, pursuant to Resolution 7-XV, ¶ 2 (1968) of the Statistical Commission, which provides for the compilation and publication of international comparable industrial data, including industrial commodity production statistics on a selected basis.

B. *Are the OECD and the United Nations Public Offices or Agencies Under 803(8)*

Prior to the enactment of the F.R.E., admission of official records in federal litigation was governed by 28 U.S.C. § 1733(a), which provided:

> Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

Records of nonfederal agencies (including those of state and foreign governments) were not admissible under this section. Rule 803(8) is thus broader in scope since, as the Advisory Committee noted, it "makes no distinction between federal and nonfederal offices and agencies."

As we observed *supra* n.11, it is clear that 803(8) permits admission of records that are the products of foreign governmental agencies. Whether the rule also permits introduction of reports of supragovernmental agencies is a different question, however, and is apparently one of first impression.

Citing *Reparation for Injuries Suffered in Service of the United Nations* (1949) I.C.J. 174, 178-79, plaintiffs have argued that under international law both the U.N. and the OECD are legal personalities and thus may be deemed public offices or agencies. They note that the United Nations Charter and the Convention and Protocols for the OECD have been accepted by the governments of both Japan and the United States. For their part, defendants interpret the phrase "public offices or agencies" as meaning offices or agencies of a "duly

constituted governmental body." While nothing in the Advisory Committee Note to 803(8) can fairly be said to address this issue, we see nothing in the language of 803(8) and no hint in the Advisory Committee Note to indicate that the phrase "public offices or agencies" is thus delimited or that a "duly constituted governmental body" cannot include an international governmental body such as the United Nations or a supranational agency such as the OECD. Rather, given the background of their creation, the breadth and regularity of their public business, and the solemnity of their duties, we see treatment of the U.N. and OECD as public offices or agencies as consistent with the theory and raison d'etre of 803(8)—the notion that circumstantial guarantees of trustworthiness are provided by the presumption that governmental reports are reliable or probably reliable. *See* Saltzburg and Redden, *Federal Rules of Evidence Manual*, (2d Ed. 1977) at 32.

In sum, in the absence of authority to the contrary, we are satisfied that both the United Nations and the OECD qualify as public offices or agencies within the meaning of 803(8). Since there has been no question raised as to whether these materials set forth "the activities of the office or agency," 803(8)(A), "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," 803(8)(B) or "factual findings resulting from an investigation . . ." 803(8)(C), we turn to the trustworthiness objection raised by defendants.

C. *Trustworthiness*

As we indicated *supra* at 1145, 803(8) presumes admissibility of public records and reports in the first instance, and the burden is on the party opposing admission to rebut the presumption of trustworthiness. As to the report of the OECD, defendants argue that there is insufficient evidence of the source of the data. In response, plaintiffs note that the data was compiled by a panel of experts who, while not identified in these materials, represented a number of countries and who discussed and agreed to the final report. There is no reason to suspect, and defendants have not presumed to suggest, any motivational problems on the part of these experts.

As to the data compilation prepared by the Statistical Office of the United Nations, defendants object that the report does not indicate that "the source of the data was ever confirmed." While we are not altogether sure what is meant by this statement, we believe that as it stands it is insufficient to impugn the sources of the information and thus the presumed trustworthiness of the document.

Relatively little time was devoted to these documents, at least in comparison to the matters discussed earlier in this opinion, and defendants did not martial much in the way of objection. While we cannot be sure what would emerge from more searching scrutiny, we conclude that as to these two documents, defendants have failed to show that "the sources of information or other circumstances indicate lack of trustworthiness." Thus, DSS #s 46 and 47 are admissible as 803(8) exceptions to the rule against hearsay.

VIII. *Conclusion*

This opinion has analyzed in great detail, through a series of evidentiary layers, the documents contained in DSS #s 1-26, as well as Judge Higginbotham's 1975 findings and certain miscellaneous documents containing statistical data. For the reasons set forth, we find admissible only the documents described in Part VII, *supra*, and will exclude the others from consideration in connection with the motions for summary judgment on plaintiffs' conspiracy and other affirmative claims, and in connection with our preliminary (Rule 104) determination as to whether plaintiffs have come forward with sufficient independent evidence of the existence of the conspiracy they have charged among the defendants to go forward with those conspiracy claims.

Had this been an ordinary case, it would have been unnecessary for us to have approached the problems presented through so many evidentiary layers. It would have been enough, for example, to exclude the evidence had we found it to be hearsay and not subject to the 803(8)(C) exception, without considering the other grounds of objection. We have addressed

all potential evidentiary questions for two reasons. First, given the magnitude of the case and its history to date, there is a certainty of appellate review, and we think it important to "touch all bases" and analyze the issues from every relevant direction for the ultimate benefit of the parties and the Court of Appeals and so that there can be no remand because of a failure to address particular questions. Second, and of more immediate applicaton, it is necessary that all evidentiary objections be decided because of the impact on the case of F.R.E. 703.

As will appear in bold relief when we write about the admissibility of plaintiffs' opinion evidence, a subject we will address in the third opinion in this evidentiary series, (the second opinion will deal with all the items listed at 1137-1139, *supra*, and not considered herein), Rule 703 provides that the facts or data upon which an expert bases an opinion or inference need not be admissible in evidence so long as they are of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." We dwelt extensively upon the expert opinions during the course of our evidentiary hearings and have read the expert reports and can thus state that many of the matters we have excluded and many matters which will be excluded in our next opinion are relied upon heavily in the reports of plaintiffs' experts. Plaintiffs announced during the hearings that they believe that the experts may properly rely on the excluded material, citing Rule 703. Thus the *basis* on which the evidence was excluded becomes extremely important. For instance, if a document was excluded for some technical reason, perhaps the expert may still rely upon it if Rule 703 is otherwise met. If, however, it was excluded because it was untrustworthy, perhaps he may not. As we have ofttimes observed during the course of these hearings, where the point was demonstrated again and again, the F.R.E. are a veritable "seamless web."

Because our rulings are all subsumed within the foregoing opinion, a separate Pretrial Order is unnecessary; this opinion will constitute P.T.O. No. 283.

APPENDIX
DOCUMENTARY SUBMISSION SHEET[1]

Date: ______

I. DOCUMENT IDENTIFICATION

A. **PARTY OFFERING EVIDENCE:** ______________

____

B. **DOCUMENT IDENTIFICATION:**

1. Document Number: ______________
2. Brief Description: ______________

____

3. FPS Reference(s)[2]: ______________
4. Description of Documents of a Similar Type[3]: ___

____

____

____

C. **PARTY(S) AGAINST WHOM OFFERED:** ______

____

____

____

II. OBJECTOR POSITION

Date: ______

Identify Objector: ______________

☐ No Objection.

Objections: Reasons.

☐ Lack Authenticity (F.R.E. 901): ______________

____

☐ Not Business Record (F.R.E. 803(6)): ______________

____

☐ Not Public Record or Report (F.R.E. 803(8)): ______

____

☐ Other Hearsay (F.R.E. 802): ______________

____

☐ Lacks Trustworthiness: ______________________

____

☐ Irrelevant (F.R.E. 402): ______________________

____

☐ Other: ______________________________________

____

____

III. PROPONENTS' REPLY

Date: ______

Rejoinder: Reason.

☐ Authentic (F.R.E. 901): ______________________

____

☐ Authentic (F.R.E. 902): ______________________

____

☐ Admission (F.R.E. 801(d)(2)): __________________

____

☐ Business Record (F.R.E. 803(6)): ________________

____

☐ Other Hearsay Exception: ______________________

____

☐ Trustworthy: __________________________________

____

☐ Relevant: ____________________________________

____

☐ Other: ______________________________________

____

1. See Documentary Submission Instructions.
2. Multiple references to be listed on separate attached sheet.
3. Documents of a similar type, such as invoices, purchase orders, etc., may be submitted with a single DSS.

ZENITH RADIO CORPORATION,
Plaintiff,

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.,
Defendants.

NATIONAL UNION ELECTRIC CORPORATION,
Plaintiff,

v.

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.,
Defendants.

In re JAPANESE ELECTRONIC
PRODUCTS ANTITRUST LITIGATION.

Civ. A. Nos. 74-2451, 74-3247.
MDL 189.

United States District Court,
E. D. Pennsylvania.

Sept. 29, 1980.

Blank, Rome, Comisky & McCauley by Edwin P. Rome, William H. Roberts, John Hardin Young, Arnold I. Kalman, Kathleen H. Larkin, Norman E. Greenspan, Lawrence S. Bauman, Philadelphia, Pa., for Zenith Radio Corporation and National Union Electric Corporation, plaintiffs.

Philip J. Curtis, John Borst, Jr., Glenview, Ill., for Zenith Radio Corporation, plaintiff.

Mudge, Rose, Guthrie & Alexander by Donald J. Zoeller, John P. Hederman, Thomas P. Lynch, Howard C. Crystal, Robert A. Jaffe, Shelly B. O'Neill, Mark K. Neville, Jr., New

York City, Drinker, Biddle & Reath by Patrick T. Ryan, Philadelphia, Pa., for Tokyo Shibaura Elec. Co., Ltd. and Toshiba America, Inc., defendants; defense coordinating counsel.

Duane, Morris & Heckscher by Henry T. Reath, Terry R. Broderick, Philadelphia, Pa., Crummy, Del Deo, Dolan & Purcell by John T. Dolan, Arnold B. Calmann, Newark, N.J., Baker & McKenzie by Hoken S. Seki, Thomas E. Johnson, Chicago, Ill., for Mitsubishi Electric Corporation and Melco Sales, Inc.

Reid & Priest by Charles F. Schirmeister, Robert J. Lynch, New York City, L. Peter Farkas, Washington, D.C., for Mitsubishi Corporation and Mitsubishi International Corporation, defendants.

Weil, Gotshal & Manges by Ira M. Millstein, A. Paul Victor, Joel B. Harris, Kevin P. Hughes, Robert K. Hood, H. Adam Prussin, Harry M. Davidow, Jeffrey L. Kessler, Stuart Peim, Lenore Liberman, Gayle E. Hanlon, Makoto Matsuo, New York City, Morgan, Lewis & Bockius by Raymond T. Cullen, Philadelphia, Pa., for Matsushita Elec. Indus. Co., Inc., Matsushita Elec. Corp. of America, Matsushita Electronics Corp., Matsushita Elec. Trading Co., and Quasar Electronics Corp., defendants.

Metzger, Shadyac & Schwarz by Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Stephen P. Murphy, William B. T. Mock, Jr.; Tanaka, Walders & Ritger by Lawrence R. Walders, B. Jenkins Middleton, Washington, D.C., Hunt, Kerr, Bloom & Hitchner by Charles J. Bloom, Philadelphia, Pa., for Hitachi, Ltd., Hitachi Sales Corporation of America, and Hitachi Kaden Hanbai Kabushiki Kaisha, defendants.

Wender, Murase & White by Peter J. Gartland, Gene Yukio Matsuo, Peter A. Dankin, Lance Gotthoffer, New York City, Dechert, Price & Rhoads, Philadelphia, Pa., for Sharp Corporation and Sharp Electronics Corporation, defendants.

Whitman & Ransom by Patrick H. Sullivan, Dugald C. Brown, James S. Morris, Kevin R. Keating, Michael S. Press, New York City, Hunt, Kerr, Bloom & Hitchner by Charles J. Bloom, Philadelphia, Pa., for Sanyo Elec., Inc., Sanyo Elec. Co., Ltd., Sanyo Elec. Trading Co., Ltd., and Sanyo Manufacturing Corporation, defendants.

Arnstein, Gluck, Weitzenfeld & Minow by Louis A. Lehr, Jr., Stanley M. Lipnick, John L. Ropiequet, Chicago, Ill., for Sears, Roebuck & Co., defendant.

Rosenman, Colin, Freund, Lewis & Cohen by Asa D. Sokolow, Renee J. Roberts, Marc Rowin, Kaye, Scholer, Fierman, Hays & Handler by Joshua F. Greenberg, New York City, Wolf, Block, Schorr & Solis-Cohen by Franklin Poul, Philadelphia, Pa., for Sony Corp. and Sony Corp. of America, defendants.

Kirkland & Ellis by Thomas P. Coffey, E. Houston Harsha, Karl F. Nygren, Chicago, Ill., for Motorola, Inc., defendant.

OPINION

(Admissibility of Materials Relating to Activities in Japan)

Pretrial Order No. 295

EDWARD R. BECKER, District Judge.

TABLE OF CONTENTS

* Since the internal organization of Part IV and subsequent parts of this Opinion are essentially the same as that of Part III, we omit subheadings for all subsequent parts except Part VIII, relating to Former Testimony, which is organized differently.

I. *Preliminary Statement*

This is the second in a series of opinions which will address the myriad issues raised during the course of a lengthy pretrial evidentiary hearing in this complex antitrust case. The anatomy and scope of the case has been described in our opinion on subject matter jurisdiction, filed April 14, 1980, 494 F.Supp. 1161. The nature and scope of the evidentiary hearing has been described in the first opinion in the current series, filed on August 7, 1980, 505 F.Supp. 1125.[1] This opinion will consider admissibility of three major groups of documents: (1) materials seized by the Japanese Fair Trade Commission (JFTC) in "raids" on the offices of several of the defendants here who were respondents in the so-called "Six Company Case";[2] (2)

[1] That opinion deals with the admissibility of various public records and reports and is cited hereafter as "Public Records Opinion."

[2] *See generally* Public Records Opinion at 88-94 (describing Japanese Antimonopoly Law and JFTC procedures). The "Six-Company Case," Case No. 6 of 1966, was brought against six respondents, all of which are defendants in this case: Sanyo Electric Co., Ltd.; Tokyo Shibaura Electric Co., Ltd. (now known outside Japan as Toshiba Corporation); Hayakawa Electric Co., Ltd. (now known as Sharp Corporation); Hitachi, Ltd.; Matsushita Electric Industrial Co., Ltd. ("MEI"); and Mitsubishi Electric Corporation ("MELCO" or "Melco"). The "raids" mentioned in the text occurred in November 1966, during the JFTC investigation and are conceded by the parties to have been legal under Japanese law. On December 14, 1966, the JFTC charged the six respondents with violations of the Japanese Antimonopoly law by issuing a document called a "recommendation," which bears the legend "No. 17 of

testimony and statements or "protocols" given by officials of the respondent companies during the course of the JFTC proceedings in the "Six Company Case"; and (3) materials produced in discovery from the files of the Japanese defendants and others relating to activities in Japan of Japanese manufacturers of consumer electronic products or of associations of manufacturers. There were virtually no documents in these categories whose admissibility was agreed upon, and all of the documents were the subject of heated dispute about their admissibility.

In the course of the pretrial evidentiary hearing, we also considered the admissibility of a host of materials produced in discovery from the files of defendants and of American pur-

1966." The six companies were charged with holding meetings known as the Tenth Day Group and the Palace Group, at which they allegedly agreed on retail list prices, retail and wholesale profit margins, and rebates in connection with the sale of television receivers in the domestic Japanese market. The JFTC held a total of 39 hearings in the case between January 31, 1967, and June 7, 1969. On June 9, 1970, the hearing examiners issued a "Draft of Decision" in which they found that the respondents had engaged in the violations charged, but that the violations ceased in 1967. The JFTC did not adopt this Draft of Decision, however. On July 27, 1978, JFTC entered an Order to Terminate dismissing the case, which stated:

> Whereas, examining the draft of decision on the basis of the case records as well as the statements of objection, etc., although it may be noted that the respondents had discussed together the retail cash list prices and wholesalers' and retailers' margin rates of color television sets and black-and-white television sets, this Commission has not been able to reach a conclusion up to the present because of the factual and legal problems involved in this case.
>
> Moreover, as the acts which are the subject matter of the hearing proceedings ended in January of 1967, thus already showing a lapse of more than ten years, the factual background cannot be expected to be further clarified even if the hearing proceedings were reopened at this time while, in addition, from the point of view of maintaining order in competition, the practical benefit of continuing the hearing proceedings has now been lost. Moreover, any further prolonging of the disposition of this case is also considered to be undesirable from the point of view of legal stability.

The plaintiffs offer in this case evidence from the JFTC record which was produced to them by the defendants in accordance with the Federal Rules of Civil Procedure.

chasers of Japanese-made consumer electronic products relating to certain import transactions. We do not rule on the admissibility of any of those documents in this opinion. However, the legal questions involved in determining the admissibility of the import-related documents are essentially the same as those considered herein.[3] As a result, the legal rulings in Part II, *infra*, will relate as well to the import transaction documents. To the extent that rulings on the admissibility of particular import-related documents are necessary, we will make them in our forthcoming opinion deciding the defendants' motion for summary judgment on proof of conspiracy.

Before we proceed further, some explanation is in order as to our reasons for writing a long opinion about admissibility of the documents relating to activities in Japan, while reserving admissibility rulings relative to import related documents. When we first addressed defendants' summary judgment motions in April 1979, we were compelled to postpone consideration of those motions addressing plaintiffs' conspiracy claims because of the amorphous state of the record. At that time plaintiffs were invoking in support of these claims not only the entire JFTC record of some 6300 pages, but also an unlimited number of documents from among the millions of documents produced for inspection during discovery. It was clear to all concerned that out of this huge record there were a limited, though yet unidentified, number of critical documents whose admissibility it was important to determine and that, at all events, it was impossible for us to decide the summary judgment motions in the absence of a more discrete record. We concluded that what was first required was the filing of plain-

[3] The principal basis upon which plaintiffs seek admission of the import related documents are F.R.E. 803(6), the business records exception to the hearsay rules, F.R.E.'s 803(24) and 804(b)(5), the so-called residual hearsay exceptions, and F.R.E. 804(b)(3), the statements against interest exception, all of which are dealt with extensively herein. Moreover, the factual patterns which affect admissibility *vel non* under the proper construction of these rules are very much the same for the import related documents as they are for the documents considered in the opinion.

Judiciary Committee explained its reasons for restoring limited residual exceptions to the Rules:

> [W]e feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.
>
> The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible. . . .
>
> The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules. . . .
>
> *It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances.* The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

(emphasis added), U.S.Code Cong. & Admin.News 1974, p. 7065.

There are essentially three legal issues before us with respect to the residual exceptions. Initially, we must determine whether the residual exceptions are available to render admissible evidence which appears to fall within a category encompassed in one of the specified hearsay exceptions, *e.g.*, former testimony or business records, but which fails to meet the precise requirements of the specific exception. In our hearings, this issue has been dubbed the "near miss" question. Secondly, we must interpret the provision in the rule requiring the proponent to make reasonable efforts to secure equally probative evidence. Finally, we must analyze the trustworthiness requirement of the rule. We address these issues in the order stated.

2. *The "Near-Miss" Problem*

The defendants contend that the residual hearsay exceptions cannot be invoked as the basis for the admissibility of evidence which is generically of a type covered by another specific hearsay exception, but which fails to meet the precise requirements of that specific exception.[90] For instance, they

[90] In a related contention, the defendants have urged that if an item fails to meet the terms of one of the specific hearsay exceptions, it may not be offered under another of the specific exceptions. On this view, for instance, if a document is generically a business record, but fails to qualify for admission as such under Rule 803(6), it may not be offered under any other hearsay exception. We reject that view. There is nothing in the language or the structure of the hearsay rules to suggest that the specific exceptions are exclusive in their application, and the Judiciary Committees of both Houses of Congress expressly rejected the position advanced by the defendants in their comments on Rule 803(5). The House Committee stated:

> [I]t is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

House Report, U.S.Code Cong. & Admin.News 1974, p. 7087. The Senate Committee expressed its agreement with this principle, using virtually the same language as the House Committee. Senate Report. This clear statement of legislative intent precludes any assertion that the specific hearsay exceptions are exclusive of one another. In our view it does not, however, defeat defendants' "near miss" contentions with respect to the residual exceptions. The quoted statement of the House Judiciary Committee cannot

contend that if a document is a "business record" it must qualify for admission under Rule 803(6), and not under the residual exceptions. The plaintiffs counter that there is no such rule of law, and cite a number of cases in which courts have considered the admissibility of evidence under the residual exceptions after finding that the evidence failed to meet the terms of one or more of the specific exceptions. *E.g., United States* v. *Hitsman*, 604 F.2d 443 (5th Cir. 1979).

We agree in principle with the defendants. The Advisory Committee explained its proposed residual exception, which was broader than the one enacted by Congress, as designated for "new and presently unanticipated situations." The Senate Judiciary Committee, which drafted the present rule, commented that "an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules." The Senate Committee also stated its intent "that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." U.S.Code Cong. & Admin.News 1974, p. 7066. We find it clear from the history of the rules that neither the Advisory Committee nor the Senate Judiciary Committee intended that the residual exceptions be used to qualify for admission evidence which is of a type covered by a specific exception, but which narrowly fails to meet the standards of the specific rule. Instead, they intended that the residual exceptions be used in exceptional and unanticipated situations which are not specifically covered by the specific exceptions.[91]

---

be applied to the residual exceptions, since the House Committee would have eliminated the residual exceptions entirely. The statement of the Senate Committee must be interpreted in light of that Committee's more specific comments on the residual exceptions, which we consider in the text.

[91] Mr. Justice Stewart, joined by Mr. Justice Marshall, has commented:

> It seems to me open to serious doubt whether Rule 804(b)(5) was intended to provide case-by-case hearsay exceptions, or rather only to permit expansion of the hearsay exceptions by categories.

McKethan v. *United States*, 439 U.S. 936, 939 n. 3, 99 S.Ct. 333, 335 n. 3, 58 L.Ed.2d 333, *denying cert.* to *United States* v. *Garner*, 574 F.2d 1141 (4th Cir. 1978) (dissenting opinion). Although this statement is somewhat cryp-

The defendants' position is also supported by a basic principle of statutory construction, which we find equally applicable to the Federal Rules of Evidence: that the specific controls the general. As the Supreme Court stated in *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153, 96 S.Ct. 1989, 1992-1993, 48 L.Ed.2d 540 (1976):

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-551, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 [(1974)].

In conformity with this rule we conclude that the residual exceptions cannot be invoked when there is a specific exception which sets forth conditions governing the admissibility of a clearly defined category of hearsay evidence.[92]

For example, the exception for former testimony, Rule 804(b)(1), applies to a clearly defined category of evidence and specifies conditions which must be met in order for evidence in that category to be admissible. *See* Part II-D, *supra*. We will thus not consider a proffer of former testimony under the residual exceptions if the testimony fails to meet the specific requirements of Rule 804(b)(1), such as unavailability of the declarant, and similarity of motive to develop the testimony at the former hearing. Some of the other specific hearsay exceptions similarly apply to a clearly defined category of evidence, and we would follow the "near miss" doctrine with respect to

---

tic, we view it as a reference to the point at issue before us. *Cf.* Saltzburg at 241 (1980 Supp.) (criticizing Justice Stewart's language and arguing for a case-by-case approach.)

[92] In *United States* v. *American Cyanamid Co.*, 427 F.Supp. 859, 865 (S.D.N.Y. 1977), Judge Brieant rejected the government's contention that the residual exceptions could not be invoked without a specific showing that the evidence offered thereunder was "exceptional." We agree with that ruling, but do not find it pertinent to the issue raised by the defendants in this case.

them as well, if the evidence before us were within those categories. *E.g.*, Rule 803(18) (learned treatises); Rule 803(22) (judgment of previous conviction.)

However, most of the hearsay exceptions which plaintiffs invoke are not of this type. They do not apply to a clearly defined category of evidence, as the former testimony exception does. Instead, they apply to a relatively amorphous category of evidence which is delimited solely by the requirements set forth in the rule itself. For instance, the business records exception applies to any "memorandum, report, record, or data compilation, in any form" which satisfies certain additional requirements. *See* Part II-B, *supra*. Rule 804(b)(3) applies to any "statement" which is against the declarant's interest, as specified in that rule. *See* Part II-E, *supra*. We view rules 803(1) (present sense impression) and 803(5) (recorded recollection), under which the plaintiffs also offer the diaries and memoranda, as of the same character. *See* n.48, *supra*. We do not see how the "near miss" doctrine which defendants urge could practically be applied to those rules, without negating the residual exceptions altogether, a result which is plainly contrary to the intent of Congress.

Accordingly, although as we have stated we agree with the defendants' position in principle, we will not apply it to the evidence before us, except for former testimony, and we will consider plaintiffs' proffer under the residual exceptions. We note, however, that the considerations which we have reviewed in this section of our discussion are additional reasons to apply the express requirements of the residual exceptions most rigorously, so as not to vitiate the hearsay rule and the specific exceptions. We turn next to those express requirements.

3. *The Requirement of Making Reasonable Efforts to Procure Other Evidence.*

Rules 803(24) and 804(b)(5) expressly require that the statement must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." The rules thus have their own requirement of unavailability of the witness or of similarly reliable evidence. Where a declarant is available for questioning, this provision requires at least that a proponent depose or produce him as a witness, if that can reasonably be done, since live testimony is inherently more probative than hearsay evidence. *United States* v. *Mathis*, *supra*, 559 F.2d at 298-99.

Several courts have held that in order to satisfy the requirement of the residual hearsay exceptions, the proponent of the hearsay evidence must attempt to procure the testimony, not only of the declarant, but also of *other* witnesses who have knowledge of the subject matter of the hearsay evidence. In *In the Matter of Sterling Navigation Co.*, 444 F.Supp. 1043 (S.D.N.Y.1977), the district court affirmed the bankruptcy court's refusal to admit under 804(b)(5) testimony of an unavailable declarant where other witnesses with knowledge of the subject matter were not deposed. Because the president of a bankrupt Bahamian corporation was unavailable, a creditor sought to introduce the president's former testimony at a bankruptcy hearing as evidence of stock ownership and loan-making authority in the corporation. But since others who might possess similar information were not questioned, the proponents did not meet the necessity requirement of the residual exception. The District Court said:

> [N]o affirmative steps had been taken to depose the Bahamian shareholders. . . . It appears that Council [proponent] was content to offer its transcript without making the requisite reasonable efforts to obtain other eivdence. In view of this attitude it can hardly be said that the interests of justice would be served by admitting the evidence.

Id. at 1047. We agree.

In *deMars* v. *Equitable Life Assurance Society*, *supra*, the First Circuit reversed the district court's ruling admitting the written report of an unavailable medical expert on the grounds that the proponent could have procured the opinion of another expert witness. 610 F.2d at 61. In *United States* v. *Kim*, *supra*,

the D.C. Circuit upheld the district court's ruling that a telex was not admissible under the residual exception because, *inter alia*, the proponent of the evidence had failed to procure other documentary evidence or testimony of knowledgeable persons other than the author of the telex. 595 F.2d at 766. In *Workman* v. *Cleveland—Cliffs Iron Co.*, 68 F.R.D. 562 (N.D.Ohio 1975), the court refused to admit the hearsay statement of an unavailable declarant under 804(b)(5) because the proponent of the evidence had made no effort to secure the testimony of other witnesses to the events dealt with in the hearsay statement.[93] In view of the rigor with which the requirements of the residual exceptions should be construed, we agree with these courts that the proponent of hearsay evidence under the residual exception must attempt to procure the testimony by deposition not only of the declarant, but also of any other witness with knowledge of the subject matter of the statement, unless such testimony plainly cannot be procured by reasonable means.

4. *Trustworthiness*

Evidence to be admitted pursuant to the residual exceptions must possess "circumstantial guarantees of trustworthiness" equivalent to the other enumerated exceptions under Rules 803 and 804. The court of appeals has said that the trustworthiness of a statement, for purposes of the residual exceptions, should be analyzed by evaluating:

> the facts corroborating the veracity of the statement, [and] also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely. Further, consideration should be given to factors bearing on the reliability of the reporting of the hearsay by the witness.

[93] In *Bailey, supra*, the court of appeals noted the existence of the requirement that the statement be more probative than other evidence which the proponent reasonably could procure, 581 F.2d at 346, but had no occasion to discuss or apply that requirement. In *Copperweld Steel Co.* v. *Demag-Mannesmann-Bohler*, 578 F.2d 953 (3d Cir. 1978), the court viewed this requirement as waived. *Id.* at 964 n. 17.

United States v. *Bailey*, 581 F.2d 341, 349 (3d Cir. 1978). Additional factors bearing on the trustworthiness of hearsay evidence are discussed in our analysis of the trustworthiness requirement of the business records exception in Part II-B-3, *supra*. In contrast to the trustworthiness provision of Rule 803(6), however, the trustworthiness requirement of the residual exceptions is part of the plaintiff's affirmative burden of establishing admissibility.

G. *The Problem of Internal Hearsay*

Many of the documents upon which we must rule are laden with internal hearsay. The diaries in particular are full of statements which internal or external evidence shows to be hearsay statements made by another person and merely recorded by the diarist. Even the testimony and protocols contain hearsay statements; according to the representations of counsel, hearsay evidence is not excluded in Japanese legal proceedings. The pervasiveness of internal hearsay necessitates some comments on the legal standards relating to hearsay within hearsay and hearsay within admissions.

1. *Hearsay Within Hearsay*

Rule 805 makes it clear that hearsay within hearsay is not admissible unless each of the hearsay components independently satisfies an exception to the hearsay rule. *See, e.g., United States* v. *Ruffin*, 575 F.2d 346, 357 (2d Cir. 1978). Thus a statement in a diary, for example, which recounts the hearsay statement of another person is double hearsay if it is offered for the truth of the matter asserted by the person whose statement is recorded. At the first level, it is hearsay because it is the statement of the diarist offered to show that the other declarant made the statement attributed to him. At the second level, it is hearsay because it is the statement of the other declarant offered for the truth of what he said. Unless the plaintiffs, as proponents of the evidence, can show that the statement recounted can overcome hearsay objections at both levels, it is not admissible evidence.

The plaintiffs argue that internal hearsay should be admitted across the board under the residual exceptions, rules 803(24) and 804(b)(5).[94] They rely heavily on *Sherrell Perfumers, Inc.* v. *Revlon, Inc.*, 1980-2 Trade Cas. ¶ 63,293 (S.D.N.Y. 1980), *further consideration*, 76 Civ. 4572 (S.D. N.Y. July 15, 1980), in which Judge Sweet found particular double-hearsay statements admissible under 803(24). We have no doubt that the residual exceptions may be applied to internal hearsay as well as first-level hearsay, if the requisites of those exceptions are met. However, as we have explained in Part II-F, *supra*, the residual exceptions should be narrowly construed. We can perceive no justification for misapplying the exceptions in the manner for which plaintiffs contend so as to negate the rule against internal hearsay. Moreover, the specific requirements of the residual exceptions must be met in order for a statement to be admissible under them. The requirements include a showing by the proponent of the evidence that it is more probative on the point offered than any other evidence which the proponent could procure by reasonable means, including depositions of other witnesses. *See* pp. 1264-1265, *supra*. In *Sherrell Perfumers*, Judge Sweet found the latter requirement met. 1980-2 Trade Cas. at p. 75,554. Thus, in considering plaintiffs' proffer of hearsay evidence under the

[94] At one point plaintiffs argued that if a document is admitted under the business records exception to the hearsay rule, any statement contained therein, hearsay or not, may be received and considered by the trier of fact. They did not press the point strongly. At all events, it is plainly incorrect. It is plain from Rule 805, as well as the structure of Article VIII of the Federal Rules of Evidence that what a declarant could not testify to on the witness stand (because of hearsay rules) cannot come in via a document itself admitted under one of the hearsay exceptions. While Rule 803(6) does operate to a very limited extent as a second level hearsay exception, it does not create an across-the-board admissibility for internal hearsay statements. The limited second-level exception mentioned arises from the fact that Rule 803(6) permits the admission of hearsay evidence which was transmitted to the declarant by another person with knowledge, acting in the course of a business duty. *See* part II B-5, *supra*. To that limited extent Rule 803(6) operates both as a first-level and a second-level hearsay exception, *i.e.*, it permits the receipt into evidence of internal hearsay which meets its specific requirements despite the more general strictures of Rule 805.

residual exceptions, we must consider, *inter alia*, whether this special requirement of the exceptions is met. We must also consider, of course, whether the internal hearsay meets the specific terms of any other hearsay exceptions so as to render it admissible.

2. *Hearsay Within Admissions*

Under the Federal Rules of Evidence, admissions under Rule 801(d)(2) are non-hearsay, rather than hearsay admitted under an exception. As a result, hearsay within an admission is not strictly within the terms of Rule 805, governing "hearsay included within hearsay." We think, nevertheless, that internal hearsay in a statement which comes into evidence as an admission must be subjected to an independent analysis to determine whether or not it would survive a hearsay objection in its own right.[95] In *Cedeck* v. *Hamiltonian Federal Savings and Loan Association*, 551 F.2d 1136 (8th Cir. 1977), the Eighth Circuit held that a statement made by the employee of the defendant could not come into evidence as an admission because it was merely "a reiteration of what someone told him," and was not independently admissible as an admission or under a hearsay exception. We agree that the mere reiteration by a party's agent of the statement of another person does not render the statement an admission against the party, unless the party or his agent adopted the statement within the meaning of Rule 801(d)(2)(B). *See* Part II-C, *supra*.

We have now concluded our survey of the law applicable to the evidence whose admissibility we will consider in this opinion. The survey has been long, but we will now be able to resolve the specific evidentiary questions before us with dispatch, by incorporating referenced portions of the foregoing

[95] Our view is supported by the Congressional amendment to Rule 806, which provided that in matters affecting the credibility of the declarant, admissions under Rule 801(d)(2)(C), (D) and (E) are to be treated the same as hearsay statements. *See* n. 61, *supra*. This suggests that admissions under those subsections should be subjected to the same internal hearsay analysis as statements admitted into evidence under the hearsay exceptions.

discussion. We turn first to the admissibility of the Yajima diaries.

III. *The Yajima Diaries—DSS 48-50*

A. *Introduction*

The Yajima diaries, DSS 48-50,[96] are three notebooks which the Japanese Fair Trade Commission ("JFTC") seized during the course of its investigation in the "Six Company Case." Plaintiffs contend that the notebooks were authored by a Toshiba official named Seiichi Yajima, who during 1965 and 1966, the period covered by the diaries, attended on Toshiba's behalf meetings of the so-called "Tenth Day Group," one of a number of groups allegedly engaged in price fixing activities within Japan. The diaries were marked as exhibits during the course of the "Six Company Case." Toshiba Corporation produced these notebooks to plaintiffs during the summer of 1972 in response to a Request for the Production of Documents which had been served by plaintiff NUE at the outset of the litigation and which called for all documents relating to the Six Company Case. The notebooks were designated with document identification numbers TJ4514-4593; TJ4598-4631; and TJ4646-4660, respectively.[97]

Plaintiffs offer the diaries in evidence against all the defendants in this action. More specifically, plaintiffs offer these diaries as business records under F.R.E. 803(6), as admissions of Toshiba Corporation under F.R.E. 801(d)(2), as a declaration against the interest of Mr. Yajima under F.R.E. 804(b)(3) and as admissible under F.R.E. 804(b)(5), one of the residual hearsay exceptions. Plaintiffs' overriding proffer is that the

[96] Each document considered at the evidentiary hearings was accompanied by a "Document Submission Sheet" or "DSS," the function of which is explained in the Public Records Opinion at 17.

[97] The documents produced in discovery ran into the millions, hence counsel established an elaborate document identification system. At the core of the system is a series of lettered prefixes, such as "TJ," which identify the company making the production. The numbers following the prefix are a function of the parties' labors in numbering each produced page.

diaries are an authentic account of what took place at the meetings of the Tenth Day Group and other groups mentioned therein.

Our modus procedendi in dealing with these diaries shall be first to set forth the plaintiffs' and then the defendants' contentions as to matters of foundation or qualification, *i.e.*, we shall set forth the factual and to some extent the legal basis for the parties' contentions that the proffered documents are (or are not) authenticated under F.R.E. 901 and that they are (or are not) admissible under one of the exceptions to the hearsay rules. This initial summary is essentially complete vis á vis the parties' contentions on authentication and business record status; as to the status of the diaries as admissions of a party-opponent, as statements against interest, and under the residual hearsay exceptions, we shall supplement the statement of contentions in the course of our later discussion. While this recitation of contentions will sometimes be lengthy, its fullness will facilitate our application of legal principles to the challenged documents. We shall also follow this modus procedendi in connection with the other documents which are taken up in subsequent segments of this opinion.

B. *Plaintiffs' Foundation For Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

(1) The diaries are specifically cited, indeed incorporated by reference, in Toshiba's answers to interrogatory numbers 8 and 42-44 to NUE's second set of interrogatories to defendants. In plaintiffs' submission, by this reference, Toshiba has, in effect, conceded authentication, business records status, and other necessary foundation for the diaries.

(2) The three diaries were lawfully seized by the JFTC from Toshiba's offices and turned over to the JFTC by Mr. Kono, then the manager of the TV division. Upon their return, Toshiba made copies of the diaries and produced them to the plaintiffs.

(3) One of the diaries, DSS-48, contains the Toshiba logo in Japanese and English at the top of the page.

(4) During the Six Company Case Mr. Yajima gave to the JFTC investigators four protocols (DSS-75, DSS-76, DSS-77, and DSS-78) during which Mr. Yajima identified the diaries. The protocols, which bear a seal, have a recognized legal status in Japan.

(5) During the course of his formal testimony before the JFTC, Mr. Yajima identified the diaries, testified to certain entries, and said that they were accurate and reflected meetings of the six defendants.

(6) Yajima's protocols and testimony also include statements that show that he was present at the meetings he recorded in his diary.

(7) The notebooks appear in the JFTC "investigator's list of evidence" (DSS-93) which plaintiffs claim is an official record of the JFTC.

(8) Testimony of defendants' other employees at the JFTC hearing and statements by defendants' other employees in their protocols referred to one of Yajima's notebooks to confirm what occurred at a meeting.

(9) Mr. Kamakura's protocol makes reference to Yajima's presence at the meetings.

(10) Mr. Yajima allegedly reported to this superiors at Toshiba after returning from certain meetings, passing on information on which they relied.

(11) The diary is on its face a business record; *i.e.* it pertains purely to business matters which are of importance to Toshiba, and it looks and reads like a business record (the "res ipsa loquitur" contention).

(12) Yajima's obligation to attend meetings and to make reports to Narita suggests that the information that he entered in the diaries was maintained by him as his regular practice; moreover, the entries (about the Tenth Day meetings) occur at fairly regular intervals.

(13) The secretary company of the Tenth Day Group meeting would take down information for production, shipment and inventory, and since Yajima testified that Toshiba was the secretary company from March 1966 to June 1966, when Yajima was recording Tenth Day Group information, he was acting on behalf of the Group and his own company.

(14) Entries were made periodically relating to regular subject matters. They covered basically the same type of information month after month. These topics were continually discussed, and it was part of the practice at these meetings and part of Yajima's practice to record this type of information.

(15) When Yajima was shown the diary during the taking of the JFTC protocol, Yajima said "This notebook is mine and what was written in it deals with the events of this year and was written on the spot."

C. *Defendants' Response*

(1) There is no testimony on the record of this case by a "custodian or other qualified witness," F.R.E. 803(6), or in fact by anyone authenticating or establishing the foundation required by the admission of any of these diaries into evidence. Indeed, plaintiffs took no deposition of any person who (i) had knowledge of the manner in which the notebooks were kept and (ii) could confirm the contents of the notebooks. Rather, plaintiffs rely for foundation completely upon their counsel's presentation to the court.

(2) The Toshiba logo appears on only one of the diaries (DSS 48), and in any event, the fact that Toshiba stationery was used is of no significance.

(3) There are time gaps in the notebooks: DSS 48 refers to November 1965 to December 1965; DSS 49 refers to the period January 1965 to June 1965; DSS 50 refers to the period January 1966 to November 1966. There is no notebook for the period July through October 1965.[98]

---

[98] Defendants also note correctly that there were numerous Tenth Day Group meetings allegedly attended by Yajima which are not mentioned in the diaries.

(4) The "Yajima Protocols" cited by plaintiffs as places where Mr. Yajima identified the diaries are simply brief passing references to only two of the diaries which, in fact, do not establish that the diaries are admissible under any of the exceptions to the hearsay rules.

(5) The Yajima testimony also does not establish the foundation for the admission of the diaries into evidence. Only one of the diaries is referred to during Mr. Yajima's testimony and only in passing references which do not establish the foundation for the admissibility of the documents.

(6) Toshiba's interrogatory answers do not establish the necessary foundation for the admissibility of the diaries, since the diaries were produced in response to a Request for the Production of Documents, not as answers to Interrogatories. At all events, the interrogatories did not request information relating to the substance of the meetings or the necessary foundation for the admissibility of the diaries. Moreover, Toshiba, in its interrogatory answers, specifically disclaimed any knowledge concerning the accuracy of the Yajima diaries or concerning what took place at any of the meetings of the groups about which the interrogatories inquired. *See* Toshiba's Answers to Interrogatories 8, 42, 43, and 44 of Plaintiff's [NUE] Interrogatories Set No. 2.

(7) The testimony and protocols of Messrs. Adachi, Narita, Tsurata, and Kamakura also do not establish the foundation for the admissibility of the diaries since these references to the diaries do not establish any of the requirements of any of the exceptions to the hearsay rules, and are merely passing references to diaries which were being used merely to refresh the recollection of the witness.

(8) While the protocols and testimony contain some statements to the effect that Mr. Yajima reported to his superiors after attending meetings, there is nothing in the record establishing that he utilized his diary for this purpose. Further, there is nothing in the record of this case establishing that

Mr. Yajima was under a business duty to keep his diary; nor is there anything in the record of this case to show that Mr. Yajima systematically checked his diary or that it was his continuous habit to keep the diary.

(9) The diaries themselves are a "hodge podge" of notes which are pointless without the testimony of some person who was present at the meetings. One cannot even tell with any certainty where accounts of meetings begin and end; whether the accounts are what the author thought or surmised, or what someone else said, and if so, who said it. Further, there are at least 28 separate entries which the translators noted as "illegible."

(10) The diaries contain double and triple hearsay, and because of the manner in which the entries were kept, it is impossible to sort out what is based upon Yajima's personal knowledge and what is based upon hearsay. Further, Mr. Yajima stated in his protocol that the information he obtained from other companies at meetings was in large part based upon "guesses" and "hunches." Therefore, it is impossible to sort out what part of his diary is guesswork and what part was actually heard by Mr. Yajima.

Against this background of contentions, we now apply our discussion of law (Part II) to the Yajima diaries on the basis of the developed record.

D. *Authentication (F.R.E. 901)*

Although the question is a close one, especially as against defendants other than Mr. Yajima's employer, Toshiba Corp., we find, pursuant to the applicable Rule (F.R.E. 104(b)), that the diaries have been authenticated under the prima facie standard of *United States* v. *Goichman*, *supra*, as the genuine diaries of Mr. Yajima. Put differently, there is sufficient admissible evidence from which the trier of fact could conclude that the diaries are what their proponents claim (i.e., Mr. Yajima's diaries). In this regard, we rely upon the items of

evidence hereinafter enumerated, making shorthand reference to the evidence that has been more fully described, *supra*, in one or the other of the parties, contentions.

(1) The Toshiba logo. See Part II-A-3(b), *supra*.

(2) The protocols, which we find admissible against Toshiba only, *see infra*, but which identify the diaries.

(3) Yajima's testimony, which we find admissible against all defendants in its authentication aspect only, *see* Part VIII-C-4, *infra*, and which identifies the diaries.

(4) Toshiba's production of the diaries and reference to them in its Rule 33(c) interrogatory answers.[99] See discussion at Part II-A-3(a), *supra*.

(5) The cross-reference to Mr. Yajima in the other defendants' interrogatory answers and JFTC testimony.

(6) The similarity to other authenticated documents. See discussion at Part II-A-3(d), *supra*. While there has been no testimony by any custodian or "subscribing witness," such is unnecessary under Rule 903.

E. *Business Record Status (F.R.E. 803(6))*

For the reasons which follow, we conclude that the plaintiffs have not qualified the Yajima diary as a record of regularly conducted activity under Rule 803(6). Furthermore, we conclude that defendants have shown a lack of trustworthiness under the 803(6) trustworthiness proviso. We make this determination pursuant to F.R.E. 104(a), hence, we give the plaintiffs the benefit of inadmissible as well as admissible evidence. Our conclusion flows from a host of individual reasons, but there are several overriding considerations which we state at the outset in terms of the legal requisites of Rule 803(6). To the extent necessary, we incorporate by reference what we said of the diaries in general at pages 1211-1213 of the Prelimi-

[99] The Answers to Interrogatories are admissible only against Toshiba. They are hearsay as to others than the answering party, *see* n. 40 *supra*.

nary Statement, for everything we wrote there applies to Yajima's diary. As is already clear, we basically accept defendants' contentions in this area.

1. *The Regular Practice Requirement*

As we have seen, one aspect of qualification of a business record is the necessity of demonstrating that the record was "kept in the course of a regularly conducted business activity," and that "it was the regular practice of that business activity to make the record." We refer to that aspect of the business records rule herein as the regular practice requirement. As such, it has two parts and the plaintiffs have made much of the first part, ignoring the second. Defendants do not dispute that Yajima's activities and the matters related in the diaries were business-related and that any information garnered from the Tenth Day Group meetings was used in Toshiba's business.[100] But as defendants correctly argue, the plaintiffs have totally failed to show that the diaries meet the requirement of regularity described at length in Part II-B-2. For, as we therein explained, F.R.E. 803(6) contemplates the admission of materials which are created by routine practices where careful checking and habits of precision and regularity assure their accuracy. There is no evidence before us from any source of any routine practice or careful checking by Yajima or any habit of precision or regularity. None of the proffers of plaintiffs supply these requisites, nor do the diaries themselves, and neither the

[100] During the relevant period, Yajima was either manager of the second television section of Toshiba (color TV) or manager of the first television section of Toshiba (black and white TV) or both, with responsibilities for production and sales planning. While not near the top of the Toshiba hierarchy, Yajima had broad managerial responsibility, and his attendance at and observations of the Tenth Day Group meetings were apparently within the scope of the authority with which he had been entrusted by Toshiba. Ostensibly, Yajima reported to his superiors the results of the meetings. Plaintiffs contend that Yajima used his diaries to report to other Toshiba officials, but they have not produced any evidence to support their contention, though they might have done so by the simple expedient of deposing any of the many Toshiba officials, peers or superiors, who were familiar with Yajima's practices and who have been available for depositions for many years. Mr. Tadashi Kamakura is but one such person.

testimony nor protocols of Mr. Yajima nor anyone else supply the missing but necessary requisite for 803(6) status.

The testimony and the protocols contain only passing references to the diaries, hence plaintiffs' argument based thereupon must fail.[101] Toshiba's Answer to Interrogatories and Rule 33(c) productions have been discussed at length in Part II supra, and we have explained there why these factors do not qualify the diaries as business records. The reference in one diary to contemporaneous recordation is just that, a random reference. There is, on the other hand, extensive evidence of gaps in these diaries, failure to record numerous meetings,[102] and delay in recordation.

In contrast to notions of regularity, the diaries are erratic. They are, like most notes that one keeps for oneself, written in an irregular and shorthand manner which Yajima himself doubtless understood, but which no one else can. One cannot tell with any certainty where accounts begin and end. The diaries are laden with all kinds of arrows and symbols and code—like notations and references which are unintelligible. Indeed, the diaries are dominated by cryptic entries. In no sense are the diaries what one could fairly describe as minutes of meetings. With a few exceptions upon which we shall comment, one can never tell whether a given word or phrase or statistic or thought set forth in the diaries represents the statement of some individual, and if so, who he was or what he said. More specifically, the reader cannot tell what Yajima meant by a given entry or what its source is—whether someone said something, whether someone told him that someone said something, whether he thought something, or someone told him that someone thought something, et cetera.

---

[101] Mr. Yajima refers to his diaries only three times in his protocols. None of these statements gives meaning to the diary entries, let alone establishes the foundation requirement of F.R.E. 803(6). These three passing references are contained in DSS 75 (MJ3278-1); DSS 76 (MJ3260-1); and DSS 77 (MJ3261-1).

[102] In Appendix B to their FPS, plaintiffs claim that 21 meetings of the Tenth Day Group occurred within the period subsumed in Yajima's diaries, yet there are only 11 entries in the diaries for this period.

Where there are numbers arranged in juxtaposition to the names of various Japanese manufacturers of consumer electronic products, or where Yajima places a number which could be interpreted as a bottom price next to the name of a company, it would be possible to conclude that we have been supplied with evidence that production figures or "bottom prices" have been exchanged by company representatives present at this meeting. But that would only be speculation, for we do not really know what Yajima meant by his entry. Equally important, we do not know when and where he got the information, including figures, which he recorded or when he recorded the entries. And even where there are supposed statements of position arranged beside the name of a manufacturer of consumer electronic products, we know nothing of the source of information or the time or manner of recordation. While some of the things we have been saying bear upon the firsthand knowledge requirement which we shall discuss *infra*, they also bear upon the regularity of practice requirements insofar as they relate to the author's method of preparing the diaries.

We have considered all of plaintiffs' alleged foundation bases and found them wanting. The res ipsa loquitur approach is totally unavailing for the reasons we have stated. Neither the protocols in the testimony nor any cross-authentication is sufficient. Passing references or even affirmations of accuracy of an occasional entry will not suffice. The mere fact that Yajima attended meetings of the Tenth Day Group or reported to his superiors thereupon (and there is no evidence he used his diaries to do so) does not satisfy the regular practice requirement. No more availing is plaintiffs' reliance upon "a pattern of reporting the conduct of the meetings" to both superiors and subordinates. That fact has not been established in this record, but even if it had and even though entries are "business related," the regular practice requirement is not thereby met.

Not only have plaintiffs failed to qualify the diaries, but the indications which appear are contra—indications negating a finding of regular practice. The short of it is that the foundational contentions set forth by defendants are correct. The

diaries are hodge-podges of notes in which Mr. Yajima has not explained with any degree of clarity what he meant. Plaintiffs have failed to meet the regular practice requirement explained in Part II.

The plaintiffs assert that code—like entries do not deprive a document of business record status, citing *United States* v. *Baxter*, 492 F.2d 150, 164 (9th Cir. 1973), *cert. dism.*, 414 U.S. 801, 94 S.Ct. 16, 38 L.Ed.2d 38 (1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974), where the court admitted the customer book left by a member of a heroin importation conspiracy which contained ambiguous nicknames and code-names. But what plaintiffs neglect to mention is that the author of the notebook testified at trial (he was the government's informant and "star" witness), hence, was subject to cross-examination on the notebook. Rather, the situation we face here is similar to what the court faced in *United States* v. *Lykes Bros. S.S. Co.*, 432 F.2d 1076, 1079 (5th Cir. 1970), where, affirming the district court's refusal to admit internal "notes" produced by the defendants, the Fifth Circuit stated:

> "An examination of the notes does not reveal either when they were prepared, by whom they were prepared, for whom they were prepared, or from what source of information they drew. The notes, therefore, of themselves, do not overcome the lack of a proper foundation which the government otherwise failed to provide."

Plaintiffs rely heavily upon *McPartlin*, *supra*, but there the diarist took the witness stand, was subject to in-court examination, and the diary was used only to refresh recollection and corroborate dates. That is not what is attempted here. Rather, plaintiffs seek to introduce the diaries and then to argue from bits and pieces, from selected words and sentences that there was (export) conspiratorial activity afoot. This is a clever litigation strategy, but one which they cannot successfully pursue because of the lack of foundation for admissibility of their evidence.

It is of course true that Yajima died before this action was instituted. However, as we have noted, others might have been called in an attempt to qualify his diary, but they were not. Yajima's superior, Mr. Kamakura, attended many meetings of the Tenth Day Group with Yajima. Presumably, he could have clarified Yajima's diary or described Yajima's reporting practices. Perhaps he could have explained (or perhaps he would have "explained away") the bits and pieces of the diary that plaintiffs rely upon. In any event, although he is alive and well and employed by Toshiba and has been available for depositions for years, he has not been called. Others familiar with Yajima's work and habits might have been called too, but they were not. We must again underscore in this regard that our remarks are not just retrospective. Plaintiffs' litigation strategy, as clearly explained by Mr. Rome, contemplated that the plaintiffs would not call any such witnesses at trial, a strategy confirmed by his failure to list any such witnesses in his FPS.

2. *Requirement of Firsthand Knowledge and Contemporaneity*

Plaintiffs have also failed to demonstrate that the diaries were made by a "person with knowledge or from information transmitted by a person with knowledge." Yajima's diaries contain double and triple hearsay, and because of the manner in which the entries were kept, it is impossible to sort out what is based upon Yajima's personal knowledge and what is based upon hearsay. Yajima stated in his protocol that information he obtained from other companies at meetings was in large part based upon "guesses" and "hunches."[103]

As we have noted, the firsthand knowledge requirement of 803(6) is subject to the provision that information may properly

---

[103] For example, he stated in his protocol that his entry concerning a March 23, 1965, Palace Group meeting was founded on hearsay:

> "But I don't know where it [the entry] was determined, it is just a note of what I heard from the director."

be transmitted to the recorder by someone with knowledge and with a duty to report. However, neither has that requirement been met as to any matters which may have been reported to Yajima by others. Again, plaintiffs' reliance upon circumstantial evidence and colloquy instead of upon conventional methods of laying foundation has failed them, for we have no evidence that such others themselves have firsthand knowledge or a duty to report. The diaries do not explain themselves, and no one, via deposition, has explained them. Nor, as we have noted above, will they do so in trial testimony, because of the failure of plaintiffs to list any such person in the FPS.

3. *The Trustworthiness Proviso*

Rule 803(6) provides for the exclusion of business records which otherwise meet its requisites when the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The burden is upon defendants to show lack of trustworthiness.

We shall not burden the record by rescribing our description of the diaries. However, given that description, we do not believe that diaries possess the circumstantial guarantees of trustworthiness that the hearsay rules implicitly and 803(6) explicitly require. The word "trustworthiness" hardly needs an exegesis in this context. Suffice it to say that the inadequacies of the diaries which we have described in such detail make it clear that where diaries such as these are sought to be admitted for the truth of their contents, they cannot be accorded faith or credit or trust within the framework of a judicial system which does not countenance guesswork or speculation. In short, a document which is unintelligible is not trustworthy. Plaintiffs might have supplied the necessary foundation, but they have not. The defendants have met their burden of showing that the diaries are untrustworthy, and that is another ground of 803(6) exclusion.

F. *Admissions of a Party Opponent*

Having held that the diaries as a whole cannot come in (against all defendants) as business records, we must consider whether individual passages from Yajima's diaries may nonetheless come in as admissions of a party opponent, *i.e.* Yajima's employer Toshiba Corp., under F.R.E. 801(d)(2). Conceivably, such an approach might require us to analyze every passage in the diaries to see if it can pass 801(d)(2) muster, as well as to determine with respect to each passage whether Yajima was authorized to make the statement (the diary entry) under Rule 801(d)(2)(C) or whether it was made within the scope of his employment so as to qualify under Rule 801(d)(2)(D).[104] Because they are simpler of resolution we turn to the latter considerations first.

There is no foundation in the record which bears on, much less establishes, whether Mr. Yajima was authorized by Toshiba to make a statement (*i.e.* make a diary) concerning the subject (presumably the subject matter of the Tenth Day Group meetings). Accordingly, there is no basis for their admissibility under F.R.E. 801(d)(2)(C). However, with the exception hereinafter noted, it seems plain that attendance at the Tenth Day Group meetings was within the scope of Yajima's agency or employment, that the diaries concern matters within the scope of his agency or employment, and that they were also made during the existence of the employment relationship. Yajima was at various times manager of marketing planning for color as well as black and white TV in Japan and it would seem that *making* a diary would be impliedly within the scope of his employment. There is no evidence that he was forbidden to make a diary and it would be hypertechnical to hold that the act of making a diary was beyond the scope of his employment. F.R.E. 801(d)(2)(D) is thus satisfied. The excep-

---

[104] Notwithstanding plaintiffs' contentions, there is no evidence of adoption of the diaries either by Yajima (in his protocols or testimony) or, more to the point, by Toshiba, to whom they were never communicated, hence 801(d)(2)(B) is unavailing. Our discussion in the text will be limited to 801(d)(2)(C) & (D).

tion which we note is that Yajima had absolutely no authority over export matters. Any reference to export matters in his diaries was beyond the scope of his employment, hence excludable.

The other problems to which we have adverted are far more troublesome. As we have seen in our discussion of the law, Part II-C-2 *supra*, an admission is, by definition, a statement which meets the fundamental requirement of F.R.E. 801(a)(2) that the "statement" be "an oral or written assertion, or "nonverbal conduct of a person if it is intended as an assertion."[105] The putative "statements" at issue are the diary entries. We are not dealing in any respect with oral utterances or nonverbal conduct, so that the question is whether the diary entries are intended as written assertions.

We have explained above that the party proffering the evidence has the burden of establishing that what it is proffering is in fact an assertion. In general terms (see discussion *infra)*, we find that plaintiffs have not met that burden here. This conclusion stems from the nature of the diaries which we have described. One cannot tell from reading the diaries what Mr. Yajima intended, whether he was making an assertion or relating the assertion of someone else, or relating what he thought someone else said or what he thought someone else thought or

[105] As we have also noted at p. 1242, *supra*, defendants have argued most persuasively that the kinds of entries which Yajima made in his diaries are not what are generally considered admissions within the meaning of F.R.E. 801(d)(2). We refer here to the fact that we are dealing with recordation of amorphous statements or thoughts attributable to no one and not communicated or apparently intended to be communicated to anyone. The conventional notion of an admission, *i.e.* a declarative utterance of the person making the statement, hardly seems sufficiently elastic to include under its umbrella someone's diary entry about what someone else *may* have said or thought without any explanation of the diarist's source. How can such an "animal" be used as a "statement of a party opponent"? Notwithstanding our rhetorical question, and for the reasons set forth in Part II, *supra*, we have come to the conclusion that under the structure of the Federal Rules of Evidence such diary entries could conceivably be admissions against Yajima's employer, Toshiba Corporation, if they meet the definition in F.R.E. 801(a) of a "statement."

what someone told him someone else said or thought, et cetera. While plaintiffs might have illuminated this area of the case had they taken the deposition of Mr. Kamakura or any of the scores of people who attended Tenth Day Group meetings, because of their calculated trial strategy, they did not.

We have couched our statement that the plaintiffs have not met their burden of establishing the diary entries as assertions in "general terms". Although we have read the diaries several times and are reasonably confident that this conclusion applies across the board, by this locution we refrain from making a categorical declaration (or holding) which applies to every passage or entry in the diaries. For reasons to be explained in our opinion addressing the conspiracy summary judgment motions, such a passage by passage analysis is unnecessary. We are satisfied, however, with respect to any supposed "export references," all of which we have examined, that plaintiffs have not met their burden of establishing the existence of an assertion, hence none of those so-called references are admissible as admissions of Toshiba.

As we pointed out in summarizing plaintiffs' foundational approach with respect to the diaries, all of the diaries and the material contained therein are proffered as accurate accounts of what transpired at meetings of the Tenth Day Group and other allegedly conspiratorial groups mentioned therein. Plaintiffs from time to time have argued their various diary passages are not offered to establish their truth or to establish Yajima's belief in their truth, in either of which cases they would, if the necessary foundation were established, qualify as assertions, but rather that they are introduced merely to demonstrate that they were made, *i.e.* that Yajima wrote the entry.[106] In such event however the diary entries would be inadmissible under F.R.E. 401 because they would be irrelevant to the litigation. Alternatively, their probative value would be so slight that it would be far outweighed by the

[106] Plaintiffs are not consistent in their advocacy, and seem to assert whatever position they think will allow any of the diary passages in.

danger of unfair prejudice, confusion of issues, misleading the jury or by considerations of undue delay and waste of time. F.R.E. 403.[107]

G. *Statements Against Interest*

Although plaintiffs have met the unavailability requirement of Rule 804(b)(3)—Mr. Yajima is dead—the diaries nonetheless fail to meet the other facets of the statement against interest exception. Preliminarily, we note that, for the reasons set forth in the preceding sections, the Yajima diary entries are not statements, i.e., assertions within the Rule 801(a) definition of statements which on its face applies to Rule 804(b)(3)'s "statements" against interest. At least, the export references are not.

Beyond this analysis, however, it is even harder for the diary entries to qualify as statements against interest than as mere statements. As has been made clear in the discussion in Part II, *supra*, in order to qualify as a statement against interest the statement must be against the interest of the declarant, i.e., Mr. Yajima, rather than that of his employer, Toshiba Corporation.[108] As we have seen, at times relevant here criminal prosecution and civil actions against alleged corporate offenders in Japan were extremely rare, and such actions against individuals were unheard of. Nonetheless, given the *text* of the Japanese anti-monopoly law, we are not prepared to conclude that Yajima stood no risk of prosecution

[107] We refer here to specific prejudice to Toshiba, confusion, delay, et cetera. Additionally, there is the pervasive problem of treating admissions against one party in a multi-party trial, when all of the defendants are charged with similar acts. Limiting instructions may be useless in such a case, and the F.R.E. 403 problems assume a heightened dimension.

[108] The defendants contend that the diaries are not even statements against the interest of Yajima's corporate employer, but rather are consistent with the defendants' defense in the Six Company Case. We find much to be said for this contention and will discourse upon it at length in our opinion addressing the motions for summary judgment with respect to plaintiffs' conspiracy claims.

as an individual, if in fact the diaries were inculpatory as to him personally. However, we find little or nothing in the diaries to render Yajima personally liable under Japanese law.

One cannot extract diary entries from context and attribute *to Mr. Yajima* any positions ascribed in the diaries to Toshiba, his employer. Because of the cryptic nature of the diaries, and their failure to attribute positions or actions to individuals, there are no utterances of Mr. Yajima as such to consider. The Yajima diaries, for the most part, record the actions of others, not the actions of Mr. Yajima, and some of the reported discussions took place at meetings that Yajima did not attend. Any passages in the diaries reflecting such discussions could not be statements against the interest of Mr Yajima, except insofar as mere recordation of entries could be deemed to be "against interest."

Moreover, under Rule 804(b)(3), the question is not simply whether the statements are against interest but whether any statements attributable to Mr. Yajima were "*so far*" contrary to his interest that a reasonable man would not have made them unless they were true. That test is not met here.

There is an additional and still stronger ground for excluding the diaries under Rule 804(b)(3). For, even if one assumes that Yajima's diaries were objectively against his interest, it is plain that the plaintiffs have not met the important requirements of Rule 804(b)(3) of showing that the declarant *believe* at the time he makes the statements that it is against his interest. There is just nothing in the record to suggest that Yajima, represented by Toshiba counsel when he gave the testimony and protocols, was aware that anything he was saying was contrary to his own interest, nor can such be inferred on this record.

H. *The Residual Hearsay Exceptions*

In view of the foregoing discussion about Mr. Yajima's diaries, and of our extensive discussion in Part II-F, we need not labor long on the admissibility of the Yajima diaries under the

residual exceptions, Rule 804(b)(5), notwithstanding Mr. Yajima's "unavailability."

First, the diaries fail to satisfy the requirements of F.R.E. 804(b)(5)(B), that the statement be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. While the testimony of Mr. Yajima obviously could not be procured at this time by reasonable efforts since he is deceased, the plaintiffs could have done much to procure evidence about the alleged conspiratorial meetings from other sources, i.e. by taking the depositions of Yajima's business associates and those who were present at the meetings. There are dozens of such people who are available. Plaintiffs' oft-repeated complaint that the witnesses would not remember is but an ipse dixit. There are voluminous materials upon which to base examination. Indeed, it would be a travesty if the plaintiffs were permitted to invoke the residual exceptions when by a calculated litigation strategy they refused to even seek the necessary foundation required by the traditional hearsay exceptions.

There is another and equally compelling reason why the diaries are not admissible: failure to meet the overriding requirements of exceptional guarantees of trustworthiness as required by the Third Circuit in *United States* v. *Bailey*, *supra*. We need not repeat what we have said at such lengths about the diaries. It is enough to say that it has been more than amply demonstrated on the record that the diaries are not trustworthy and, as we pointed out above, the burden of showing trustworthiness for purposes of the residual exceptions is upon the preponent of the evidence. Thus, neither of the requirements, i.e. exceptional guarantees of trustworthiness or high degrees of probativeness and necessity, are present here. For all of the foregoing reasons, and in light of the narrow construction we are obliged to give the residual exceptions under *Bailey*, we hold that Yajima's diaries are inadmissible under 804(b)(5) and 803(24).

I. *Internal Hearsay (Rule 805)*

It is also necessary to subject the content of the diaries to internal hearsay examination. Subject to such scrutiny, vast portions of the diaries would have to be excluded as containing multiple hearsay not subject to any exception to the hearsay rule. In view of our decision to exclude the diaries for other reasons, it is not necessary for us to make a page by page analysis so as to redact them leaving only what is not multiple hearsay. We can however say with confidence that were we to do so such significant portions would be excised that the diaries as a whole would themselves have to be excluded as having been so fragmented as not to give a fair representation of anything, even if they did theretofore.

IV. *The Yamada Diary, DSS 51*

A. *Introduction*

The Yamada Diary is a notebook into which Noboru Yamada, Department Manager of the Electric Applicance Department, Consumer Products Division of Hitachi, Limited, made certain entries during the period from (approximately) August 1965 to November 1965. It was seized during the JFTC raid upon the offices of Hitachi Ltd. on November 8, 1966. Hitachi produced this notebook to plaintiffs in the course of discovery in these proceedings. At that time, the document was identified by document identification numbers HJ 50016 through HJ 50054.

Plaintiffs offer the Yamada diary in evidence against all defendants. Plaintiffs claim that it is authenticated under F.R.E. 901(a), 901(b0(4), 901(b)(9), and 902. They offer it as a business record under F.R.E. 803(6), as an admission of Hitachi, Limited, under F.R.E. 801(d)(2), as a present sense impression under F.R.E. 803(1), as a declaration against interest under F.R.E. 804(b)(3) and as admissible under the residual hearsay exceptions F.R.E. 802(24) and 804(b)(5). In general terms plaintiffs offer the Yamada notebook as an authentic account of what took place at the group meetings which Mr. Yamada purportedly attended.

B. *Plaintiffs' Foundation For Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

Plaintiffs' proffer of Yamada's notebook, as well as those of Yamamoto, Okuma, and Tokizane, considered *infra*, is based upon the same types of matters that they offered to lay foundation for the Yajima notebooks. Plaintiffs describe the common bases as follows:

(1) Identification of the diaries in the (respective) interrogatory answers of the diarist's employer as its response to those interrogatories.[109]

(2) The "pattern of cross-authentication" which exist among the DSS 48-98, in which various persons identify entries in documents.[110]

(3) The "confirming testimony" which establishes the trustworthiness of the JFTC material.[111]

Plaintiffs also rely across the board upon "a pattern of reporting the conduct of the meetings to both superiors and subordinates," the fact that the notebooks are "business-related" and upon the lawful JFTC seizure of the diary from the Hitachi premises.

In addition to these factors, plaintiffs also rely upon the following:

(1) Counsel for the Hitachi defendants have indicated that there was "no reason to believe that it was not Mr. Yamada's diary."

(2) The "chop" or seal of Mr. Yamada has been affixed to one of the pages of the diary (HJ50034).

---

[109] The Yamada diary was identified in answers to interrogatories filed by Hitachi, Ltd. and Hitachi Kaden.

[110] For example, selected passages in the Yamada notebook (DSS 51 at 50017) are said to parallel selected passages in the Yamamoto notebooks (DSS 52 at 50066). DSS 48-98 includes the diaries, protocols, and testimony.

[111] Testimony by Mr. Adachi of Hitachi before the JFTC (DSS 64 at MJ 1925-1) is said to confirm entries in Yamada's notebooks (DSS 51 at 50017).

(3) The Yamada diary appears in the JFTC investigator's list of evidence (DDS-93), which plaintiffs claim is an official record of the JFTC.

(4) One or more individuals named Yamada are identified in Hitachi, Toshiba, and Sanyo Answers to Interrogatories (Plaintiffs' FPS, App. A. at 423, 480, 485) as having attended meetings of the MD Group and the Market Stabilization Council.

(5) Entries in the Yamada diary are of the sort which might be expected by one in Mr. Yamada's high position, (*i.e.*, general manager of the Yokohoma works and later Department Manager, Electronic Appliance Department Consumer Products Division), thus indicating the authenticity of the diary.

(6) There is a pattern of reporting in the notebook congruent with that of other diaries.

C. *Defendants' Response*

(1) The document was produced to plaintiffs in response to a Rule 34 request, not a Rule 33(c) proffer.

(2) Hitachi's interrogatory answers do not establish in any way either its authenticity or business record status.

(3) Other than a reference in the JFTC list of evidentiary materials (DSS-93), which is of dubious admissibility, there is no information in the record regarding the document.

(4) No evidence has been presented as to when or for what purpose Mr. Yamada's seal was attached to *one* page of the Yamada document.

(5) Entries are essentially illegible and unintelligible.

(6) Mr. Adachi's testimony before the JFTC merely elucidates a few figures in the Yamada diary and does nothing to authenticate the diary.

(7) Validation of the Yamada diary by comparison of certain entries therein to certain entries in the Yamamoto diaries

is impermissible unless the Yamamoto diaries have first been authenticated, and even if the Yamamoto diaries were authenticated, similarity in entries could have resulted from information which was derived from a common third-party source.

(8) Yamada is a common Japanese surname and the persons named "Yamada" who are identified in various defendants' answers to interrogatories as having attended various group meetings are not necessarily the same as Noboru Yamada of Hitachi, Ltd., since at least four other persons named "Yamada" are mentioned in the record.

(9) No evidence is in the record to indicate that Noboru Yamada attended any of the meetings noted in the Yamada diary.

(10 Plaintiffs have presented no evidence to demonstrate that Mr. Yamada acted under a duty to record any of the information in the diary.

(11) Plaintiffs have presented no evidence as to what periods of time may have elapsed between when Mr. Yamada learned certain information and when he recorded it in his diary.

(12) There is no evidence of systematic checking or of a regular or continuous habit on Mr. Yamamoto's part in marking entries in his notebooks relating to group meetings.

(13) Mr. Yamada is alive and well and still employed by Hitachi and available for depositions, but has not been deposed by plaintiffs.

D. *Authentication*

Although the point is very close, we find Mr. Yamada's diary to be authenticated for much the same reason as we found Yajima's diaries authenticated. We rely in this regard on the identification of the documents in answers to interrogatories

and its production by Hitachi[112]; the presence of Mr. Yamada's "chop" on one of the pages of the diaries; the apparent acknowledgement of the authenticity of the diary in Mr. Adachi's testimony before the JFTC,[113] and the circumstances of seizure of the diary. We believe that these factors taken together satisfy the *Goichman* standard.

E. *The Business Records Exception*

Yamada's diary does not qualify as a business record under F.R.E. 803(6) for the reasons set forth at length in our discussion of Yajima's diaries. We shall not burden the record by rescribing virtually all of the reasons for nonadmissibility advanced there, and we simply incorporate by reference our rulings. In capsule form, we note the following. First, the plaintiffs have failed to adduce any evidence of routine practice or systematic checking or of any habit of precision or regularity on Mr. Yamada's part in connection with his diary entries. Second, this diary is worse than a "hodge podge." We have read it in its entirety (in English translation of course) and can certify that there is hardly a line much less a page which is intelligible—that is to anyone other than Mr. Yamada, assuming *he* could understand it. To call this document cryptic would be extremely charitable. Third, there are the same problems of lack of evidence of first hand knowledge and a duty to report. Fourth, there is no evidence in the record as to what periods of time may have elapsed between when Mr. Yamada learned certain information and when he recorded it in his diary. Moreover, for the foregoing reasons and because of the character of the diary there are trustworthiness problems of such dimension as to render the diary inadmissible under the 803(6) pro-

[112] Defendants have asserted that the document was produced in response to a Rule 34 request, not a Rule 33(c) proffer. This would make some difference on the question of authentication but not enough to affect the outcome here.

[113] Mr. Yamada did not testify before the JFTC and gave no protocol. We do not ignore the defendants' contention that Mr. Adachi's testimony before the JFTC merely elucidates one minor facet in the Yamada diary; that alone would not be enough but it does not stand alone.

viso. To repeat what we said in discussing Yajima's diaries, a document which is unintelligible cannot be trustworthy. We have thus essentially accepted defendants' contentions about the Yamada diary and its admissibility under Rule 803(6).[114]

In addition to the reasons akin to those which required exclusion of Yajima's diaries, there are other reasons preventing the Yamada diary from coming in as business records. There is no evidence in the record as to Yamada's presence at any of the Tenth Day Group meetings. Plaintiffs seem to believe that the congruence between entries in Yamada's diary and entries in the other diaries is sufficient to establish such a presence and also to establish the admissibility of the diary as a business record under 803(6). For the reasons explained above that is incorrect. Moreover, unlike Yajima, Yamada is alive and well and available for depositions but they have never been taken. Plaintiffs have had an opportunity to lay foundation for admissibility—that is what lawyers usually do in cases before us—but have passed it by.

F. *Admissions, The Other Hearsay Exceptions, and Internal Hearsay*

The Yamada diary and the entries within it do not qualify as admissions for the same reason as the Yajima diaries: lack of foundation. Rather than repeat what we said above we incorporate it by reference and add the overall comment that, as in Yajima's case, there is insufficient information in the record for us to conclude that the entries in Yamada's diary constitute assertions, or what they assert. And if they are not proffered as assertions they are irrelevant.

The diaries do not qualify as statements against interest for the same reasons as the Yajima diaries: the absence of asser-

[114] As we have explained above, production of the document, even pursuant to Rule 33(c), does not establish it as a business record. Equally unavailing is the supposed pattern of reporting which though not established would not qualify a document as a business record in any event. The fact that entries are business related or that Mr. Yamada had a high position in the company or that an occasional entry was verified during JFTC testimony does not help the plaintiffs either.

tions, the absence of identifiable statements of Yamada which would be personally inculpatory against him, and plaintiffs' failure to produce evidence from which we could infer that Yamada was conscious that any statements were against his interest. In addition, plaintiffs have failed to meet the unavailability requirement, for Mr. Yamada, unlike Mr. Yajima, is alive and well and has been available for a deposition.

The residual exceptions are unavailing because of the utter lack of trustworthiness of the diary on its face. Additionally, Mr. Yamada is available for depositions; hence the diaries themselves are not more probative on the point for which they are offered than other evidence which the proponent could procure through reasonable efforts. We understand of course that the events at issue occured many many years ago, and that plaintiffs therefore argue that the diary is the best available evidence of what occurred. The plaintiffs have failed to establish that this is so, however since they have not made the slightest attempt to take depositions. Rather than being meaningless, we think that a deposition might have been very fruitful inasmuch as the deponent/declarant could have been examined on all of the diaries, testimony, protocols and the other hearsay materials. As with the Yajima diary, this is not the stuff of which residual exceptions are made.

It is also necessary to subject the content of the diaries to internal hearsay examination. As with the Yajima diaries, vast portions of the Yamada diary would have to be excluded as containing multiple hearsay not subject to any exception to the hearsay rule. As with the Yajima diaries, the deletion of internal hearsay would result in the excision of such significant portions that the diaries as a whole would themselves have to be excluded as having been so fragmented as not to g[i]ve a fair representation of anything, even if they did theretofore.

V. *The Yamamoto Diaries, DSS 52-54*

A. *Introduction*

The Yamamoto diaries, into which Mr. Mamoru Yamamoto of Hitachi, Limited, purportedly made certain entries during the period of approximately October of 1964 to July of 1966, were seized by JFTC during the course of the Six Company Case. Hitachi Ltd. produced these notebooks to plaintiffs during discovery in these proceedings. At that time, these documents were identified by document identification numbers HJ 50055 through HJ 50160 and HJS 60002 through HJS 60010.

Plaintiffs offer these diaries in evidence against all defendants. More specifically, plaintiffs claim these diaries are authentic under F.R.E. 901(a), 901(b)(4), and 901(b)(9). They are offered as admissions of Hitachi, Limited, under F.R.E. 801(d)(2), as present sense impressions under F.R.E. 803(1), as business records under F.R.E. 803(6), as declarations against Mr. Yamamoto's interest under F.R.E. 804(b)(3) and under the residual exceptions, F.R.E. 803(24) and 804(b)(5). Plaintiffs offer the diaries as authentic accounts of what took place at the group meetings which Mr. Yamamoto purportedly attended.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

(1) The Yamamoto notebooks were identified in answers to the interrogatories filed by Hitachi Ltd.

(2) In his protocol before the JFTC (DSS-86), Mr. Yamamoto identified the notebooks, which are in turn identified in the JFTC investigator's list of evidence (DSS-93) as his own.

(3) In his testimony before the JFTC (DSS-64), Mr. Adachi testified concerning two entries in the Yamamoto notebooks, and raised no challenge to the authenticity of the notebooks at that time.

(4) Mr. Yamamoto put his business address into his notebooks, and kept his notebooks at his desk, for that is where the JFTC investigators found (and lawfully seized) them

(5) In his protocol before the JFTC, (DSS-64), Mr. Yamamoto stated that he went to some meetings of the Tenth Day Group.

(6) As to group meetings which he did not attend, Mr. Yamamoto states in his protocol before the JFTC (DSS-64) that Mr. Adachi would communicate information concerning these meetings to Mr. Yamamoto within a week of occurrence of the meetings, and that Mr. Yamamoto would promptly record all information relevant to his business responsibilities.

(7) It can be assumed from the corporate structure of Hitachi, Ltd. that Mr. Yamamoto was receiving regular timely reports concerning group meetings which he did not personally attend.

(8) Dates of group meetings noted by Mr. Yamamoto correspond with dates of which plaintiffs are aware from other evidence in this litigation, thus corroborating the accuracy of Mr. Yamamoto's notes.

(9) Mr. Adachi did not "embellish" any of the reports he made to Mr. Yamamoto concerning meetings which Mr. Yamamoto did not attend because he knew the information had to be reliable enough for Mr. Yamamoto to act upon it.

(10) All entries in the Yamamoto notebooks are business-related.

(11) The contents of the Yamamoto notebooks must have been communicated at least at Mr. Ueno, for he signed the receipt when the JFTC investigators seized the notebooks.

(12) Mr. Adachi ratified the contents of the Yamamoto notebooks because, if Mr. Yamamoto's practice in writing this information down were against company policy, Mr. Adachi would have stopped him from acting as he did.

(13) One diary (DSS 53) bears the Hitachi logo, with the legend "1964 Diary" and under that "Hitachi Kaden, Inc." and under that "Hitachi Installment Sales, Inc." Yamamoto gives

his name and for his address he gives "TV Dept., TV. SEC," which identifies the diary as a business notebook, not a personal notebook.

C. *Defendants' Response*

(1) The Yamamoto notenooks were produced to plaintiffs in response to a Rule 34 request, not a Rule 33(c) proffer;

(2) The authenticity of the Yamamoto notebooks was not challenged before the JFTC because the notebooks were not introduced as substantive evidence.

(3) Mr. Adachi's testimony before the JFTC relating to entries in the Yamamoto notebooks relates not to the authenticity of the notebooks, but to the inaccuracy of figures recorded in the notebooks.

(4) Correlation of dates recorded for group meetings recorded in the Yamamoto notebooks with dates noted in other items of proffered evidence does nothing to satisfy the requirements of the Federal Rules of Evidence.

(5) Many dates of group meetings which took place in the period covered by the Yamamoto notebooks are not noted therein, which fact indicates a lack of regularity in creation of these entries.

(6) Plaintiffs have presented no evidence that Mr. Yamamoto regularly put into his notebook information concerning group meetings that Mr. Adachi had personally attended, as opposed to meetings which Mr. Yamamoto or Mr. Adachi may have learned of from unidentified third persons.

(7) There is no evidence of systematic checking or of a regular or continuous habit on Mr. Yamamoto's part in making entries in his notebooks relating to group meetings.

(8) Mr. Yamamoto states in his protocol before the JFTC (DSS-86) that Mr. Adachi added his own ideas and accounts of Tenth Day Group Meetings to Mr. Yamamoto's.

(9) There is no evidence indicating what Mr. Yamamoto's source was for information regarding meetings of any group other than the Tenth Day Group, and neither Mr. Yamamoto nor Mr. Adachi ever attended a single meeting of some of the groups referenced in the Yamamoto notebooks.

(10) The supposition that a document is found in a business office does not establish it as a business record, nor does the fact that portions of the document are business-related.

(11) There is no evidence that the contents of these notebooks were ever communicated to anyone, and the fact that Mr. Ueno signed the JFTC receipt does not establish that he read the notebooks.

(12) Entries in the Yamamoto notebooks are essentially unintelligible, and it is impossible to determine where opinion stops and the information, if any, begins.

D. *Discussion*

We need not dwell long on the Yamamoto diaries because we agree essentially with defendants' contentions. Accordingly, the diaries must be excluded for the reasons set forth in our discussion of the Yajima and Yamada diaries. They are authenticated by virtue of their mode of seizure and production, by Mr. Adachi's brief testimony, by Mr. Yamamoto's act of putting his business address in the notebooks, and by his reference to the diaries in his protocol. However, they must be excluded as hearsay because they have not satisfied any of the exceptions.

First, they cannot qualify as business records because they suffer from the same vices as the Yajima and Yamada diaries. They are more similar in character to Yajima's diary then to Yamada's; hence we incorporate by reference our discussion of the admissibility of Yajima's diary under Rule 803(6) including our comments upon plaintiffs' proffered foundation. However, Yamamoto's diaries also have problems of their own. The principal additional problem with the Yamamoto diaries is that it is plain (and plaintiffs concede) that Mr. Yamamoto never

attended many of the meetings whose events are allegedly recorded in the diaries. Indeed, Yamamoto stated in his protocol that his diaries were founded *entirely* on hearsay:

> These two notebooks are mine and the content of the discussions at the meetings of the Tenth-Day Group and TS Group was written by me from what I heard from Vice-Director of the TV Department Adachi. It was when I went to Vice-Director Adachi's desk or when he came to my desk that he talked to me about the discussions at the meetings. This was either the next day or within a week following the date of the meeting. He talked to me looking at his memo from the meeting, and he added his own ideas. I have written only the parts of the meeting which related to me in my notebooks.

The hearsay source of this diary would never have been apparent but for this statement. That is another reason why the absence of testimony concerning the diary entries relied upon by plaintiffs renders the entries extremely suspect.

It is thus known with respect to at least some of these meetings that they were attended by Mr. Adachi, who would communicate information concerning these meetings to Mr. Yamamoto. Plaintiffs submit that Mr. Adachi would communicate the information to Mr. Yamamoto within a week of the occurrence of the meetings and that Mr. Yamamoto would thereupon promptly record all information relevant to his business responsibilities. They assert that the correspondence of dates of group meetings noted by Mr. Yamamoto with dates of which the plaintiffs are aware from other evidence of the litigation corroborates the accuracy of Mr. Yamamoto's notes. They submit that Mr. Adachi did not embellish any of the reports he made to Mr. Yamamoto concerning meetings which Mr. Yamamoto did not attend because he knew the information had to be reliable enough for Mr. Yamamoto to act upon it in his official duties. And they conclude that Adachi ratified the contents of the notebooks because if Yamamoto's practice in recording this information were against company policy, Mr. Adachi would have stopped him from doing so.

These contentions are all very interesting and might be convincing had plaintiffs established them by taking the deposition of either Yamamoto or Adachi, both of whom have always been available. In the absence of such evidence, plaintiffs' contentions must fail. There is no evidence that Mr. Adachi or anyone else ever saw the diary. Plaintiffs have presented no evidence that Yamamoto regularly put into his notebook information concerning group meetings that Adachi had attended as opposed to meetings which Yamamoto or Adachi may have learned of from unidentified third persons. In addition to the fact that Adachi added his own ideas to his accounts of the Tenth Day Group meetings to Yamamoto, the diary contains entries regarding the meetings of groups (the TS Group and the Palace Group) which neither Yamamoto nor Adachi ever attended.

There was, alas, no evidence of systematic checking or of habits of precision or of a regular continuous practice on Yamamoto's part in making entries in his notebooks relating to group meetings. The regularity problems are further demonstrated by the fact that within the time frame of 21 meetings of the Tenth Day Group referenced in Appendix B of plaintiffs' FPS, both Yamamoto diaries contain a total of only four references to the meetings. That fact hardly supports a claim of regularity of either attendance or of reporting.

The diaries contain the same methodological problems that the Yajima diary contains in terms of being similarly cryptic and erratic. There are likewise numerous unintelligible entries and it is impossible to sort out opinion from fact. Notwithstanding plaintiffs' suggestion, correlation of dates recorded for group meetings recorded in the Yamamoto notebooks with dates noted in other items of proffered evidence does not qualify the diaries as business records within the meaning of the F.R.E. Neither does it matter that the diaries relate to business matters. For the same reasons we mentioned in the

case of the other diaries, there are overwhelming indicia of the unreliability of the diaries.[115]

We need not dwell further on the Yamamoto diaries. For the very same reasons set forth in our discussion of the Yajima and Yamada diaries and the preceding discussion with respect to the Yamamoto diaries, neither the diaries nor the individual entires within them can qualify as an admission against Hitachi, or as statements against interest, nor can they qualify under the residual exception. Moreover, they are afflicted by the same internal hearsay problems as we have noted with respect to the diaries of Yajima and Yamada.

VI. *The Okuma Diary, DSS 55*

A. *Introduction*

The Okuma diary is a notebook into which Mr. Mshizo Okuma, formerly assistant manager of the radio and television section and later assistant director of the sales department of Melco, made certain entries. While the diary is lengthy, we have before us only the three pages thereof which have been translated. The diary was seized by the JFTC during the course of the Six Company Case. Melco produced the diary to plaintiffs during discovery. At that time, the translated pages of the diary were marked by document identification numbers 2198 to 2200, although as will be seen, Melco claims that the plaintiffs have misrepresented the diary by marking the pages out of their correct order. Plaintiffs offer the notebooks in evidence against all defendants on essentially the same basis as we have noted in connection with the previous diaries. They offer the diary pages as containing authentic accounts of what took place at the group meetings which Mr. Okuma purportedly attended.

---

[115] Mr. Adachi's testimony before the JFTC relating to entries in the Yamamoto notebooks itself points out the inaccuracy of certain figures recorded therein.

B. *Plaintiffs' Foundation*

(1) The Okuma diary was identified via Melco's supplemental answers to interrogatories of NUE, dated May 15, 1975, in which Okuma was identified as assistant to the manager of the Consumer Product Sales Department of Melco. The diary was also identified in Melco's response to plaintiffs' interrogatories to defendants relating to the existence, location, and destruction of documents.

(2) Okuma identified his diary in his protocol given to the JFTC, stating that it was his diary and specifically referring to a February 16th meeting of the Tenth Day Group which he attended. Moreover, he identifies the February 16th entry as being *written at* the Tenth Day Group. In the protocol, Okuma also confirms a certain diary entry.

(3) In his testimony given under oath before the JFTC, Okuma confirms attendance at Tenth Day Group meetings, and makes (only) one correction in the protocol. Okuma was not confronted with his diary during his JFTC testimony, but plaintiffs assert that in light of the fact that he was testifying and made a correction to the protocol, he could have corrected the diary had he wished.

(4) The diary was lawfully seized by the JFTC from Melco's premises and is so identified in DSS 93.

(5) The statement on the top of the diary, namely, "Confirmation of the proceedings of the previous minutes" confirms the fact that minutes were kept.

(6) Okuma made one correction in the diary, "thus confirming the others are accurate."

(7) Okuma identified one of the entries as an entry he wrote down while talking to the factory, thereby establishing it as a business entry.

C. *Defendants' Response*

Melco asserts generally the same objections to the authenticity and admissibility of the diary under exceptions to the hearsay rules as do Toshiba and Hitachi in the discussion above. We add only the points especially stressed by Melco. First, Melco asserts that this was a personal diary intended for Okuma's eyes only. Melco contends that the diary is not authenticated by Okuma's testimony or protocol because the testimony does not mention the diary and because all of the materials taken together are "confusing, internally inconsistent, and meaningless without explanatory testimony by Okuma himself, which the plaintiffs consciously elected not to seek as a matter of trial strategy." Melco highlights its claim that the unexplicated diary is untrustworthy by demonstrating that the documents submitted by plaintiff are out of chronological order and would be confusing and incomprehensible to the trier of fact. More specifically, Melco asserts that the documents which were originally legended as Melco documents number 20583 and 20584 were reversed by plaintiff in their numbering, creating the impression that certain events took place when they in fact did not.

D. *Discussion*

We shall not dwell on the Okuma diary because our analysis of its admissibility *vel non* essentially tracks our previous analysis. The Okuma diary is authenticated against Melco by virtue of its mode of seizure and production and reference in answers to interrogatories and in Okuma's protocol. However, Melco's interrogatory answers and Okuma's protocol are both admissible only against Melco. As against all other defendants, there is insufficient authenticating evidence even to meet the prima facie standard of *Goichman, supra*. As a result, the Okuma diary is authenticated only against Melco, and is inadmissible against all other defendants because it is not authenticated by evidence which is admissible against them.

The diary cannot qualify as a business record because it suffers from the same vice as the other diaries, the lack of

evidence of systematic checking or of a regular continuous habit on Okuma's part in making entries in his notebooks relating to group meetings. There is a trustworthiness problem caused by plaintiffs' submission of misordered pages. Moreover, the few pages of the diary that have been translated are punctuated with illegible entries (in English), the correctness of whose translation is challenged.[116] Other problems include attribution of statements to various companies without explaining who the speaker was or explaining whether this was merely what the diarist's impression was of the companies' position; a nine-page gap between the first and second pages proffered by the plaintiffs; and the presence of cryptic narrative and chart-like entries which it would take the testimony of the diarist or someone present at the meeting to explain. The diary entries plainly are not admissible as business records. Neither are the diaries nor portions thereof admissible under 801(d)(2) or 804(b)(3) nor 803(6) nor 803(24) or 804(b)(5)—all for the same reasons as heretofore expressed.

VII. *The Tokizane Diary, DSS 56-57*

A. *Introduction*

The Tokizane diary is a notebook of approximately 80 pages, comprising entries purportedly made by Hayata Tokizane, an employee of Matsushita Electric Industrial Co., Ltd. ("MEI"). At the time that the diary entries were allegedly made (between March and April, 1965) Mr. Tokizane was the Director of the Television Division of MEI. He was also a director of MEI from 1967 to 1971 and Managing Director from 1971 to 1974. Only two pages of the diary were submitted to the Court, document numbers MJ3972 and MIH20080.

Plaintiffs offer the Tokizane diary in evidence against all defendants. More specifically, plaintiffs offer this diary as a business record under F.R.E. 803(6), as an admission of MEI

[116] We do not deem pages which plaintiffs have not bothered to translate to be candidates for admission.

under F.R.E. 801(d)(2), as a declaration against the interest of Mr. Tokizane under F.R.E. 804(b)(3), and under the residual hearsay exceptions, F.R.E. 803(24) and F.R.E. 804(b)(5). Substantively, plaintiffs offer the diary as evidence that Matsushita and Sony conspired to fix the price of 9″ color transistor TV sets at 39,800 yen, and that there was a meeting of the Palace Group on March 23, 1965, where a decision was made concerning the price of color TV's.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Hearsay Rules*

(1) MEI answers to interrogatories identify Mr. Tokizane as the director of the television division of MEI from 1964 to 1968; as such, he was the direct superior of the general manager of the television department of MEI, the immediate superior of the general manager of the transistor department of MEI, and the immediate superior of the general manager of the color television department of MEI.

(2) The first part of the diary was produced by the Matsushita defendants, and is referred to by them in their correspondence and in their Answers to Interrogatories Set No. 2, Interrogatories 8, 42, and 44.

(3) The diary contains entries about employees' wages, new employees, and a meeting concerning a press release for new products, *i.e.* business related matters.

(4) The diary was an exhibit in the "Six Company Case," and part of the record in that proceeding (DSS 93).

(5) The diary contains a March 31 entry about a meeting at the "Head Office" involving the President, Vice President and Managing Director who discussed color TV prices, transistor TV's, that the price of a 9″ television receiver would be 39,800 yen, and that the president would inform Sony to that effect. The diary also contains an April 1 entry indicating "telephone from President about the Sony matter." Plaintiffs claim that this entry, in conjunction with the March 31 entries, indicates that Matsushita and Sony set the price of 9″ transistor color TV's at 39,800 yen.

(6) The April 5 entry refers to a phone call from the "Chairman" (but does not specify which chairman) concerning the decision of the Palace Group on color prices. This decision was purportedly made at a Palace Group meeting on March 23, 1965, since Appendix B to Plaintiffs' FPS and document MJ2823 (the JFTC investigator's statement of the case, DSS-94) lists a Palace Group Meeting on March 23, 1965.

(7) Despite the fact that the diary entries do not mention the year, they do indicate that April 5 was on a Monday, and an examination of a perpetual calendar reveals that the year must be 1965.

C. *Defendants' Response*

(1) There was no testimony or protocol by Mr. Tokizane in the Six Company Case record. No one else in the Six Company case referred to Mr. Tokizane's diary. The present case has no deposition dealing with Mr. Tokizane. There was no foundation laid for admissibility of the diary in the JFTC proceeding. Consequently, other than the bare diary itself, there is no explanation of what the diary means, how it was prepared, and for what it was used.

(2) Since no other source sheds light on the meaning of the diary, it is impossible to relate any individual entry in the diary to any other entry. For example, nothing in the diary indicates that the 9″ T.R. price of 39,800 yen in the March 31 entry relates to the "telephone from president" entry of April 1, or the "Chairman phone call entry" of April 5, or any other entry. The attempted connection between the 9″ television receiver price of 39,800 yen, in the March 31 entry, with the April 5 entry concerning the Palace Group decision on color prices is impossible, since 39,800 yen is too low a price for a color TV.[117]

(3) The entries do not purport to have anything to do with an export conspiracy, nor do they say that there was any

[117] Plaintiffs have now conceded the mistake and stated that the reference should be to a monochrome set.

agreement reached in the sense of parallel pricing conduct. Consequently, the jury cannot be permitted to speculate as to what these meaningless entries refer to.

(4) Plaintiffs' contention that the March 31 and the April 1 entries indicate that Sony and Matsushita together set the price of 9" color transistor TV sets at 39,800 yen is clearly erroneous, since at the alleged time of the diary entries (April 1965) Sony was not exporting color TV sets. Also, the price of 39,800 yen was not comparable to Sony's prices for those models. Furthermore, the diary entries nowhere state that Sony and Matsushita fixed prices, merely that the president will inform Sony about *something*, and it is impossible to infer a price-fixing agreement involving Sony from these cryptic comments in the diary.

(5) It is uncontested that Mr. Tokizane never attended any of the various group meetings. Thus, any references to discussions at the Palace Group meetings are, at best, multiple hearsay.

(6) There is no showing in the diary as to what year the entries were made. References in other documents that meetings took place in 1965 does not shed light on the year that *this* diary was made.

(7) If the diary was necessary to Mr. Tokizane's business, it would have been written in a comprehensible manner.

D. *Discussion*

We have spent much time in dealing with the diaries. This has been necessary because of the great scaffolding which plaintiffs have erected on the basis of random entries therein, a scaffolding which collapses because of the non-existence of foundation. It is time to move on to other matters and so we shall simply note that we agree with defendants' contentions and conclude that the Tokizane diary is not admissible under any of the exceptions to the hearsay rules for essentially the

same reasons as the other diaries.[118] Plaintiffs make much of Mr. Tokizane's high position within Matsushita. That does not affect admissibility. This document is as cryptic as can be and we are not about to let the trier of the fact (aided of course by some helpful suggestions of their friendly plaintiffs' counsel) speculate as to what it means on the basis of selected bits and pieces.

At the hearing plaintiffs' counsel argued that even if the document was inadmissible, it would still be relied upon for "corroboration." We know of no authority for such a proposition, and suggest that it reflects the bankruptcy of plaintiffs' evidentiary case.

VIII. *JFTC Testimony, DSS 58-74*

A. *Introduction*

During the Six Company proceedings, a total of 17 different witnesses testified before the JFTC Hearing Examiners.[119] The names of the witnesses are as follows:

---

[118] We do find it authenticated against MEI, but not against any other defendant because of the absence of authenticating evidence which is admissible against the other defendants.

[119] All of the testimony that was presented during the Six Company Case was discussed together at the evidentiary hearings, hence we shall discuss all of the testimony together herein.

DSS Number	Witness	Company	Document Number
DSS 58	Tsuruta	MEI	TJ 2144-2218
DSS 59	Oshima	MEI	TJ 2509-2551
DSS 60	Ta Fujio	MEI	TJ 1468-1523
DSS 61	Tsu Fujio	MEI	TJ 4416-4464
DSS 62	Hirano	Sanyo	TJ 2014-2143
DSS 63	Yoshioka	Sanyo	MJ 2232-2264
DSS 64	Adachi	Hitachi	MJ 1893-1986
DSS 65	Yamamoto	Hitachi	TJ 1408-1467
DSS 66	Nishi	Hitachi	MJ 2652-2661
DSS 67	Okuma	Melco	MJ 1987-2044
DSS 68	Kihara	Melco	MJ 2527-2547
DSS 69	Kamakura	Toshiba	MJ 2044-2087
DSS 70	Yajima	Toshiba	MJ 2098-2160
DSS 71	Kawahara	Toshiba	MJ 2662-2670
DSS 72	Ogawa	Sharp	MJ 2161-2187
DSS 73	Ogawa	Sharp	MJ 2617-2632
DSS 74	Iue	Sanyo	MJ 2671-2678

The six defendants were jointly represented by three counsel, identified in the translations as "surrogates." The vast bulk of the interrogation of the witnesses was conducted by these counsel. Some questions were also put to the witnesses by the JFTC Hearing Examiners and occasionally questions were put by the investigators. The subject matter of the testimony related to business practices of the six companies, with emphasis upon their pricing policies, and to activities at meetings of the Tenth Day Group at which there were discussions of "bottom prices," predicted consumer demand, and of the wholesale, retail, and rebate margins operative in the manufacturers' distribution chains. Virtually all of the testimony concerned the Japanese domestic market, although there is an occasional random reference to exports.

Not all of the testimony is inculpatory of a domestic price-fixing conspiracy. Indeed, the testimony is pervaded by denials that any agreements were reached, by testimony that the companies did not tell each other the truth at the meetings, and

by contentions that the principal function of the meetings was not the fixing of prices, but the projection of demand. There were occasional references to the diaries, but they did not play a significant role in the testimony. There was no effort to formally authenticate the diaries. We shall not dwell here upon the substantive import of the JFTC testimony, reserving that for the conspiracy summary judgment opinion. Suffice it to say for now that the tenor of the testimony nowhere contains the slightest suggestion that the activities of the defendants were in the nature of fixing an artificially high price in Japan for the purpose of financing a predatory export raid on the American market. Indeed, there is no suggestion of that even in the JFTC complaint. *See* DSS 94.

Plaintiffs offer the testimony of the above-listed witnesses against all defendants in this action. Plaintiffs offer this testimony as prior testimony under F.R.E. 804(b)(1); as statements against interest under F.R.E. 804(b)(3); as party admissions under F.R.E. 801(d)(2); as business records of the JFTC under F.R.E. 803(6); and as admissible under the residual hearsay rules, F.R.E. 803(24) and F.R.E. 804(b)(5). Defendants object on grounds of lack of authentication and hearsay. We turn to a discussion of these issues against the background of our legal discussion in Part II, *supra*.

B. *Authentication*

The proffered documents are copies of the notes of the testimony taken before the JFTC, but without any kind of seal, or certification from the JFTC or its court reporter of its correctness, and without testimony by a witness who has compared the copies with the original. While most of the defendants have not asserted the point, and although plaintiffs express understandable chagrin at the apparent hypertechnicality of the contention, Melco, correctly noting that it is the plaintiffs' burden to authenticate its evidence regardless of what the defendants come forward with, objects to the admission of the

JFTC testimony on the grounds of lack of authentication. The Melco objections are based on the lack of:

1) certification by the JFTC that the profferred copy is a genuine copy of the original;

2) testimony or certification that the typed copy is an accurate transcript of the original handwritten copy;

3) testimony or certification that the examiner accurately reported his notes of the witness' statements;

4) signature or oath by the witness; and

5) certification of a "public document" as required under F.R.E. 902(3) relating to "foreign public documents."

For reasons stated in Part II A-5, *supra*, we view Rule 1005 objections as waived and Rule 80(c) as inapposite. We will consider Melco's objections, however, under the general standards of Rule 901.

The plaintiffs have responded to these objections in several ways. First, they point out that defendants identified the notes of testimony in their answer to "Plaintiffs' [NUE] Interrogatories to Defendant Set. No. 2, Interrogatories Nos. 8, 42-44." Secondly, the plaintiffs note that the transcripts were produced by the defendants in response to plaintiffs' Request for the Production of Documents. Thirdly, the plaintiffs observe that all of the witnesses were called to testify by an attorney who represented all respondents to the JFTC case, and that the witnesses were sworn. Fourth, they note that there is a stenographer's seal on the (copy of the) transcript. Fifth, they point out that the format of all the notes of testimony is the same. Finally, they argue that all the witnesses were employed by the various defendants.

We are satisfied that the plaintiffs have made a sufficient prima facie showing of authentication under Rule 901 by virtue of the factors they have noted, and by virtue of the contents and substance of the transcripts themselves taken in conjunction with circumstances. F.R.E. 901(b)(4).

C. *Admissibility as Former Testimony—Rule 804(b)(1)*

Since we are dealing here with the admissibility of former testimony, we must first consider the terms of F.R.E. 804(b)(1), which we have discussed in Part II.D above. In accordance with that discussion, there are three distinct points we must address in considering the admissibility of the JFTC testimony: (1) unavailability; (2) opportunity and similarity of motive; and (3) the predecessor in interest notion. The latter point is important because the plaintiffs seek to offer the JFTC testimony against all defendants, not just those involved in the Six Company Case, on the grounds that the defendants in the Six Company Case are the predecessors in interest of the other defendants.

1. *Unavailability*

We have explained in Part II-D-1 the principles regarding the requirement of unavailability both in general and as applied to Rule 804(b)(1). For the reasons stated there, we find Yajima unavailable because of his death, and we find the other witnesses who testified before the JFTC unavailable within the meaning of Rule 804(a)(5), for purposes of Rule 804(b)(1) only, because they are beyond the subpoena power of the Court.

2. *Similarity of Motive to Develop The Testimony*

a. *Contentions of the Parties*

We commence our discussion of similar motive by summarizing the positions of the parties. It is more convenient to begin with the position of defendants who in one of their briefs have outlined the differences between the JFTC action and the present action as follows:

	Japan	U.S.
Nature of Action	Investigation by an administrative agency in Japan under the Japanese civil law system with minimal evidentiary rules, including the admission of hearsay evidence.	Private, treble damage lawsuit in the U.S. under the Sherman Act and common law system with evidentiary rules generally excluding hearsay.
Nature of Charge	Whether or not an alleged agreement between Japanese television manufacturers on the suggested retail price resulted in a restraint on the actual prices within Japan.	Whether or not certain Japanese television manufacturers combined and conspired for the purpose and with the intent of predatorily invading the U.S. market by selling at unreasonably low prices in order to drive plaintiffs out of business.
Substantive Law	Whether the alleged agreement on suggested retail prices constituted an "unreasonable restraint of trade" under the Japanese interpretations of the Japanese Anti-monopoly Law (JAL Sections 3, 1(6)). No "per-se" rule under Japanese law.	Whether there was a broad, all-embracing conspiratorial agreement to fix prices and make a predatory invasion of the U.S. market.

Defendants thus contend that the issues are not substantially similar. They argue that in the JFTC proceeding the only issue was "whether respondents had jointly established a suggested retail price, the retailers and wholesalers margins, and the rebate level." In the case at bar, defendants claim the issues are (1) whether "the alleged two year Japanese conspiracy drove the prices of television receivers up and established inordinate profit margins," (2) whether "this domestic conspiracy was an integral part of an alleged export conspiracy involving almost one hundred companies doing business all over the world to create a 'war chest' to finance the sale of CEP's in the United States at artificially low prices"; and (3) whether the JFTC testimony establishes the authenticity of the diaries as business records.

Defendants claim that neither issues (1) nor (2) were involved in the JFTC proceeding. As to issue (3), defendants maintain that there was no motivation in the JFTC hearing to show that the diaries of the declarants were not business records because no similar rules of evidence exist in Japan.

In addition to claiming that there is no similarity of issues between the two proceedings, defendants urge that there is no similarity of purpose for which the testimony is offered and that the circumstances under which the opportunity to develop the testimony arose are not meaningful in light of the present circumstances. In this regard, defendants emphasize the following factors: (1) the unforeseeability to the parties to the JFTC proceeding that there would ensue a subsequent litigation involving additional defendants, some with no operations in Japan, and involving complex allegations of home market *and* export conspiracies; (2) the difference in the natures of the proceedings, *i.e.* an administrative agency hearing under Japanese civil law with minimal evidentiary rules versus a private treble damage lawsuit in the U.S. with more stringent evidentiary rules; and (3) the differences in the sanctions available, *i.e.* a fine of 500,000 yen in Japan (equivalent at the time to 1,388 U.S. dollars) and treble damages of 1.2 billion dollars in the instant case.

Plaintiffs claim that the requirements of similar motive as measured by substantial similarity of issues and purpose are fully met in this case. They deny that any circumstances in the present proceedings have made the opportunity to develop the testimony in the prior proceeding less meaningful. Plaintiffs assert that the testimony given at the JFTC proceedings con-

cerned the issue of a conspiracy to fix prices in the Japanese domestic television market and that "this is the precise issue and purpose for which such testimony is being offered in this litigation." Furthermore, plaintiffs contend that the testimony was offered at the JFTC proceedings on the issue of the authenticity of the diaries and notebooks, again a precise issue and purpose for its being offered here.

In addition, plaintiffs take issue with defendants' contention that there is a requirement that parties to the action in which the former testimony was taken know or should know there was additional pending litigation in which the testimony might be used. Even if there were such a requirement, plaintiffs submit that the parties had reason to believe that civil or criminal lawsuits might follow the JFTC proceeding because the act under which the proceedings was instituted also contained provisions for a private right of action and for criminal sanctions. *See* Part II.E.3, *supra* (quoting Japanese Antimonopoly Law).

Having stated the parties' contentions as to the similarity of motive requirement, we now turn to their resolution.

b. *Similarity of Issues and Purpose*

In order to establish the existence of the alleged unitary conspiracy among defendants, plaintiffs must prove the existence of the conspiracy's component parts and their connection. One element or building block of this theory is an alleged agreement between the six defendants named in the JFTC proceeding to fix prices in Japan. Insofar as that issue was an issue before the JFTC and is an issue in the present case, we find that the six defendants named in both cases had a similar motive to develop the testimony by direct examination to satisfy Rule 804(b)(1).

The record makes plain that one of the precise issues before the JFTC was whether the six companies made and put into practice agreements on the suggested retail price, retail and wholesale profit margins, and rebate levels for color and black

and white TV. That alleged agreement is a component of plaintiffs' case here, and to that extent the issues are substantially similar in both cases and thus the first requirement for similarity of motive is met. Indeed, since the vast bulk of the interrogation in the Six Company Case was conducted by counsel (surrogates) for the defendant companies, and it was those counsel who elicited all the facts on these points, it would seem unfair not to permit into evidence here what they brought out there, given the similarity of issues.

The second requirement for similarity of motive which we have described in Part II, *supra*, is also met. The purpose for which the testimony was offered by the six defendants in the JFTC proceeding was such that they had an adequate motive for testing there the credibility of the testimony now offered to prove the home market side of the alleged conspiracy.

c. *Other Differences in Circumstances*

While the similarity of motive may be negated by other differences between the circumstances of the two proceedings, the simple existence of such differences does not require a finding of lack of similarity of motive. In the circumstances of this case we find that such differences between the proceedings as do exist do not greatly affect the motive to develop the testimony as to the issue of the alleged home market conspiracy. Because the testimony will be limited to its relevance to that one issue in the case, defendants' arguments that circumstances which now prevail render the former opportunity to develop the testimony meaningless must fail.

First, administrative agency and preliminary hearings under American law, both less than full trials, are nevertheless sufficient forums for admissible former testimony. The crucial factors are that the testimony has been given under oath and that the opposing party had a reasonable opportunity to cross-examine. It is not contended by defendants, nor can we find any evidence, that the testimony before the JFTC was either

not given under oath or was given without opportunity to develop the testimony regarding the issues raised by the JFTC "recommendation."

Second, there is no requirement that the parties to the JFTC proceedings have reason to know that subsequent litigation would ensue. Nor does the fact that the subsequent litigation which did ensue is far more complex than the original action affect the six defendants' motives to develop the testimony regarding the home market price-fixing issue. Because we shall, *see infra*, narrowly limit the purpose for which the testimony may be introduced and the specific defendants against whom it may be used, the additional issues and parties in the present case have no bearing on the similarity of motive to develop the testimony as it will be offered. As McCormick states, "Additional issues or differences in regard to issues upon which the former testimony is not offered are of no consequence." McCormick § 257 at 620-21. And because the evidence will not be allowed against defendants other than the six defendants in the JFTC proceedings, their presence in this action cannot affect the motives of those six defendants.

Defendants' argument that the different sanctions available in each case affects the similarity of motive to develop the testimony likewise must fail. Although there may be valid reasons for defending a small claim less vigorously than a large one, the JFTC proceeding was hardly analogous to a matter in small claims court, *see* n. 77 *supra*, and the respondents in the JFTC proceeding appear to have defended themselves quite thoroughly. Thus, we find no reason to believe that the six defendants would have attempted to elicit any different testimony than that given on the issue of a consipiracy to fix prices in the domestic market.

The defendants submit that the dangers of admitting the JFTC testimony are similar to those involved in admitting the diaries, *i.e.* the testimony is misleading and confusing in the .text of this case, without clarification by a live or deposed d knowledgeable) witness. The defendants are protected in

this regard by their right and apparent ability to call the delarants as witnesses in the present case and thereby to seek to rebut any inferences they fear might otherwise be drawn.

We conclude then, with the exception hereinafter noted, that as against Sanyo, Toshiba, Sharp, Hitachi, Matsushita, and Melco, who defended the Six Company Case jointly, the testimony of their employees before the JFTC on the issue of retail prices, retailers and wholesalers margins, and the rebate level, all relating to the Japanese domestic market, is admissible as former testimony under Rule 804(b)(1) in this action.

d. *Export References*

The defendants contend that the JFTC proceeding involved only Japanese market matters, and there were no claims of (a) "war chesting" or (b) an "export low price consipiracy," hence, that they did not have an adequate opportunity or motive there to cross examine the witnesses on the issues involved in this litigation. In support of their contention they add that references to export in the JFTC testimony are predominantly characterized by discussions of (a) the witnesses' duties and responsibilities (*i.e.* "export is not my responsibility")[120] and (b) the witnesses' lack of knowledge about export matters.

---

[120] Consider, e.g., the following exchange:

TRIAL EXAMINER: One other point. How do you arrive at the export price? For instance, is the export price calculated by a comparison with the domestic price? Or is there an entirely different method of pricing applied for export purposes?

WITNESS: *Although I am not in a position to answer your question because it is beyond my area of responsibility*, I believe that when a product is sold domestically, expenses on service, shipping, publicity, and so forth are all included in the price. Whereas in the case of export, the price is usually negotiated on the basis of F.O.B., thus excluding all other expenses, covering shipping, advertisement, services, etc. Naturally, there would be a difference in price, as well as in the external design of a T.V. For export purposes, the cabinet is very crude in contrast to the deluxe of domestic models. This is true not only of external design but also true of what goes inside. We can export a set with very simple inside arrangements. Accordingly, from the point of view of manufacturing those television sets for exportation are treated quite differently from those for domestic use. In view of all these factors, we, of course, see some difference in the production cost and consequent price differences in the products.

We agree with defendants' description of the record and with their contentions. While we have ruled that defendants cannot escape whatever cut there may be of the testimony about their activities in the Japanese home market, regardless of its use in an unforeseen lawsuit, we are satisfied that there is no way that any "war chesting" or export references which may appear in the JFTC testimony can be utilized here. While the alleged export conspiracy and its connection to the alleged home market conspiracy is here in issue, it was not even remotely involved in the JFTC case. The defendants would have had no reason whatever to develop by way of direct or cross examination anything about exports or "war chesting" before the JFTC. Thus we shall excise from admission into evidence under Rule 804(b)(1) any reference in the JFTC testimony which could be construed to reference "war chesting" or any export connection.

3. *Predecessor in Interest*

Plaintiffs suggested in oral argument that the six defendants involved in the JFTC proceedings qualify as "predecessors in interest" of all those defendants who were not parties to that prior action, thereby rendering the testimony admissible against all defendants. Defendants on the other hand urge that the six JFTC defendants could not be predecessors in interest of all the other present defendants whose alleged involvement in a conspiracy was unknown at the time. Moreover, defendants argue, many of the alleged co-conspirators have such different interests and strategies that effective representation of one might conflict with the interests of another.

TRIAL EXAMINER: The hearing will now proceed in an open session.

SURROGATE YAMADA: Does the so-called Television Division handle only domestic affairs?

WITNESS: Yes, that is correct.

SURROGATE: Then, you are involved with affairs related to export?

WITNESS: No. *Anything to do with export is done through a separate division.* (emphasis added)

MJ 00208-1 to 2083-1

We agree with defendants that the six JFTC repondents do not qualify as predecessors in interest of the other defendants in this case. Under *Lloyd, supra*, the standard is whether the six respondents had a like motive to develop testimony about the same material as the other eighteen defendants would have had, if they had been represented at the JFTC hearing. *See* Part II.D.3, *supra*. We think they plainly did not, as the six respondents had no motive to inquire about the participation of their present co-defendants in the conspiracy charged by the JFTC. To permit the testimony into evidence against the eighteen co-defendants would be to risk unfair prejudice to them merely because the plaintiffs have joined them with the six JFTC respondents in the present litigation. Apart from the allegation of conspiracy, there is no evidence of a "community of interest" between the six repondents in the JFTC proceedings and the other eighteen defendants in this case, some of whom are not even Japanese corporations.

Moreover, we are cognizant of the factual differences between *Lloyd*, a case involving the government as a representative of the public interest, and the present case, which involves co-defendants with potentially conflicting interests. The facts of this case are much closer to those of *Pinto, supra*, which similarly involved co-defendants with potentially conflicting interests, than to those of *Lloyd*. We agree with Judge Wilson's analysis in *Pinto* of the dangers inherent in admitting testimony developed by one co-defendant against another, and find similar considerations relevant here.

4. *Authentication References*

Plaintiffs offer certain references in the testimony to authenticate some of the diaries. While none of the diaries were formally authenticated during the testimony, and no witnesses were asked directly whether or not a particular diary was genuine, some witnesses were shown particular portions of particular diaries and asked to comment upon them in some way. Some witnesses were shown diaries which they allegedly maintained themselves (e.g., Yajima), while others were

shown diaries maintained by other persons (e.g., Adachi). Plaintiffs offer this testimony as circumstantial evidence authenticating the diaries.

We find the references to the diaries, offered here to authenticate them under Rule 901, admissible against all defendants. There was no issue expressly raised as to the authenticity of the diaries in the JFTC proceeding. However, the six respondents there plainly had ample opportunity, and would have had sufficient motive, to challenge their genuineness when they were shown to witnesses, if in fact they had any reason to suspect that the diaries were not authentic. Moreover, on this narrow issue only, the interest of all other defendants in showing the diaries to be inauthentic was adequately represented by the six respondents. Given the narrowness of the issue, the motive of the six respondent companies to challenge the authenticity of the diaries was identical to the motive which any other defendant would have had to challege their authenticity. Thus, the previous and the present parties shared a like motive to develop testimony about the same subject matter sufficient to make the six respondents "predecessors in interest" of the others under *Lloyd, supra*, with respect to the authentication references only.

D. *Other Hearsay Exceptions, Admissions, and Internal Hearsay*

We need not tarry long on the admissibility of the testimony under the other exceptions We consider the residual exception 803(24) and 804(b)(5) inapplicable to former testimony, for reasons stated in Part II-F, *supra*. The exception for statements against interest, Rule 804(b)(3), is not met because none of the declarants, except Yajima, is unavailable, since their depositions could have been taken; because plainiffs have made no showing from which we could infer that any of the declarants were conscious that tne statements were against their personal interests; and because the testimony is generally consistent

with the defense offered in the Six-Company Case and therefore is not even against the employers' interests.[121]

The plaintiffs also offer the testimony as admissions of the employers of each witnesses. Since we have ruled that the testimony, except for export references, is admissible under F.R.E. 804(b)(1) against the six companies which collectively employed all of the witnesses, we need not consider that contention except with respect to export references. We find the export references in the testimony of only two witnesses admissible as admissions.

While the witnesses may have been authorized to testify before JFTC, thus rendering their statements concerning the domestic market authorized admissions under Rule 801(d)(2)(C), the JFTC proceeding did not concern the export market, and therefore any testimony concerning that market would have been outside their authority under subsection (C). Under Rule 801(d)(2)(D), our inquiry is whether the witnesses whose testimony included so-called export references in fact held positions in their companies which gave them any responsibility for exports. In their list of purported "export references" in the testimony, the plaintiffs have included portions of the testimony of five persons: Yajima and Kamakura of Toshiba; Tsu Fujio of MEI, Yoshioka of Sanyo; and Nishi of Hitachi.[122]

---

[121] Plaintiffs' claim that the testimony is admissible as a business record of the JFTC is not responsive to the pertinent hearsay objection that the witness who testified before the JFTC is a declarant who will not be present at the trial in this litigation. No party has interposed an objection to the JFTC reports of the witnesses' testimony as hearsay. Instead, such matters have been considered, properly, under the rubric of authenticity. Moreover, to the extent that any transcript of testimony is a "memorandum, report, record, or data compilation" of the JFTC, within the meaning of Rule 803(6), it is a memorandum report, etc. only of what the witness *said*, and not of the truth concerning the matters which he testified to. As a result, the testimony would still have to be subjected to hearsay analysis even if viewed as a business record of the JFTC.

[122] These portions of the testimony were designated as export references in a letter of Arnold I. Kalman, Esq., plaintiffs' counsel, dated February 12, 1980. Plaintiffs also designated as export references portions of the testi-

Tsu Fujio was Senior Managing Director of MEI (DSS 61 at TJ004417). Although the record does not indicate what his duties were in the area of export, we are willing to infer from his senior position in the Matsushita parent company that it is more probable than not that his duties had some relation to export. Accordingly, the "export reference" in his testimony will be admissible against MEI only, under 801(d)(2)(D). The same reasoning applies in the case of Mr. Nishi, who was Senior Managing Director of Hitachi, Ltd., DSS 66 at MJ002652, and the "export reference" in his testimony will accordingly be admissible against Hitachi, Ltd. only.

The "export references" in the Yajima and Kamakura testimony, however, are inadmissible. Kamakura was the Director of the TV Business Department of Toshiba Shoji and Toshiba Corporation, and Yajima was a section manager within that department; according to Kamakura's protocol, the department is "in charge of the *domestic* business." DSS 81 at MJ003294 (emphasis added). During his testimony, Kamakura repeated at least five times that he and his department had no responsibility for export matters. DSS 69 at MJ002091-83 and 90-91.

As for Yoshioka of Sanyo, while he does not discuss in his testimony whether or not he had any export responsibility, we do not think that there is anything in the record to support an inference that his duties related to exports. Yoshioka testified that he was the Assistant Director of the Business Department of the TV Division of Sanyo Electric Co., Ltd. Although we have been provided no information about precisely where this put him in the hierarchy of Sanyo executives, he plainly did not enjoy the stature which Nishi and Fujio had within their companies. More importantly, the plaintiffs have conceded in their FPS, with preclusive effect, that Sanyo Electric Co., Ltd., did not engage in exporting. Instead, all exports were channeled through its subsidiary, Sanyo Electric Trading Co., Ltd. *E.g.*, FPS vol. 2 at 773 and 948. Thus Yoshioka's employer did not itself export consumer electronic products to the United States, and Yoshioka's relatively low position in the parent company's hierarchy does not permit an inference, on the record before us, that he had export responsibilities. As a result, the export reference in his testimony is inadmissible.

mony of Tsuruta of MEI and Hirano of Sanyo. However, we can find no mention of export in the referenced portions of the testimony of either of those witnesses and accordingly we do not discuss their authority here. Plaintiffs designated part of the testimony of another witness, Yasuo Ito, as an export reference, but Ito's testimony has not been proffered in our hearings and is not considered here. We intimate no view here as to whether the "export references" referred to in the text are in any way probative of the "unitary conspiracy" charged by plaintiffs.

Defendants' final contention about the JFTC testimony is that it is replete with hearsay and double hearsay statements. The principles which we enumerated in Part II with respect to internal hearsay are applicable to former testimony as well as to other forms of hearsay. The defendants are correct that there is much internal hearsay contained within the JFTC testimony and that any such hearsay which does not meet the requirements of Rule 805, described above, must be excluded. However, we shall not take the time to review the testimony ourselves at this time for purposes of internal hearsay analysis. Should it become necessary, we shall do so in connection with the summary judgment motions.

IX. *JFTC "Protocols," DSS 75-92*

A. *Introduction*

The "records of statements" ("protocols") were prepared during the course of the JFTC investigation, prior to the initiation of the JFTC hearings. These protocols were prepared by the JFTC investigators based on statements voluntarily submitted by employees or representatives of defendant companies. Plaintiffs offer in evidence the protocols of Messrs. Yajima, Narita, Kamakura, Kamuro, Kawahara (Toshiba); Adachi, Yamamoto (Hitachi); Ito, Okuma (Melco); Maekawa, Saeki (Sharp); and Koiski (Fuji). The protocols were produced by defendants during the course of discovery in these proceedings. Plaintiffs offer the protocols as prior statements

of the declarants under F.R.E. 801(d)(1); as admissions of the defendant companies under 801(d)(2); as public records under 803(8)(B); as former testimony under 804(b)(1); as statements against interest under 804(b)(3); and as admissible under 803(24) and 804(b)(5), the residual hearsay exceptions. Plaintiffs offer these protocols as evidence of what transpired at the Tenth Day and Palace Group meetings, as evidence of the alleged home market conspiracy, and to authenticate the diaries.

B. *Plaintiffs' Foundation For Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

(1) The protocols are reliable and trustworthy because their making was governed by JFTC regulations, Articles 6, 8, and 12. Article 12 provides that whenever an investigator has interrogated persons, he shall make a protocol, read it to the deponent, and review it for verification. If the deponent affirms the contents of the protocol, he may be asked to sign and seal the document. The protocol statements are the declarants', not the investigators'.

(2) The protocols are authentic because they were produced in response to interrogatories, were exhibits in the Six Company Case, and were signed by the declarants who acknowledged their truthfulness.

(3) The protocols represent prior testimony because at the JFTC proceeding they were identified as part of the record, and the declarants could have been cross examined concerning their accuracy.

(4) The declarants were authorized by their respective companies to make the statements to the investigators because they gave their statements voluntarily, were identified with defendant companies, and were put forward by defendant companies to testify at the JFTC proceedings.

(5) The protocols are public records of the JFTC within the meaning of Fed.R.Evid. 803(8) since the investigators recorded the statements.

(6) The statements were contrary to the *employers'* pecuniary or proprietary interests. Declarants would have told the truth since there is a perjury provision at Section 92-2 of the JFTC proceedings.

(7) The protocols establish that there was a regular practice by which information concerning the meetings was communicated among defendant employers.

C. *Defendants' Response*

(1) The procedure for producing the protocols was as follows: The JFTC investigators listened to the witnesses, wrote down their versions of what transpired, and would sometimes let the witnesses see the statement, but would more often simply read the statement to the declarant. All changes which were made in the protocols were made by the investigators. The protocols were not statements of the declarants, but statements of the investigators.

(2) The declarants did not testify to the truth of the statements, just that there were "no mistakes." DSS's 88 and 89 do not contain signatures.

(3) Since plaintiffs in their FPS have not listed the declarants as witnesses, the declarants will not be present at trial to authenticate the protocols when they are offered, and no depositions of the declarants have been taken.

(4) There is nothing on the record of this case indicating that the declarants were authorized by the defendant companies to make the statements. The declarants by appearing before the JFTC did not do so in the course of their employment, and the mere fact that the declarants testified at the JFTC hearing does not indicate that the statements before the investigators were authorized or ratified by the employers.

(5) The investigators recorded the witnesses' accounts of what took place in the past. The records were not prepared for purposes independent of litigation.

(6) There is no indication that the declarants had a personal interest at stake or that they feared personal prosecution as a result of giving the statements. Further, there is no indication that they were aware the statements were against their interest.

(7) Portions of the protocol statements are not based on the witnesses' personal knowledge. There are many inconsistencies between the protocols and the testimony.

(8) The protocols do not contain any export references.

D. *Authentication*

We conclude pursuant to F.R.E. 104(b) that the protocols have been authenticated as the genuine protocols given by the various deponents to the JFTC. There is sufficient evidence from which the trier of fact could conclude that the protocols are what their proponents claim, *i.e.*, genuine protocols. We rely in this regard upon: (1) the production of the protocols by the various defendants in response to interrogatories; (2) the fact that the protocols were in fact exhibits in the Six Company Case, and some of them were referred to by witnesses during their testimony; (3) the fact that the protocols were signed by the declarants, acknowledging their truthfulness; (4) the similarity of all of the protocols to each other; and (5) our conclusion from examination of the protocols that their appearance and internal patterns are distinctive characteristics which, taken in conjunction with circumstances, support the inference of genuineness. *See* Part II.A.3, *supra*.

E. *Admissibility Under Exceptions to the Hearsay Rules*

Before reaching the weightier aspects of plaintiffs' contentions and defendants' response, we dispose of the simpler questions of admissibility. First of all, the protocols cannot come in as former testimony under F.R.E. 804(b)(1) because they are not testimony. The former testimony rule encompasses only testimony given at a hearing, and the ex parte interview by the JFTC investigator, even as explained by plain-

tiffs' witness Professor Haley, did not constitute a hearing. Secondly, although the statements and the protocols are direct statements of the declarant, the protocols and any component part thereof cannot constitute statements against interest because of the failure of plaintiffs to make a showing that any of the declarants believed at the time he made the statements that it was against his interest. We have elaborated on this point in connection with our discussion of the diaries and need not repeat it here.

Neither may the protocols come in under the residual exceptions for the same reasons explained in the case of the diaries—failure to meet the foundational burden of establishing that they are more probative on the point than any other evidence which the proponent can procure through reasonable efforts. Nor are the protocols admissible as public records and reports under F.R.E. 803(8)(B) because the statements of witnesses are not "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report." Such a reading of 803(8)(B) would be in direct contravention of its fundamental thesis, *i.e.* the notion that there are circumstantial guarantees of trustworthiness which create a presumption of reliability of government reports. *See* Public Records Opinion at p. 29. The plaintiffs do not offer the protocols simply to establish that the JFTC investigator took the statement accurately, but rather for their truth. No action of the public official is implicated by that proffer and 803(8)(B) is not a basis for admission.[123]

The only basis on which the protocols can come into evidence is under F.R.E. 801(d)(2). Rule 801(d)(2) relates solely to admissions of a party opponent, hence the protocol of Koiski of the Fuji Company cannot be admitted because Fuji is not a defendant in the case. Because the makers of the other "protocols" are employees of either Toshiba, Hitachi, Melco, or Sharp we must turn to the question of their admissibility

[123] The contention that the protocols can come in under 801(d)(1) is baseless because none of the declarants have been proffered as witnesses in the forthcoming trial.

against those companies. Obviously—by the plain terms of the rule—a protocol is admissible only against the company who employed the person giving it.

The plaintiffs having invoked Rule 801(d) in its entirety we must consider admissibility under each of the rule's component parts. Only subparagraphs (B), (C), and (D) are potentially applicable. In the technical sense all of the protocols are adoptive admissions under 801(d)(2)(B) in that they were written by the JFTC investigator and signed by the witness, who thereby manifested his adoption or belief in the truth of the statement written by another. However, the witness's "adoption" would not suffice to admit the statement against the employer. Hence we must turn to the terms of 801(d)(2)(C) & (D).

An immediate problem arises in the case of the protocol given by Mr. Maekawa of Sharp Corporation. Sharp has represented to the Court that Mr. Maekawa was not employed by Sharp Corporation at the time he gave the protocol, hence the protocol could not be admissible under 801(d)(2)(C) or (D). We accept Sharp's uncontroverted representation and conclusion.[124] However, with respect to all of the other protocols, we are unpersuaded by defendants' position that when appearing before the JFTC investigator, the givers of the protocol were neither authorized by their employers nor within the scope of their employment. At all times they were represented by company counsel, were apparently on company time, were identified with defendant companies, and were ultimately put forward by defendant companies to testify at the JFTC proceedings. Under the circumstances we cannot see how we can conclude other than that the declarants were authorized by their employers to give protocols and that, at all events, they were within the scope of their agency and employment at the time they gave their protocols to the JFTC investigators.

---

[124] The plaintiffs have pointed out that Mr. Maekawa's employer when he gave the protocol was a company which had the word "Sharp" in its name. However, that fact is plaintly insufficient to establish an agency relationship between Sharp and Mr. Maekawa's employer.

The receipt of the protocols as admissions against Toshiba, Hitachi, Melco, and Sharp respectively does not mean the statements are free from internal hearsay scrutiny. There is much internal hearsay within the protocols which would, at trial, have to be redacted. *See* Part II.G., *supra*. However, we need not for present purposes analyze the protocols to determine which portions must be the subject of redaction for, the protocols contain no export references which would aid plaintiffs in establishing a low price export conspiracy.[125] We shall thus assume, for purposes of the summary judgment motion and the F.R.E. 104(a) preliminary determination on conspiracy, that the protocols are admissible in their entirety.

X. *The "Shimizu Memorandum"—DSS 95*

A. *Introduction*

This memorandum is a hand-written document dated December 29, 1965, bearing the "chop" of "Shimizu." It was seized by the JFTC during the 1966 raid on the offices of Hitachi. Hitachi, Ltd. produced this memorandum to plaintiffs in the course of discovery in these proceedings. At that time the document, which is captioned "the second meeting of the color TV committee," was identified by document identification numbers HJ 50004 through HJ 500010. Although they concede that it is an internal Hitachi memorandum, plaintiffs offer the "Shimizu memorandum" in evidence against all defendants. More specifically, plaintiffs claim this memorandum to be authentic under F.R.E. 901(a), 901(b)(1), 901(B)(4) and 902. They offer it as an admission of Hitachi, Ltd. under F.R.E. 801(d)(2), as a business record under F.R.E. 803(6), as a declaration against interest under F.R.E. 804(b)(3), and under the residual hearsay exceptions F.R.E. 803(24) and 804(b)(5).

---

[125] Consequently, we need not consider here whether export matters were within the scope of employment of the givers of the protocols.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Exceptions to the Hearsay Rules*

(1) The memorandum is on stationery bearing the Hitachi logo.

(2) Mr. Shimizu's "chop" is on the memorandum, thereby identifying him as its author and the memo itself identifies him as a participant in the meeting.

(3) The JFTC exhibit list (DSS 93) identifies the "Shimizu memorandum" as having been seized from a Hitachi, Ltd. file on "the color TV committee."

(4) The contents of the memorandum show it to be a business record.

(5) Information contained within the memorandum concerning group meetings is consistent with information contained within other items of proffered evidence.

(6) The memorandum purports to deal with the "second meeting of the color TV committee" within Hitachi, and this is the type of information which the "ambience" of intracompany reporting demonstrates is regularly communicated within the corporate structure.

(7) The memorandum contains export references and figures.

(8) The memorandum is a business record because it was drafted in connection with a business activity.

(9) The memorandum was kept as a part of Hitachi, Ltd.'s files for a year before the JFTC seized it.

(10) The memorandum is dated as having been written on the date of the meeting to which it refers.

(11) The memorandum is relevant in that it shows that information gathered at Okura and Palace group meetings were utilized in Hitachi corporate planning.

(12) The presence of the letters "UE" in a circle on the memorandum indicates that Mr. Satoshi Ueno of Hitachi, Ltd. who turned the document over to the JFTC investigators, was routed a copy of the memorandum.

(13) The memorandum is a "statement of an Hitachi employee concerning a meeting he was authorized to attend."

The plaintiffs, in a post-hearing memorandum, add a host of other "reasons," but these are in essence conclusory statements which are a function of their interpretation of the document (assuming it is authentic and admissible) purporting to explain its relationship to Hitachi's business practices. These other "reasons" do not add to plaintiffs' argument on foundation.

C. *Defendants' Response*

(1) No evidence other than the mere presence of the chop of a Mr. Shimizu on the memorandum has been presented to indicate who the author of this memorandum is.

(2) Mr. Shimizu of Hitachi, Ltd. is alive and well, but plaintiffs have not deposed him.

(3) The individuals who might be those indicated by name in the memorandum are alive and well, and plaintiffs have not deposed any of them.

(4) Hitachi, Ltd. sells stationery containing the corporate logo to its employees.

(5) This memorandum is not mentioned in either the protocols or the testimony before the JFTC.

(6) The alleged export references within the memorandum are inconsistent and fail to support plaintiffs' allegations.

(7) The text of the memorandum is confused and has possibly been altered.

(8) No testimony of the custodian of this memorandum has been presented.

(9) No evidence of the regularity of creation of this memorandum has been presented.

(10) The memorandum contains multiple hearsay, and no evidence has been presented as to who attended the intercompany group meetings from whence much of the information purportedly contained in the memorandum is derived.

(11) No evidence of communication of the memorandum has been presented.

(12) The memorandum does not contain assertions such as are required for something to constitute an admission.

(13) Without knowing the identity of the author of the memorandum, it is impossible to determine the scope of his agency within Hitachi, Ltd., whether he had authority to speak concerning the matters discussed in the memorandum, or whether his statements are based upon firsthand knowledge.

D. *Discussion*

We find the memorandum authenticated on much the same basis as the diaries the seizure, Hitachi's production, and the "chop." Business record status is, however, another matter. This document is no more a "business record" than the diaries. We do not know who wrote it, nor do we know anything of the method of its preparation, whether it was created by a process involving habits of precision or regularity and systematic checking, or otherwise. There is no showing of who received the document or that it was relied upon. Neither do we know anything of the sources of information of the writer of the memo. The plaintiffs assert that the document speaks for itself, but of course it does not and cannot. The plaintiffs have the burden of establishing that the document is a business record. They cannot shift that burden no matter how hard or often they try. Although Shimizu and others with knowledge have been available, the plaintiffs have not deposed them. Moreover, the memorandum is laden with internal hearsay, including "news from the OKURA group." The document is far from clear;

rather, like the diaries, it needs interpretation by someone familiar with it. We shall not prolong the opinion unnecessarily by recapitulating our legal discussion. It is plain from the recitations of the positions of the parties that the applicable legal principles cut in the same way as in the use of the diaries; the document just does not pass 803(6) muster.

Not only does the document not qualify as a business record, but it does not qualify under the other asserted exceptions for statements against interest and the residual exceptions, for the same reasons as in the case of the diary of another Hitachi employee, Yamada. Nor can plaintiffs prevail in their statement that they

> "rely upon the entire ambience created by the protocols that there was a recording system evidenced within companies in which reports were made to people who were not present in meetings in order to inform them of the content of the meetings."

Plaintiffs just have not established the fact they assert, by "ambience" or otherwise. Even if they had established the existence of a recording system generally, it would not establish foundation for any particular entry, in view of the legal precepts we have so extensively set forth in Part II.

Finally, the memorandum is not an admission of Hitachi because we know nothing of the authority of the writer. In the absence of evidence of export authority, in particular, the document is not admissible for any export references.[126] Nor can most of the language in the memorandum, which seems to be written in a kind of shorthand, be fairly characterized as "assertions."

---

[126] The notion that the memorandum shows an export conspiracy must also be rejected. The export figures reported make little sense. *Inter alia*, they show Hitachi as having no exports in 1965. Thus, plaintiffs' claim that a reference to Hitachi's desire to increase its market share plainly refers to the export market is baseless. If the reference were to the export market, it would be as consistent with a desire to compete as a desire to conspire. In any event, the figures shed no light on an export conspiracy.

XI. *Toshiba Internal Memoranda—DSS 96, 97 and 98*

A. *Introduction*

DSS's 96, 97 and 98 are documents which were seized by the JFTC during the "raids" described above. DSS 96 and DSS 97 were exhibits in the Six Company Case. DSS 98 was not marked as an exhibit therein. These documents were produced by Toshiba Corporation to plaintiffs during discovery in these proceedings and are identified by document identification numbers TJ 4502-4505; TJ 4506-4510; TJ 4511-4513. Plaintiffs offer these as internal Toshiba memoranda to prove the alleged home market conspiracy. Plaintiffs offer these documents as business records under F.R.E. 803(6), as admissions under F.R.E. 801(d)(2), as statements against interest under F.R.E. 804(b)(3), and under the residual exceptions.

B. *Plaintiffs' Foundation for Authentication and Admissibility under one of the Exceptions to the Hearsay Rule*

(1) DSS's 96, 97 and 98 were authenticated by being identified in the protocols and in Toshiba's answers to interrogatories.

(2) The documents bear "receipt" stamps and "confidential" seals.

(3) DSS 96 is a memo from Kamuro to Narita of Toshiba. Kamakura, in his second protocol, DSS 82, identifies DSS 96 as a document coming from Kamuro. Kamuro, in his protocol, DSS 83, admits writing DSS 96. Kamuro based this memo on information received from Narita. Narita, in his protocol, DSS 79, identified DSS 96 as an internal Toshiba memo dated April 11, 1966 referring to an April 18, 1966 Palace Group meeting.

(4) DSS 97 is a Toshiba document sent from Kamakura, Director of the TV Business Division, to Iwata, Senior Managing Director, and Narita. The document refers to a Tenth Day Group meeting. The document was identified in the list of the investigator's evidence, DSS 93. The document contains a notation that it is from the television file. DSS 97 is authenticated based on the "entire ambience created by the protocols" that there was a recording system whereby those who were not present at the Tenth Day Group meetings were informed of the contents of the meetings.

(5) DSS 98 is a Toshiba document from Kamakura, Director of TV Business Division, to Narita, Senior Managing Director. The document was written by Yajima, but Kamakura sent it under his name. Yajima in his protocol, DSS 75, identifies DSS 98 as an internal Toshiba report of the Tenth Day meeting and acknowledges that he wrote it. The reason that the memo was addressed to Narita was because "prices were decided by top level persons."

(6) The contents of DSS's 96, 97 and 98 make them business records. The subject matter of the memos is consistent with testimony concerning the meetings. They also contain the type of information that was exchanged regularly and reported regularly within the companies.

C. *Defendants' Response*

(1) Certain of the memos are not authenticated, and there are differences between plaintiffs' and defendants' translations.

(2) DSS 97 is not identified as to the author, and the list reconstructed by plaintiffs' translators, DSS-93, is not proof of the author's identity.

(3) There is nothing to indicate that DSS's 96, 97 and 98 were communicated outside the company.

(4) There is no indication that the memos were kept in the regular course of business, or that there was a regular routine way of recording these documents to guarantee their trustworthiness. There is no testimony by a custodian or anyone else. The reports are unreliable, not based on first hand knowledge, and contain double hearsay.

D. *Discussion*

We shall not dwell upon DSS 96-98 because they are a virtual carbon copy of the diaries.[127] Like the diaries, they also report on Tenth Day Group Meetings and the only difference is that they were communicated to someone. They suffer from precisely the same vices.

While we are satisfied that DSS's 96-98 have been authenticated, they are not business records for the reasons that the diaries are not business records. We are in the dark as to the method of preparation of the memos. We do not know if their preparation was attended by regularity or systematic checking. We know nothing of the writer's source of information. In addition, the documents are opaque and require interpretation. As with the diaries, we do not know whether the entries reflect what someone said, or what the writer thought or heard someone say, or what he thought they thought. And the memos are suffused with internal hearsay which would itself vitiate their admissibility. Once again, by not taking depositions of someone who could explain them, the plaintiffs have failed to meet their burden of establishing these three memos as business records. Neither are they admissible under the statement against interest and residual exceptions for the same reasons as the diaries, i.e., plaintiffs' failure to meet the unavailability requirements; failure to meet the requirement of consciousness that the statement is against interest [804(b)(3)]; lack of trustworthiness; and failure to establish the memos as more probative than other available evidence [804(b)(5) and 803(24)]. They are not admissions for the same reasons as the diaries, principally plaintiffs' failure to demonstrate that they are assertions.

[127] Indeed, DSS 98 was purportedly written by Yajima.

XII. *"Minutes" of the EIAJ Officers' Meetings—DSS 1027 and DSS 1028*

A. *Introduction*

The EIAJ Officers' Meeting "Minutes" were produced to plaintiffs during the course of this litigation by the Electronic Industries Association of Japan (EIAJ) at its offices in Japan. DSS 1027 refers to a February 16, 1963, meeting and is identified by document identification numbers EIAJ 318-321. DSS 1028 refers to a January 18, 1964, meeting and is identified by document identification number EIAJ 286.

Although plaintiffs had the opportunity to take the deposition of an EIAJ person with knowledge about the identity of the preparer or the method of preparation of the minutes or the sources of information therefor, they elected not to do so, satisfying themselves with mere production. The "minutes" purport to show attendance at the meetings of representatives of some 24 companies other than the defendants.

Plaintiffs offer the EIAJ Officers' Meeting "Minutes" in evidence against all of the defendants. The documents are offered as admissions of the EIAJ and the defendants who were attendees of the meetings under F.R.E. 801(d)(2), (C) and (D), as business records under F.R.E. 803(6), as present sense impressions under F.R.E. 803(1), as statements against interest of defendants who were attendees of the meetings under F.R.E. 804(d)(3), and as admissible under the residual hearsay exceptions, F.R.E. 803(24) and F.R.E. 804(b)(5).

B. *Plaintiffs' Foundation for Authentication and for Admission Under One of the Exceptions to the Hearsay Rule*

(1) The rules of the EIAJ entitle each of the EIAJ members to "peruse" records of the EIAJ and to receive materials published and distributed by the EIAJ. The EIAJ Officers' Meeting Minutes are typewritten and not handwritten, which indicates that they were distributed among the EIAJ members.

The Japanese defendants in this litigation who are EIAJ members have access to these minutes and, therefore, have control over these minutes.

(2) The Japanese defendants form the standing board of directors of EIAJ. Accordingly, they control positions of authority in EIAJ.

(3) Various defendants' answers to interrogatories identify the two officers' meetings referred to in DSS 1027 and DSS 1028 as having been held. The interrogatory answers also state that the Japanese defendants were represented at those meetings.

(4) Judge Higginbotham in the transcript of February 26, 1976, at 280, directed that a good faith effort be made to make EIAJ documents available to plaintiffs and that some responsible person be present when plaintiffs searched for such documents. DSS 1027 and DSS 1028 were produced in accordance with Judge Higginbotham's direction, and Hoken Seki, Esquire, counsel for Melco, was present at that production.

(5) The meetings were held monthly. Minutes were made for every meeting, and were kept at the offices of EIAJ. The format of the minutes follows a consistent pattern. Accordingly, the minutes alone show completeness and accuracy. The meetings for which the minutes were kept conform to the list of the meetings contained in Exhibit B of plaintiffs' FPS. DSS 1027 and DSS 1028 were pulled from a stack of other minutes.

(6) None of the defendants has ever withdrawn as a member of the EIAJ throughout the entire period covered in this litigation.

(7) There is no indication in the minutes that any defendant attendee left a meeting during the course of deliberations. There is also no indication in the minutes that there were any disputes or objections concerning the decisions made at the meetings. The attendees allegedly had an opportunity to object to the minutes. Accordingly, the minutes show that there was consistent unanimity among the attendees. The minutes are thus admissions by all the attendees.

(8) Defendants were receiving information concerning U.S. law, i.e. "the problem of duty appraisement," DSS 1027 [apparently a reference to the 1921 Antidumpting Act] from their attorney in the United States, Mr. Tanaka. Therefore, they had knowledge of the United States laws.

C. *Defendants' Response*

(1) Plaintiffs did not depose anyone from the EIAJ.

(2) Neither DSS 1027 nor DSS 1028 was signed or indicates its author.

(3) The minutes do not show completeness nor accuracy. There is no indication of the methodology of the anonymous authors to guarantee the reliability of the minutes.

(4) There has been no testimony by any keeper or custodian of the minutes or other witness to establish the foundation for admission of the documents.

(5) There is no indication in the minutes as to who said what at the meetings or what the votes were, if any. There has been no showing that the attendees had authority to act or speak on behalf of their employers. Accordingly, the minutes are not admissions by any defendant.

(6) There has been no showing that the author or custodian of the minutes or any of the any of the attendees at the meetings are unavailable, as required under F.R.E. 804(a)(5).

(7) There is nothing to indicate that the by-laws of the EIAJ on which plaintiffs rely were the by-laws that were effective in 1963.

(8) Judge Higginbotham's direction that some defense lawyers be present when plaintiffs search for documents does not catapult the EIAJ documents to admissible status.

(9) There has been no foundation laid for the admission of the minutes against any of the defendants who were not members of EIAJ.

(10) Nothing is shown in the minutes that would be contrary to anyone's pecuniary or penal interest. Application to a governmental agency for assistance regarding receiving tubes (that is one matter mentioned) is not a crime in Japan or the United States, nor does it subject anyone to civil liability. Regarding the check price agreements, the United States Department of Justice has reviewed them on at least two occasions and has not found anything objectionable.

(11) The minutes contain double hearsay.

D. *Authentication*

Although no one has contended that they are specious, and although the task of qualification might not have been difficult had plaintiffs bothered to take a deposition for use at trial, the fact is that plaintiffs have failed to authenticate DSS 1027-1028. As we have explained in Part II *supra*, mere production of a document from an organization's files does not authenticate it. Defendants neither produced nor vouched for the "minutes" in connection with their interrogatory answers. Rather, the "minutes" were produced by an organization which is not a party in this litigation. Unlike some of the diaries, protocols, or testimony, there is no distinguishing feature of the documents that marks them as genuine "minutes" of meetings. We, of course, cannot read the original Japanese, but we certainly cannot say that the English translation bears some indelible imprint that smacks of genuineness. In short, the plaintiffs have done nothing to establish the genuineness of these documents so as to meet the test of *U.S. v. Goichman, supra*.

E. *Business Record Status*

DSS 1027 and 1028 do not qualify as business records for a host of reasons. Plaintiffs seem to think that there is some talismanic effect to be accorded to production by the EIAJ, but, of course, as we have explained above, there is not. This result is unchanged by the fact that there are a number of other "minutes" which were produced, suggesting that whatever

was done with respect to DSS 1027 and 1028 may have been done on a regular basis. We do not have even the foggiest notion of who wrote these "minutes," whether the writer attended the meetings, where he got his information, or when he wrote the entries. We know nothing about his method of keeping records, much less whether it is careful and accurate. Indeed, nothing in these documents suggests completeness. There is no record of who said what to whom, nor do we know whether what is written is what someone said, or what the writer (or someone informing his judgment) thought. The mere fact that the writer (if it was in fact he) did the same thing on other occasions would not help establish DSS 1027-28 as a business record. In short, none of the factors which qualify something as a business record, all of which have been elaborated above, are present here. We agree with defendants' contentions and with their conclusion that these documents do not achieve business record status.

F. *Admissibility Under Other Exceptions to the Hearsay Rules*

DSS 1027 and 1028 cannot come in as admissions. The documents do not attribute any statements to anyone. There is no indication as to who said what at the meeting, and if something was acted upon, there is no indication of who voted and approved it. Indeed, it is conceivable (had there been EIAJ action taken) that the representative of some defendants left the meeting early or voted contra (if the attendance record on 1027 and 1028 is accurate, the defendants were far outnumbered). Nor have the plaintiffs laid any foundation to render EIAJ the agent of any defendant for purposes of an admission. In short, the plaintiffs have not made a showing that these minutes are the assertion of any defendant and they cannot come in under Rule 801(d)(2).

By the same token, statements in the minutes cannot come in as statements against the interest of any declarant. The unavailability requirement for 804(b)(3) is not met. Furthermore, there is no showing that anything was said which the

author of the "minutes" or any person present at the meeting was conscious was against his personal interest. The requirements of the residual exception are not met because the "minutes" are not more probative than other evidence which the plaintiffs could have procured, and are not trustworthy. DSS 1027 and 1028 cannot come in under any of the exceptions to the hearsay rule.

XIII. *The EIAJ Statistics Committee 1966 (or Japan Victor Document)—DSS 1029*

A. *Introduction*

DSS 1029 is an internal memorandum produced from the files of Japan Victor Company ("JVC"), which is not a party in this litigation. It refers to the December 26, 1966 meeting of the Statistics Committee of the EIAJ. It was produced to plaintiffs during the course of this litigation by Victor Company of Japan, Limited at its offices in Japan, and was designated with document identification number V 3747. In plaintiffs' submission, the document shows that the manufacturers who attended a meeting of the EIAJ Statistics Committee, including defendants, agreed to modify their accounting practices to cover up the disparity between home market and export practices.

Plaintiffs offer the Japan Victor document in evidence against all of the defendants in this action. Plaintiffs offer the document as a business record under F.R.E. 803(6), as admissions of JVC and MEI under F.R.E. 801(d)(2), as present sense impressions under F.R.E. 803(1), *see* n. 48, *supra*, as a then existing mental, emotional, or physical condition under F.R.E. 803(3), *see* n. 48, *supra*, and as admissible under the residual hearsay exceptions, F.R.E. 803(24). Plaintiffs offer the Japan Victor document as a non-hearsay verbal act, in which the author reported his understanding of what had been discussed and agreed upon at the December 26, 1966 meeting of the EIAJ Statistics Committee, and in which the author

gave a direction to the manager of the accounting department in order to effectuate internally an agreement reached at said meeting.

Because of the great reliance which plaintiffs place on the Japan Victor document, and the amount of time devoted thereto (plaintiffs alone have filed a 46 page brief relating to its admissibility) we shall deal with it in detail.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Exceptions to the Hearsay Rule*

(1) This document was produced pursuant to a subpoena served on and accepted by MEI's counsel on behalf of Japan Victor Company. It was produced at the offices of Japan Victor Company in Tokyo.

(2) The Answers of the Matsushita Defendants to Plaintiffs' Supplemental Interrogatories to Defendants, Set No. 2, dated May 29, 1979, listed JVC as a member of the EIAJ Statistics Committee. The same answers stated in Answer to Interrogatory No. 33 that the December 26, 1966 meeting of the EIAJ Statistics Committee had actually taken place, that MEI's representative had attended the meeting, and that there had been a discussion of the subject referred to in the Japan Victor document. The Answers of the Hitachi Defendants to Plaintiffs' Supplemental Interrogatories, Set No. 2, Relating to Consumer Electronic Products, dated May 25, 1979, Answer to Interrogatory No. 33, stated that the December 26, 1966 meeting had taken place, that Hitachi had been represented at the meeting, and that the subject referred to in the Japan Victor document had been discussed. The Answers of Sony Corporation to Plaintiffs' Supplemental Interrogatories to Defendants, Set No. 2, dated May 22, 1979, Answer to Interrogatory No. 33, stated that Sony's representative had attended the same meeting of the EIAJ Statistics Committee.

(3) Matsushita's Answers to Plaintiffs' Supplemental Interrogatories as mentioned above identified Mr. Oguri as one of the representatives of Japan Victor Company to attend the December 26, 1966 meeting of the EIAJ Statistics Committee. Mr. Oguri's chop appears on DSS 1029. The author of this document is Mr. Oguri, or, at the very least, if he is not the author, he reviewed the document and adopted its correctness.

(4) The document itself identifies the recipient of the document as the manager of the accounting department of the plant. "Common sense" tells the Court that the accounting department is the appropriate place for this document to be sent.

(5) This document contains the directive from the sales promotion section to the accounting department of the plant. "Common sense" tells the Court that an endorsement by the chief of a section where such directive was issued would in fact be needed in order to effectuate such a directive to the accounting department. Mr. Shiokawa was the chief of the sales promotion section. His chop appears on the document, showing this endorsement.

(6) Defendants in their answers to plaintiffs' interrogatories denied the accuracy of what was reflected in DSS 1029. Their denials amount to defendants' admissions of the fact that there was a December 26, 1966 meeting of the EIAJ Statistics Committee. The answers circumstantially evidence the authenticity of the Japan Victor document.

(7) The content of the document shows the obvious knowledge of the document's author regarding what transpired at the meeting and how JVC records the particular information.

(8) "Common sense" dictates that Mr. Oguri, who had represented JVC at the December 26, 1966 meeting, would have to report back to his superiors after the meeting in order to relay the agreement and information which resulted from the meeting. This document is an internal memo of JVC to serve this reporting purpose.

(9) The document bears the legend "confidential outside the company."

(10) The document indicates that it was prepared on January 6, 1967. This was eleven days after the December 26, 1966 meeting. The document was thus prepared in a timely fashion within the time period for effectuating the reduction of the domestic shipment price which would as agreed begin with the shipments for January 1967.

(11) MEI controls JVC by owning at least 51 percent of its shares of stock. JVC is the "alter-ego" of MEI. Accordingly, an admission of JVC which is the subsidiary of MEI is also an admission of MEI.

(12) "Common sense" tells the Court the import, probative value and high relevancy of the document.

C. *Defendants' Response*

(1) Notwithstanding plaintiffs' proffer of this document as evidence against all defendants, the document could even if admissible constitute evidence *aliunde* only against JVC (which is not a party).

(2) There has been no evidence of the author or recipient of the document. There has been no showing of the file where this document originated. There has been no testimony or even an affidavit of a custodian or any other witness about the author, recipient or content of this document, or the practice of preparation of this kind of document. Plaintiffs consciously and willfully refused to take a deposition of Mr. Oguri or Mr. Shiokawa or any other personnel of JVC. Both Mr. Oguri and Mr. Shiokawa are still in the employ of JVC.

(3) Two chops appear on the document, Mr. Oguri's and Mr. Shiokawa's. Part of the alleged chop of Oguri is not even on the document. There has been no evidence that could show the meaning of these chops. There has been no evidence showing that Mr. Oguri, and not Mr. Shiokawa, authored this document. There has been no showing of Oguri's or Shiokawa's

practice of putting their chops on a document. Chops are sometimes used to show receipt of a document as well as who authored it.

(4) There has been no showing of the meaning of the Japanese word "Kokeicho," the title of the alleged recipient. Even on the basis of the plaintiffs' translation of the document, there has been no identification of either the "Manager," the "Accounting Department" or the "plant."

(5) The document does not make sense on its face. The agreement allegedly entered into at the EIAJ Statistics Committee meeting and the measures to implement such agreement do not correlate.

(6) All defendants whose answers to interrogatories identified the December 26, 1966 meeting as actually taking place, denied the accuracy of what was stated in the document as a decision of that meeting. Plaintiffs' argument that defendants' denials that they followed the plan described in the document amount to admissions that there was a plan or agreement of the EIAJ Statistics Committee is pure sophistry.

(7) Plaintiffs failed to take any depositions of Japan Victor Company personnel.

(8) DSS 1029 is the only document produced by JVC relating to a meeting of the EIAJ Statistics Committee. The content of the document does not show anything about whether it was a regularly-prepared document.

(9) Japan Victor Company is a separate company from MEI. It is separately operated, separately managed and has separate product lines, separate distribution and separate brands, and the products are sold in competition with MEI's products both in Japan and in the United States. A 51 percent subsidiary does not make admissions that are ipso facto admissible as to the parent company.

(10) There has been no showing as to who made the statement contained in the Japan Victor document, whether he had

authority to make such statement, or whether he had knowledge of the subject matter. The Japan Victor document constitutes hearsay within hearsay under F.R.E. 805.

D. *Authentication and Business Record Status*

Because of the manner in which plaintiffs have approached this matter, we shall address authentication and business record status together. Much of what is said with respect to the "minutes" of the EIAJ Officers' Meetings applies to the Japan Victor document. We have no notion of who wrote the document, or where or on what basis. In fact, we know nothing about the document except that it was in Japan Victor's files. No defendant, including Matsushita, whose counsel was present when the document was produced, has itself either produced it (or a copy thereof) of vouched for it in answers to interrogatories or otherwise. Matsushita has disclaimed any knowledge about it and sharply disputed its accuracy.

In the absence of some documented explanation, and notwithstanding plaintiffs' hortatory references to "common sense," plaintiffs' claims about Mr. Oguri and Mr. Shiokawa, and the manager of the Accounting Department, are not only unsupported but are sheer speculation. Yet, while the plaintiffs might have taken the deposition of someone from Japan Victor when their counsel was in Tokyo to receive production of the document and thus shed some light on its origin and its genuineness, they elected not to do so.

Notwithstanding some 46 pages of argument, plaintiffs' position as to authentication and business record status of the Japan Victor document is best characterized by the following passage at pp. 40-41 of their brief:

> If a corporation's own documents are not business records, admissions, evidence of corporate knowledge and state of mind or evidence of their nonverbal conduct, then there was absolutely no reason for those documents to exist and be maintained in the first instance . . . *Any document created and maintained by a corporation is*

> *sufficiently trustworthy as to that corporation to make it admissible at an absolute minimum against that corporation.*
>
> The only reason that a corporation would maintain a document in its files is because of that corporation's reliance on that document.

That this formulation is an ipse dixit and without any basis in law is plain from our discussion in Parts II-A-3 and II-B-4, *supra*, where we explained that, particularly in light of the broad sweep of the federal discovery rules, no such inference can be drawn from mere production of a document.

Unwilling to rest solely upon this proposition, plaintiffs advance what Matsushita's counsel appropriately calls several "imaginative but unavailing excuses" for their failure to make any attempt at all to establish a foundation for admission of the document. Plaintiffs' first such contention is that depositions would have been "fruitless" since such questions as who wrote the document and who received it "could never be answered" (p. 16). The possibility that no one at Japan Victor may be able to identify this document does not advance plaintiffs' cause, for it does not follow that because plaintiffs may be unable to authenticate the document they therefore should not be required to do so, or at least to attempt to do so.

Plaintiffs next argue that the Japan Victor document should be admitted because the defendants supposedly do not recall what happened at the meeting in question.[128] This is irrelevant, because the question whether or not defendants recall this specific meeting has no bearing whatsoever on the admissibility of the document. In the next breath, plaintiffs argue that it does not matter whether or not anyone can recall the meeting or identify the document because, in their view, where a witness "repudiates" a contemporaneous document the document must be believed, and not the witness. However, the cases

[128] This is a disputed factual premise. Defendants did not all respond that they could not recall the meeting. *See* answers of Toshiba and Matsushita to interrogatory 33, attached to plaintiffs' memorandum, in which they describe the meeting and deny the accuracy of the Japan Victor document.

cited by plaintiffs[129] have nothing to do with the refusal or inability of a witness to authenticate a document. Rather, they deal with the weight to be given to a document which has been properly authenticated and admitted into evidence, where a witness disputes the accuracy of the *contents* of the document. None of these cases holds that a document is admissible even if no one can authenticate it or lay any sort of foundation for its admissibility.[130] Plaintiffs thus have failed to meet the *Goichman* standard of authentication.

The notion that the Japan Victor document qualifies as a business record does not merit extended discussion. Not only do we know nothing of its author, but we know nothing of the circumstances of its preparation,[131] of its source or origin or when it was prepared. Thus, we do not know if there was any habit of regularity or precision or systematic checking attendant to its preparation, or whether it was maintained in the ordinary course of business, nor do we know whether the

[129] They cite, *e.g.*, *United States v. United States Gypsum Co.*, 333 U.S. 364, 396, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *United States v. Corn Products Refining Co.*, 234 F. 964, 978 (S.D.N.Y.1916).

[130] *United States v. American Cyanamid Co.*, 427 F.Supp. 859, 865-66 (S.D.N.Y.1977), cited by plaintiffs at p. 21 for the proposition that witnesses from distant locations need not be called to authenticate a contemporaneous document, does not support plaintiffs' argument. In that case the documents at issue were various corporate responses to government questionnaires. There was no dispute as to authenticity, and the authors of the documents, and the circumstances under which they were prepared, were known. The decision, which dealt solely with the hearsay issue, turned on the "reasonable efforts" standard of Rule 803(24).

[131] When we inquired of plaintiffs' lead counsel, Mr. Rome, about what he knew about the circumstances of the preparation of the JVC document, he replied:

> "Just by looking at the document, sir, there is contained in it a statement setting forth that the author of the document was undertaking to report an agreement which was reached at the Statistics Committee." PTO 275 at p. 38. That of course is "bootstrapping" and the defendants have all denied the existence of any "agreement." Indeed, Matsushita has argued convincingly that the "agreement" to change statistical reporting to cover up discrepancies between the home market price and the export price makes no sense (mathematically) in terms of proving plaintiffs' theory of conspiracy. PTO 224 at pp. 230-231.

author had first hand knowledge or received information from someone with such and with a duty to report.

Plaintiffs point to the "obvious knowledge of the author." Such an argument is characteristic of the kind of bootstrapping they have used throughout these proceedings as a substitute for foundation. Plaintiffs also rejoin that: (1) the document was not thrown out, but remained in Japan Victor's files for 10 years; and (2) although Japan Victor produced no other documents purporting to describe the meetings of EIAJ Statistics Committee — which plaintiffs claim met *every month* — Japan Victor did produce memoranda pertaining to other meetings of other groups (specifically, the MD group), which plaintiffs contend, are similiar in "form, content, structure and purpose" to the Japan Victor document.

As to point (1), we note that plaintiffs cite no case which holds that the failure to dispose of a document establishes that it is a business record. There is no such case, and the argument is without merit. As to point (2), the obvious rejoinder is that, using plaintiffs' own criteria, the fact that Japan Victor allegedly attended monthly meetings of the EIAJ Statistics Committee, but had only one memorandum about all these meetings, hardly suggests that Japan Victor had a regular practice of making such memoranda. Nor does the alleged similarity of the document with three other MD Group memoranda prove anything. Although we cannot read Japanese, the documents do not look all that similar to us. The fact that they all have dates on them, and a beginning, middle and end, and (according to the translations) look like memoranda, is hardly startling. Finally, even if there were some similarity, that would be irrelevant, since the MD Group memoranda are as lacking in foundation as the Japan Victor document itself.

In sum, plaintiffs have not met their burden of showing that the Japan Victor document is authentic, *U.S.* v. *Goichman*, *supra*, or that it is a business record.

E. *Is the Japan Victor Document an Admission of Matsushita on the Ground that Japan Victor is its Agent?*

The claim that the Japan Victor document is an admission against Matsushita requires a two step analysis. First, it must be established that the document is an admission of Japan Victor Corp. Then, it must be somehow established that JVC is the agent of Matsushita. We shall not dwell upon the first part of the proposition. We have no basis for applying the strictures of Fed.R.Evic. 801(d)(2)(C) and (D), for we do not know who wrote the document and, therefore, what his authority or the scope of his employment was. Nor is there a scintilla of evidence of adoption by JVC.

Assuming arguendo that the document could be an admission of Japan Victor Corp., there is still no basis for its admissibility against Matsushita. The Rule, on its face, requires the showing of an agency relationship between Japan Victor and MEI. However, the mere fact that a parent company owns some, most, or even all of the stock of a subsidiary company is not sufficient to support a finding of an agency relationship between the parent and its subsidiary. To establish agency, and thus admissibility, plaintiffs would have to go beyond mere stock ownership, and establish that MEI "directly intervenes in the management" of Japan Victor so as to treat it as a "mere department of its own enterprise." *Consolidated Rock* v. *DuBois*, 312 U.S. 510, 524, 61 S.Ct. 675, 685, 85 L.Ed. 982 (1940). We incorporate by reference the discussion in Part II-C-6, *infra*.

Plaintiffs have adduced no evidence that Japan Victor is a "mere instrumentality" of MEI. According to the representation of defendants, management of the two companies is entirely separate; there is no dictation by MEI of Japan Victor's business policies; Japan Victor's stock is publicly traded; it has its own product lines, brand name ("JVC"), distribution and sales organizations, and research and development staff; JVC has its own representatives on industry committees, and the two companies are in fact competitors. Whether or not all of

this is so, the burden is on plaintiffs. What plaintiffs have tried to do throughout these evidentiary hearings is to proffer a document, assert that it looks authentic or that it looks like a business record, and then to seek to shift the burden of going forward and the burden of proof to defendants. This they cannot do.[132]

F. *The Residual Exceptions*

The document is not admissible under the residual exceptions because of plaintiffs' failure even to attempt to procure equally probative evidence by some form of deposition, and because of the lack of trustworthiness of the document. We lack information concerning its source and manner of preparation. The document has internal problems, and as we have noted in Part II-F-3, the burden of showing equivalent guarantees of trustworthiness under the residual exception is on the proponents.

Plaintiffs' argument for admissibility under F.R.E. 803(24) includes the following statement:

> plaintiffs, through interrogatories and requests for production of documents, have failed to discover anything more probative concerning the agreement reached at the meeting of December 26, 1966 (p. 30).

What this means is that there is no evidence to support the statements made in the Japan Victor document. Plaintiffs, of course, do not count as "more probative" the denials of various defendants, including MEI, that there was any such agreement. Since they disdained to take the deposition of even a single Japan Victor employee, or any other person who attended the meeting in question, plaintiffs' argument is untenable. A single deposition of someone like Mr. Oguri, whose chop on the document is a fact upon which plaintiffs so heavily rely, would have been far more probative than this document. Plaintiffs should not be permitted to rely upon their own deliberate refusal to take depositions as a pretext for admission into evidence of an unauthenticated hearsay document like the Japan Victor memorandum.

[132] Plaintiffs also argue: (1) that MEI files consolidated financial statements including Japan Victor; (2) that Matsushita's founder, K. Matsushita, was Chairman of the Board of JVC from 1966 to 1970; and (3) that another MEI director was Japan Victor's auditor (pp. 32-33). This is not even close to the required showing. The filing of joint financial statements means merely that MEI is the majority shareholder of JVC; and the presence of one (or even more than one) common director is also insufficient, under the law, to establish agency. *See e.g., Matter of Bowen Transports, Inc.*, 551 F.2d 171, 178-9 (7th Cir. 1977); *Overstreet v. Southern Ry. Co.*, 371 F.2d 411, 412 (5th Cir. 1967), *cert. denied*, 387 U.S. 912, 87 S.Ct. 1700, 18 L.Ed.2d 634 (1968); *In Re Penn Central Securities Litigation*, 335 F.Supp. 1026, 1035 (E.D.Pa.1971).

The supreme irony here is that the plaintiffs attribute so much importance to the JVC document. It has been famous for years among those involved professionally in this case, and yet plaintiffs have not lifted a finger to establish its foundation.

G. *Non-Assertive Conduct*

As one last ditch effort to seek admission of the JVC document, plaintiffs have fashioned the argument that the JVC memo is admissible as non-hearsay because it is "non-assertive conduct" of Japan Victor, i.e., is said to be evidence of conduct that was not intended to be an assertion. Plaintiffs' argument goes:

> There can be little doubt that the Japan Victor document is evidence of the conduct of Japan Victor in reliance upon the agreement reached at the Statistics Committee of the EIAJ on December 26, 1966. This memorandum constitutes an instruction to change the statistical reporting practices of Japan Victor in accordance with the agreement reached at the Statistics Committee meeting. It is evidence of Japan Victor's conduct in relying upon the agreement to which Japan Victor was a part. This act of Japan Victor's in reliance on this agreement is sufficient evidence of trustworthiness so as to take such conduct outside of the definition of hearsay:
>
> "[W]hen a person acts in a way consistent with a belief but without intending his act to communicate that belief, one of the principal reasons for the hearsay rule — to exclude declarations whose veracity cannot be tested by

cross-examination — does not apply because the declarant's sincerity is not then involved. . . .

[T]he underlying belief is in some cases self-verifying: 'There is frequently a guarantee of the trustworthiness of the inference to be drawn . . . because the actor has based his actions on the correctness of his belief, i.e., his actions speak louder than his word.' " (footnotes omitted). Weinstein's Evidence, § 801(a)[01], p. 801-55.

This argument, conceived after the hearing, is totally at odds with plaintiffs' submission, for the past several years, that the memorandum is offered to prove the truth of the matters contained therein. Nor does the plaintiffs' newly asserted position effectively undercut their long-held view of the document. For the memorandum is not an "act," and there is no evidence in plaintiffs' preclusionary FPS that JVC ever did anything to implement any alleged agreement. To draw the inference that the "act" of requesting a change in statistical reporting procedures resulted from an agreement among manufacturers requires one first to accept—*for its truth* — the portion of the memorandum which purports to recount the alleged agreement. In short, the JVC document is inadmissible hearsay, and to the extent that it is non-hearsay it is irrelevant under Fed.R.Evid. 401. And in any event it would at most be admissible against JVC which is not a defendant, and on this record, not a co-conspirator.

XIV. *TV Export Council Meetings—DDS 1030-1034 (Production by Matsushita)*

A. *Introduction*

DSS's 1030-1034 refer to meetings of the TV Export Council. The documents were produced by Matsushita and are identified by document identification numbers MIH 29097-29098, MIH 29099-29101, MIH 29103-29104, MIH 29105, MIH 29142-29143.

Plaintiffs offer DSS's 1030-1034 in evidence against all defendants. They offer DSS's 1030-1034 as business records of Matsushita under F.R.E. 803(6), as admissions of Matsushita

under F.R.E. 801(d)(2), and as admissible under the residual exception, F.R.E. 803(24). These documents evidence meetings of the TV Export Council from 1969-1973. The documents allegedly evidence defendants' collective participation in responding to the U.S. dumping investigation.

B. *Plaintiffs' Foundation for Authentication and Admissibility Under One of the Exceptions to the Hearsay Rule*

(1) DSS's 1030-103[illegible] were produced by Matsushita in 1975-76 in response to a set of interrogatory and document requests. These documents were later *referred* to in a number of interrogatory answers.[133] Plaintiffs submit that the answers show that Matsushita regularly attended meetings of the TV Export Council, took the minutes at the meetings themselves, and kept them for their own use and purposes at Matsushita.

(2) DSS 1030 is a document entitled "Minutes of TV Export Council Meeting of November 17, 1969." The chops of Morimatsu and Sonoda are on the document. The initials of Onishi are also on the document.

(3) These documents were not produced to plaintiffs in this case until after discovery had closed. Therefore plainitiffs were unable to identify the persons whose chops and initials appear in DDS 1030.

(4) Matsushita has admitted that it was a member of the TV Export Council, and that representatives of Matsushita regularly attended meetings of the TV Export Council through this relevant time period.

---

[133] *See* Amended Answers of MEI to NUE's Interrogatories to Defendants, Set No. 2, dated May 25, 1979, Interrogatory No. 51. These documents were also referred to in Answers of Matsushita Defendants to Plaintiffs' Interrogatories to Defendants Relating to Existence, Location and Destruction of Documents, Interrogatory 19, and in the Amended Answers of Matsushita Electric Industrial Company, Ltd., and Matsushita Electric Trading Co., Ltd. to Plaintiffs' Interrogatories to Defendants, Set No. 1, Interrogatory No. 37, dated May 25, 1979.

(5) The Japanese originals of these documents are stamped "confidential." Matsushita would not stamp a document "confidential" unless it believed it to be genuine or authentic.

(6) Several portions of these documents have been deleted pursuant to assertion of the attorney-client privilege. Defendants would not have claimed attorney-client privilege if these documents were not genuine or authentic.

(7) DDS 1031, dated November 25, 1969, which appears to be minutes of the TV Export Council of November 24, 1969, contains the seals of Isomura and Normatsu. The initials of Yamaguchi also appear on the document. (These persons are not identified in Matsushita's Answers to Inerrogatories.)

(8) DDS 1034 is dated "10/26 (T-h-u) (1400)." From reading the text of the document, it is apparent that it refers to a meeting held on October 26, 1972, because the first paragraph speaks of an "extension of four months until 2/28/73." As indicated by Matsushita's Answers to Interrogatories, these documents were maintained as a regular part of the business of Matsushita. The Answer to Interrogatory No. 19 states "prior to 1971 these notes or minutes were routinely disposed of shortly after the meetings." Thus it can be inferred that "from 1971 until the future such routine destruction no longer became part of Matsushita's course of conduct." Also Matsushita would have entered into a normal business practice of retaining documents by virtue of the fact of this lawsuit.

(9) DDS 1033 contains the seal of Kitaoka. Kitaoka is identified in the Answers to Interrogatories as being an executive of Matsushita who attended meetings of the TV export Council from 1963 through 1973. This document also identifies various other persons as being in attendance at the meeting. The various Answers to Interrogatories identify many of these individuals as being participants at the meetings of the TV Export Council.

(10) The structure of the documents themselves allegedly establishes that the documents were prepared in the regular

course of business in connection with the regular practice of that business. The documents allegedly list "the date, time, place, agenda, and the regular order in which they were prepared, including the summation of the response of each of the individuals who took part in the conversations and discussions at the export council meetings." Plaintiffs rely on the fact that the documents "show a continuing series of these memoranda evidencing the events before the TV Export Council," and the fact "that many of them appeared on a regular basis in the files of Matsushita." The existence of the memoranda on a regular basis, about 25 of them, shows a consistent pattern of business conduct on behalf of Matsushita to record what took place at the particular meetings and to keep them on file at Matsushita. The Matsushita answers to interrogatories state the "from time to time attendants prepared notes and minutes of TV Export Council Meetings." This answer is alleged to show that when something of consequence transpired at the meetings, there was an obligation to report them. Matsushita would not engage in a regular destruction program of something that isn't regularly maintained. A business record does not have to reflect every meeting that occurred.

(11) There is a correlation between the date of preparation of the documents and the date and time which is recorded on them.

(12) MEI acknowledged that the minutes were prepared by its attendants, thus establishing that the documents were prepared by a person with knowledge.

(13) These documents are admissions as stated by Matsushita's answers to interrogatories, "MEI believes that from time to time its attendants prepared notes or minutes." Its attendants are its agents. These documents represent an assertion of what went on during the meetings. The documents were reviewed by others within Matsushita as evidenced by the chops and initials of various persons.

C. *Defendants' Response*

(1) Notwithstanding plaintiffs' proffer of these documents as evidence against all defendants, the documents could, even if admissible, constitute evidence *aliunde* only against MEI.

(2) The identities of the persons whose chops and initials appear on DSS 1030 are not known. DSS's 1033 and 1034 do not contain chops.

(3) These documents contain the headings "TV Export Council *Meeting*" not as plaintiffs assert "TV Export Council *Minutes*." Plaintiffs have not established that these documents are genuine records of TV Export Council meetings.

(4) DSS's 1030 and 1031 appear to be memoranda, but it is not clear to whom or from whom they were sent. DSS 1032 appears to be a memorandum in that it says "to division director." DSS 1033 appears to be an internal Matsushita document. DSS 1034 could be either a memorandum or a minute or some other type document. But there is no identification of who prepared any of the documents. There are seals on these documents of people who were not identified anywhere in this record as having attended the meeting. The documents are not in the form of minutes of meetings. There really is no information concerning these documents.

(5) Plaintiffs misread Matsushita's Answers to Interrogatories. The end of Matsushita's Answer to Interrogatory No. 19 states "To the extent that notes of "minutes" covering the period prior to 1971 have been located, they have been produced for plaintiffs' inspection." This answer does not show any regular practice of keeping the documents. The language in Matsushita's Answer to Interrogatories, "MEI *believes* that from time to time attendance prepared notes or "minutes" of TV Export Council Meetings," does not import regularity of preparation of the notes.

(6) The mere fact that the documents were produced from Matsushita's files and the fact that MEI attended meetings do not establish that the documents are authentic or business records.

(7) The fact that parts of a document have been designated as falling within the attorney-client privilege does not make the document authentic.

(8) As plaintiffs admit, as the result of a strategic or tactical decision plaintiffs did not take depositions of the Japanese defendants. Therefore plaintiffs' argument that they received the documents after the close of discovery is irrelevant.

(9) There is no testimony of a witness or of a custodian of these documents to establish that they are business records. There is no indication who wrote the documents. There is no indication that the scrivener had any personal knowledge of what was contained in the documents because it is unknown whether the scrivener went to the meeting. If the scrivener did not have personal knowledge, it is not known who was the source of the information. There is no indication whether DSS's 1033 and 1034 were prepared in a timely fashion. There is no showing that these documents were regularly prepared during the regular course of business, why the documents were prepared, or whether they were ever sent to anyone. There is further no indication whether these are notes of meetings by a Matsushita employee or minutes of meetings. The documents were retyped from Japanese to English, so that on their face it is not possible to ascertain whether they look like business records. Further, there is nothing to show that the documents accurately reflect what happened at the meetings.

(10) It is pure speculation that these documents represent admissions of Matsushita. Since there is no showing who wrote the documents, there is no way to conclude that it was a person authorized by the company to go to the meeting and take notes.

(11) The confidential stamp was placed on the documents during the course of discovery and does not connote authenticity.

(12) The documents contain hearsay within hearsay.

D. *Discussion*

Because of our desire to move on, we will assume authentication and address the question of admissibility of these documents under Article VIII of the F.R.E.

For the reasons set forth in defendants' contentions #(4), (5), (6) and (9),[134] these documents are not admissible under 803(6). We add only that neither the structure of the documents nor their sheer number nor their retention in MEI's files satisfies the "regular practice" requirement as we have explicated it, *supra*. Insofar as plaintiffs argue that because of late production they were unable to lay foundation by taking depositions a procedure they have not otherwise used in this litigation — we note that plaintiffs failed to avail themselves of that provison of P.T.O. 154 which permitted reopening of discovery for good cause shown. *See* 478 F.Supp. at 948. Good cause shown is expressly stated therein to include late production of documents, thus this excuse is unavailing. Similarly, the memos are not admissible as statements against interest under Rule 804(b)(3) since there has been no showing that their author, whoever that may be, was conscious that they were against his interest, or had any reason whatever to think so. Neither are the documents admissions of MEI. We do not know the identity, hence the authority or scope of employment of the writer of the documents; indeed, we do not know if he was a Matsushita employee.[135] Thus we cannot say that any Matsushita employee made any statement or assertion.[136]

[134] We do not, however, rely upon the "custodian" requirement. See Part II.E.3, *supra*.

[135] Plaintiffs make much of a Matsushita interrogatory answer which states that MEI "believes" that from time to time MEI employees made notes of TV Export Council Meetings. P.T.O. 275, pp. 156-65. That, however, does not link the documents in question to Matsushita. Again, the plaintiffs rely on speculation rather than the careful laying of foundation.

[136] We shall not deal separately with DSS 1035, which is the same type of document as DSS's 1030-34 except that it was produced by MELCO instead of Matsushita. Again, we do not know who authored the document, the source of his knowledge, the method of preparation of the document, et cetera. It suffers from the same vices as DSS's 1030-34 and the diaries and is inadmissible under 803(6), 804(b)(3), 803(24) and 801(d)(2) for the same reasons. This is still another document for which plaintiffs, despite the availability for depositions of persons with knowledge, made no attempt to lay foundation.

DSS 1036 is also a memo purportedly reporting events transpiring at a TV Export Council meeting. Unlike DSS 1030, 1035, DSS 1036 is asserted by plaintiffs to have been authored by an *identifiable* person (Mr. Kumano) who attended the meeting which was the subject matter of the memorandum. We will assume authenticity. However, the status of DSS 1036 under F.R.E. 803(6), 804(b)(3) and 803(24) is precisely the same as DSS's 1030-1034; it does not pass muster and for the same reasons. We note too that the supposed author of DSS 1036, Mr. Kumano, is not only alive and well and has always been available for depositions, but, according to the representation of Melco's counsel, he even speaks fluent English! While it is possible to infer that DSS 1036 was written by a Melco employee, Mr. Kumano or someone else, it is not an admission of Melco for the same reason as in the case of the diaries.

XV. *Conclusion*

The foregoing represents our evidentiary rulings on disputed issues relating to the critical documents generated in Japan. We may consider other Japan-generated documents in our opinion on the motion for summary judgment on plaintiffs' conspiracy claims. The legal principles we have enunciated herein will also be applied in that opinion to additional documents. Because this opinion, which will be filed of record, memorializes a plethora of orders as to the admissibility of various documents, we need not append a formal Order hereto.

ZENITH RADIO CORPORATION,
Plaintiff,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Defendants.

NATIONAL UNION ELECTRIC CORPORATION,
Plaintiff,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Defendants.

In re JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION.

Civ. A. Nos. 74-2451, 74-3247.
MDL 189.

United States District Court,
E. D. Pennsylvania.

Dec. 10, 1980.
As Amended Feb. 19, 1981

Blank, Rome, Comisky & McCauley by Edwin P. Rome, William H. Roberts, John Hardin Young, Arnold I. Kalman, Kathleen H. Larkin, Norman E. Greenspan, Lawrence S. Bauman, Philadelphia, Pa., for Zenith Radio Corporation and National Union Electric Corporation, plaintiffs.

Philip J. Curtis, John Borst, Jr., Glenview Ill., for Zenith Radio Corporation, plaintiff.

Mudge, Rose, Guthrie & Alexander by Donald J. Zoeller, John P. Hederman, Thomas P. Lynch, Howard C. Crystal, Robert A. Jaffe, Shelly B. O'Neill, Mark K. Neville, Jr., New York City, Drinker, Biddle & Reath by Patrick T. Ryan, Philadelphia, Pa., for Tokyo Shibaura Elec. Co., Ltd. and Toshiba America, Inc., defendants; defense coordinating counsel.

Duane, Morris & Heckscher by Henry T. Reath, Terry R. Broderick, Philadelphia, Pa., Crummy, Del Deo, Dolan & Purcell by John T. Dolan, Arnold B. Calmann, Newark, N.J., Baker & McKenzie by Hoken S. Seki, Thomas E. Johnson, Chicago, Ill., for Mitsubishi Electric Corporation and Melco Sales, Inc.

Reid & Priest by Charles F. Schirmeister, Robert J. Lynch, New York City, L. Peter Farkas, Washington, D.C., for Mitsubishi Corporation and Mitsubishi International Corporation, defendants.

Weil, Gotshal & Manges by Ira M. Millstein, A. Paul Victor, Joel B. Harris, Kevin P. Hughes, Robert K. Hood, H. Adam Prussin, Harry M. Davidow, Jeffrey L. Kessler, Stuart Peim, Lenore Liberman, Gayle E. Hanlon, Makoto Matsuo, New York City, Morgan, Lewis & Bockius by Raymond T. Cullen, Philadelphia, Pa., for Matsushita Elec. Indus. Co., Inc., Matsushita Elec. Corp. of America, Matsushita Electronics Corp., Matsushita Elec. Trading Co., and Quasar Electronics Corp., defendants.

Metzger, Shadyac & Schwarz by Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Stephen P. Murphy, William B. T. Mock, Jr.; Tanaka, Walders & Ritger by Lawrence R. Walders, B. Jenkins Middleton, Washington, D.C., Hunt, Kerr, Bloom & Hitchner by Charles J. Bloom, Philadelphia Pa., for Hitachi, Ltd., Hitachi Sales Corporation of America, and Hitachi Kaden Hanbai Kabushiki Kaisha, defendants.

Wender, Murase & White by Peter J. Gartland, Gene Yukio Matsuo, Peter A. Dankin, Lance Gotthoffer, New York City, Dechert, Price & Rhoads, Philadelphia, Pa., for Sharp Corporation and Sharp Electronics Corporation, defendants.

Whitman & Ransom by Patrick H. Sullivan, Dugald C. Brown, James S. Morris, Kevin R. Keating, Michael S. Press, New York City, Hunt, Kerr, Bloom & Hitchner by Charles J. Bloom, Philadelphia Pa., for Sanyo Elec., Inc., Sanyo Elec. Co., Ltd., Sanyo Elec. Trading Co., Ltd., and Sanyo Manufacturing Corporation, defendants.

Arnstein, Gluck, Weitzenfeld & Minow by Louis A. Lehr, Jr., Stanley M. Lipnick, John L. Ropiequet, Chicago, Ill., for Sears, Roebuck & Co., defendant.

Rosenman, Colin, Freund, Lewis & Cohen by Asa D. Sokolow, Renee J. Roberts, Marc Rowin, Kaye, Scholer, Fierman, Hays & Handler by Joshua F. Greenberg, New York City, Wolf, Block, Schorr & Solis-Cohen by Franklin Poul, Philadelphia, Pa., for Sony Corp. and Sony Corp. of America, defendants.

Kirkland & Ellis by Thomas P. Coffey, E. Houston Harsha, Karl F. Nygren, Chicago, Ill., for Motorola, Inc., defendant.

OPINION AND ORDER

(Admissibility of Expert Testimony)
Pretrial Order No. 301

EDWARD R. BECKER, District Judge.

TABLE OF CONTENTS

I. *Preliminary Statement*

This is the third and last in a series of opinions addressing evidentiary issues which were the subject of extensive pretrial evidentiary hearings in this complex antitrust litigation, the scope of which has been amply set forth elsewhere.[1] We address herein the admissibility under Article VII of the Federal Rules of Evidence (F.R.E.) of the critical opinions expressed in five compendious reports, totalling some 2700 pages, submitted by plaintiffs' expert witnesses.[2] The admissibility of all of these opinions is vigorously attacked by defendants. The reports, which set forth the opinions to which the experts are prepared to testify at trial and the bases therefor, were required by pretrial order no. 154, the comprehensive case management order that governs this litigation.[3]

[1] The factual background of the litigation is described in the first of our parallel series of opinions addressing various motions for summary judgment. That first opinion served as an introduction to the summary judgment motions and dealt with the question of subject matter jurisdiction. *See Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F.Supp. 1161; 1164-67 (E.D.Pa. 1980). The anatomy of the pretrial evidentiary hearings was described in the first opinion in the evidentiary, as opposed to substantive law, series, which also addresses the summary judgment motions. *See* Opinion (Admissibility of Public Records and Reports), Pretrial Order No. 283, 505 F.Supp. 1125, at 1136-1139 (1980). Further background is provided by the second opinion in our evidentiary trilogy. *See* Opinion (Admissibility of Materials Relating to Activities in Japan), Pretrial Order No. 295 (Sept. 29, 1980). These opinions will hereinafter be referred to as the Public Records Opinion and the Japanese Materials Evidentiary Opinion, respectively.

[2] At our request, in order to facilitate consideration of the expert reports, each expert has provided a summary of the primary opinions to which he would testify. Although plaintiffs maintain that a summary cannot effectively portray the scope of the expert's proposed testimony, we find the summaries helpful, and we shall utilize them as a vehicle for our analysis when appropriate.

[3] Pretrial Order 154 is published as an appendix to our opinion addressed to the necessity for a jury trial. *See Zenith Radio Corp.* v. *Matsushita Elec. Ind. Co.*, 478 F.Supp. 889, 948 (E.D.Pa. 1979). While the jury trial opinion was subsequently vacated and remanded, 631 F.2d 1069 (3rd Cir. 1980), PTO 154 has not yet been the subject of appellate review.

The reports at issue are: (1) "Economic Study of the Japanese Television Industry," by Dr. Horace J. DePodwin, Dr. David Schwartzman, and Marcio Teixeira of Horace J. DePodwin Associates, Inc., an economic consulting firm (the DePodwin Report); (2) "The Pervasive Use of Collusive and Company Group *(Keiretsu)* Activities in Achieving the Rapid Increase of Japanese Exports of Television Receivers to the United States," by Professor Kozo Yamamura, Chairman, Japan Studies Program and Professor of Economics and East Asian Studies at the University of Washington (the Yamamura Report); (3) "Economic Analysis of Evidence Relating to Japanese Electronic Products Antitrust Litigation," by Stanley Nehmer of Economic Consulting Services, Inc. (the Nehmer Report); (4) "The Impact of Japanese Financial and Employment Practices on Japanese Production, Marketing, and Price Behavior," by Prof. Gary R. Saxonhouse, Professor of Economics, University of Michigan (the Saxonhouse Report); and (5) "Vertical Restraint by Japanese Television Manufacturers: Anticompetitive Effects," by Professor John Owen Haley, Associate Professor of Law at the University of Washington (the Haley Report).[4]

While defendants' objections to the opinions expressed in these reports implicate a number of evidentiary issues, there are two critical overriding questions. The first relates to F.R.E. 703: we are asked to engage in a line drawing exercise to define what materials, although inadmissible in evidence, are encompassed within those "of a type reasonably relied upon by experts in the particular field." While F.R.E. 703

[4] Five additional expert reports referenced in plaintiffs' final pretrial statement, filed with preclusionary effect pursuant to the provisions of pretrial order no. 154, *see* 478 F.Supp. at 949-50, were not the subject of dispute during the pretrial evidentiary hearings and will not be addressed herein. These reports are an opinion of Milton L. Davies, Certified Public Accountant; an opinion with attachments by Morris J. Cohen & Co., Certified Public Accountant; a report of Walter Lukas, Consulting Engineer; a report of Karl Horn and Vito Brugliera, of Zenith Radio Corporation; and an opinion by the Japanese law firm of Braun, Moriya, Hoashi & Kubota concerning the Japanese commodity tax law.

permits an expert to base his opinion upon materials which would otherwise be inadmissible, it is not clear that the rule cognizes an expert's reliance upon materials which have been independently excluded from evidence by the court by reason of irrelevance or inability to meet one of the hearsay exceptions, because of untrustworthiness or otherwise. Many of the materials which underlie the opinions here under consideration have in fact been ruled inadmissible in our two previous evidentiary opinions. In addition, some of the experts have based portions of their testimony upon advocatory documents such as plaintiffs' Preliminary Pretrial Memorandum, a document of plainly questionable evidentiary reliability. Defendants maintain that such materials may not form the basis for an expert opinion.

Plaintiffs respond that F.R.E. 703 plainly permits an expert's reliance upon inadmissible evidence in forming his opinion, citing caselaw which explains that one facet of an expert witness's expertise is his ability to sift reliable from unreliable information and to analyze the information before him with full understanding of the extent of its validity. In addition, plaintiffs' experts have submitted affidavits certifying that the information upon which they relied in preparing their reports was of a type generally relied upon by experts in their respective fields.

The second critical issue, which relates to F.R.E. 702, is whether, notwithstanding the provision of F.R.E. 704 permitting an expert witness to testify to an opinion embracing an ultimate issue, the "helpfulness" and "specialized knowledge" requirements of F.R.E. 702 preclude an economist from drawing an inference of the existence of a conspiracy based upon his analysis of evidence in the case coupled with his knowledge of treatises describing the practices and patterns of cartels. Defendants contend that plaintiffs' expert reports are not the business of economists, but of "conspiracyologists": that the experts have strayed beyond their respective spheres of expertise and have invaded the province of the jury by drawing factual conclusions based upon the same evidence

which the jury has under consideration. This, suggest defendants, is "lay testimony in experts' clothes," and is impermissible "oath-helping." A related issue is the extent to which the court may consider whether inferences drawn by experts are logical ones, thus excluding expert opinion which the court determines to be illogical (or unreliable), or whether such questions go to the issue not of admissibility but of the weight to be accorded the opinion by the trier of fact. Plaintiffs respond that their experts, with their vast stores of knowledge of economic behavior, are uniquely suited to assist the jury in understanding the evidence before it, and that the conclusion of the existence of a conspiracy is rooted in sound economic theory, plainly within the areas of expertise of these witnesses.

Defendants raise a number of additional objections. They claim that great chunks of the experts' reports are entirely irrelevant; they further suggest that even if the reports were deemed to have some minimal probative force, the fact that permissible materials are inextricably interwoven with highly inflammatory, conclusory rhetoric renders them too prejudicial to be admissible by reason of F.R.E. 403. Finally, they argue that Rule 404(a), regarding the inadmissibility of character evidence, prohibits plaintiffs' experts, principally Professor Yamamura, from implying that the Japanese have a "propensity to conspire." We confine ourselves in this opinion to consideration only of the Article VII objections; the relevancy-based objections will be considered in conjunction with our forthcoming opinion disposing of the overall conspiracy summary judgment motions.

Plaintiffs urge that many of these problems would be mooted in the actual trial context, with the give and take of question and answer, and that our consideration of the admissibility of the expert opinions as memorialized in written reports, which were intended not as exhibits to be independently admissible, but as descriptions of the opinions to which they would testify, is premature. We disagree. It is true that some phrasings of an

expert opinion might be admissible while others might not be,[5] but the two overriding issues outlined above are properly before us and must be addressed at this time if we are to consider the expert opinions in conjunction with (1) our decision on the pending motions for summary judgment on plaintiffs' conspiracy claims; and (2) our preliminary determination pursuant to F.R.E. 104(a) of the existence *vel non* of sufficient independent evidence of conspiracy to permit plaintiffs' evidence to be admissible against alleged coconspirators under F.R.E. 801(d)(2)(E).

The propriety of our consideration of the expert opinions is clear. First, the provisions of Pretrial Order No. 154 requiring the filing of expert reports are plainly within the case management powers of the court conferred by F.R.Civ.P. 16. Indeed, in a complex case such provisions are salutary and to be encouraged. *See Manual for Complex Litigation* § 2.60. They are especially in order in a case such as this in which there have been monumental discovery problems and in which the court has perceived a pressing need for clarification of plaintiffs' case. Second, plaintiffs themselves wish us to consider the expert opinions, believing them to add substance to their case. Alternatively, consideration of the opinions is necessitated by the fact that plaintiffs' case, or at least a significant portion thereof, is at risk by virtue of the evidentiary rulings made in the first two opinions in this series, and plaintiffs have in effect attempted an "end run" around these rulings by offering expert opinions explicitly based upon the excluded material on the grounds that, although inadmissible, it is nonetheless of a type "reasonably relied upon" by experts in the field.

---

[5] Obviously, inflammatory rhetoric and highly conclusory statements, which appear throughout these reports, are never appropriate expert testimony. We understand plaintiffs to agree, for they have steadfastly adhered to the position that questions put to the expert witnesses at trial, as well as the answers by the witnesses, would be carefully framed, and rephrased when necessary, to avoid objection. *See, e.g.*, Pretrial Order No. 281 at 117. We do not find it difficult to ignore the rhetoric and focus instead on the gist of the actual opinions offered.

We note that, in a surprising show of unanimity, both plaintiffs and defendants approach the expert reports as single, complete units. Defendants argue that, because many of the opinions contained in the reports are, in their submission, inadmissible, the entire reports must be excluded. Plaintiffs, similarly, appear to imply that the entire reports may be considered if parts are acceptable. We disagree with this approach. Instead, we shall analyze the reports and extract from them (aided by the summaries provided by the experts) those expressions of opinion which are of significance to plaintiffs' case, making individualized rulings as to admissibility.

Before turning to a detailed analysis of each expert report, we will outline the basic legal principles to be applied.

II. *The Applicable Legal Principles*

A. *Rule 703*

1. *The Rule and its Roots*

Federal Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The Rule represents a departure from the common law tradition of restricting the bases for expert testimony to (1) information obtained by the expert's personal knowledge; (2) the hypothetical question, which assumes facts reasonably supported by the evidence; and (3) in some jurisdictions, testimony previously elicited during the trial, with the expert instructed to assume the truth of the evidence and to base his conclusions thereon. *See generally* 3 *Weinstein's Evidence* ¶ 703[01], at 703-4. All of these common law bases remain permissible under Rule 703, but a significant factor has been added: an expert may now testify to an opinion he has formed

based on information which is not necessarily admissible into evidence, if that information is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

That provision grew out of an exception to the hearsay rule which had been employed in a number of jurisdictions. The basis for that hearsay exception was explained by the Fifth Circuit in a case decided while the proposed new federal rules were pending:

> Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion as to value even though his opinion is based in part or solely upon hearsay sources. . . . The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.

United States v. *Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971), *cert. denied*, 405 U.S. 954, 92 S.Ct. 1168, 31 L.Ed.2d 231 (1972) (citations and footnote omitted). The court noted that the proposed F.R.E. 703 was in accord.

The hearsay exception which evolved into Rule 703 was originally restricted to a limited group of cases. Perhaps the most frequent application was to permit a physician to testify based in part upon information received from nurses, patients, radiologists, pathologists, and so forth. This is the only ex-

ample, in fact, offered by the Advisory Committee.[6] *See, e.g.*, *Birdsell* v. *United States*, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366 (1965); *Jenkins* v.

---

[6] The Advisory Committee Note reads:

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand.L.Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, *supra*, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co.* v. *Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963). See also Blum et al., The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, 24 U.Chi.L.Rev. 1 (1956); Bonynge, Trademark Surveys and Techniques and Their Use in Litigation, 48 A.B.A.J. 329 (1962); Zeisel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322 (1960); Annot., 76 A.L.R.2d 919.

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts

United States, 307 F.2d 637 (D.C.Cir.1962); *cf.* F.R.E. 803(4) (the hearsay exception for statements made for purposes of medical diagnosis or treatment).

A second class of cases in which federal courts have permitted expert testimony based upon hearsay information is that involving land valuation based upon comparable sales. *See, e.g., United States v. 1,516.90 Acres of Land*, 405 F.2d 913 (6th Cir. 1968), *cert. denied*, 395 U.S. 909, 89 S.Ct. 1752, 23 L.Ed.2d 222 (1969); *United States v. 60.14 Acres of Land*, 362 F.2d 660 (3d Cir. 1966). Judge Weinstein suggests that this exception was created out of necessity. 3 *Weinstein's Evidence* ¶ 703[02], at 703-12. A third category, related to the second, consists of a few cases in which courts permitted experts to testify as to valuation of businesses based upon diverse background sources, including accounting data. *See, e.g., Standard Oil Co. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958). To the extent that cases permitting expert testimony based upon hearsay information fall into one of these traditional mainstream categories, Rule 703 does not represent the radical departure that some critics had warned against. *See* 3 *Weinstein's Evidence* § 703[02], at 703-9. Nonetheless, given the potential for open-ended receipt into evidence of testimony based upon information of questionable reliability, it is plain that some limitation on the types of information upon which an expert may rely is essential. This possible problem was recognized by the Advisory Committee, which noted:

> If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the

in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied. See Comment, Cal.Law Rev. Comm'n. Recommendation Proposing an Evidence Code 148-150 (1965).

> point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.

See the entire Advisory Committee note, quoted at note 6, *supra*.

Because of the context out of which the Rule arose, (*i.e.*, as an exception to the hearsay rule, *see* pp. 1322-1323, *supra*), the cases which anticipated it can be helpful in determining the practical application of the requirement that an expert testify only to opinions based upon information on which he has placed "reasonable reliance." In *United States v. Aluminum Co. of America*, 35 F.Supp. 820, 823 (S.D.N.Y.1940), Judge Caffey, in allowing expert testimony concerning the results of test drills for bauxite deposits despite a lack of personal involvement in the drilling, explained:

> Opinion testimony by an acceptable expert resting wholly or partly on information, oral or documentary, recited by him as gathered from others, which is trustworthy and which is practically unobtainable by other means, is competent even though the firsthand sources from which the information came be not produced in court. With respect to the matter, in what impresses me as unambiguous authoritative judicial language, it has been said that "the requisites of an exception of the hearsay rule" are "necessity and circumstantial guaranty of trustworthiness." *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 2 Cir. 207 F. 515, 518. [L. Hand, J.] In other words, when hearsay evidence is offered it is admissible if resort to it be essential in order to discover the truth and if the surroundings persuade the court that the information adduced by the expert as a basis of his opinion is reliable.

The "necessity" element required by Judges Caffey and Hand, drawn originally from 3 *Wigmore on Evidence* §§ 1421-22 and 1690 (1st ed. 1913), *see Alcoa, supra*, at 823, was abandoned by the Ninth Circuit in *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958). In that case, which permitted the testimony of an expert regarding the valuation of a business based upon a variety of background

sources, the court focused on the reliability of the underlying information:

> It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay, in so far as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. *It is for the trial court to determine*, in the exercise of its discretion, *whether the expert's sources of information are sufficiently reliable* to warrant reception of the opinion. If the court so finds, the opinion may be expressed. If the opinion is received, the court may, in its discretion, allow the expert to reveal to the jury the information gained during such investigations and studies. Wide latitude in cross-examination should be allowed.

Id. at 222 (emphasis supplied) (footnote omitted).

Thus it is plain that the "reasonable reliance" requirement of F.R.E. 703 grew from and is cognate with the requirement that information admitted as an exception to the hearsay rule have some circumstantial degree of reliability or trustworthiness. We see the "reasonable reliance" language built into Rule 703 as essentially a shorthand translation of the hearsay rules' trustworthiness element. However, because the evidence before us is far outside the traditional mainstream categories of cases described *supra*, it requires a rigorous application of the general principles enunciated in the cases and by the Advisory Committee.

2. *The Parties' Rule 703 Contentions*

Given the text of Rule 703, the parties to this litigation agree, as they must, that the information which undergirds an expert's opinion need not be admissible into evidence, and that hearsay can be a permissible basis for opinion testimony. Their dispute centers instead upon the extent to which such information may be used and the degree of trustworthiness it must attain. As to trustworthiness, plaintiffs argue, in essence, that

an expert may testify to anything related to his field of expertise, and that it is the expert who is best qualified to assess whether the materials which he has utilized are the subject of reasonable professional reliance and hence are sufficiently trustworthy to support an opinion. Defendants counter that the question of "reasonable reliance" is one for judicial determination, and that the court must recognize limits to the amount and type of inadmissible data upon which an expert may rely, making trustworthiness determinations when necessary or appropriate.

Putting their Rule 703 position in the best possible light, plaintiffs point to numerous economic treatises, studies, and articles cited by their experts—presumably admissible under the 803(18) exception to the hearsay rule—which in their submission suffice to render their experts' opinions based in part thereon admissible. Defendants do not quibble over those sources; they point out, however, that in addition to such legitimate bases of information, plaintiffs' experts have canvassed enormous quantities of material proffered in this litigation, much of which has been ruled inadmissible on various grounds in our two previous evidentiary opinions.[7] Furthermore, the experts had access to, and often cited in their reports, various advocatory documents, such as plaintiffs' preliminary pretrial memorandum (PPTM) and briefs in both this litigation and in other lawsuits.[8] The use of inadmissible or questionable documents was so pervasive, and so many of the experts' assumptions were based wholly on such documents, defendants argue, that their entire opinions are necessarily suspect. Thus in defendants' submission plaintiffs are attempting to import into evidence via the "back door" of their experts'

[7] This canvass forms the basis of defendants' major objection under Rule 702 to the effect that the experts, by sifting through the evidence in the case and forming conclusions based thereon, are not assisting the jury but rather usurping its function. This argument will be discussed *infra*.

[8] *See, e.g.*, the Nehmer Report at IV-14; Yamamura Report at 128; DePodwin Report at II-20, II-31, *et seq.*

testimony the very evidence already ruled inadmissible, for the underlying basis for the opinion would inevitably be revealed, if not on direct examination, at least upon cross-examination by defendants.[9]

In sum, the primary questions which confront us under Rule 703 are: (1) the identity— the expert or the court—of the ultimate decisionmaker with regard to reasonable reliance on underlying information; and (2) if it is the court, the standards to be used in assessing "reasonable reliance" in a given case.

3. *Identity of Decisionmaker Regarding Reasonable Reliance on Underlying Bases for Opinion Testimony*

As to the first question, our study of the rule and the cases leads us to accept defendants' position. While it is true that some courts have used relatively broad language in describing an expert's ability to choose materials upon which to base his opinion, *see e.g., United States* v. *Sims*, 514 F.2d 147 (9th Cir.), *cert. denied*, 423 U.S. 845, 96 S.Ct. 83, 46 L.Ed.2d 66 (1975),[10] it is nonetheless plain that courts routinely make the decision whether a particular expert has reasonably based his opinions upon trustworthy underpinnings. *See, e.g., Punnett* v. *Carter*, 621 F.2d 578 (3d Cir. 1980); *United States* v. *Genser*, 582 F.2d 292 (3d Cir. 1978), *cert. denied*, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979); *Pittsburgh Press Club* v. *United States*, 579 F.2d 751 (3d Cir. 1978). *Accord, S. Saltzburg & K. Redden, Federal Rules of Evidence Manual* 426 (2d ed. 1977). The fact that a court may permit certain testimony, finding that a

[9] *Cf.* F.R.E. 705, which provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

[10] In *Sims*, the court permitted a psychiatrist to testify regarding defendant's sanity based in part upon conversations with government attorneys and I.R.S. agents, saying: "[y]ears of experience teach the expert to separate the wheat from the chaff and to use only those relied upon by similar experts in arriving at sound opinions on the subject." 514 F.2d at 149.

particular expert's opinion was reasonably based, does not imply that the court does not inquire into the trustworthiness of the underlying data. The Advisory Committee, *see* note 6, *supra*, plainly contemplated that the trial court, as part of its admissibility judgment, would inquire into an expert's reasonable reliance. Furthermore, because the court under F.R.E. 702 must assess a witness's qualification in order to permit his testimony, it follows that when an expert deviates from his area of expertise by basing his opinion upon untrustworthy matters, that assessment must similarly be within the province of the court.[11]

We view the question of reasonable reliance to be a preliminary determination of admissibility under F.R.E. 104(a), analogous to the question of qualification of the witness. We do not consider the affidavits submitted by plaintiffs' experts to the effect that the material upon which they relied in forming their opinions is of a type generally relied upon by experts in their respective fields as in any way determinative of the issue. We deal in this opinion not with a Rule 56 motion, on which the affidavits could potentially be viewed as attempts to create a material factual issue; rather, we have before us a pretrial evidentiary objection under F.R.E. 104(a), pursuant to which we must sift the relevant factors in arriving at a conclusion. We will thus undertake an independent analysis of the trustworthiness of the data underlying the expert opinions in this litigation.

Our conclusion that the judge must be the ultimate arbiter of the reliability of materials upon which an expert witness bases his opinion is congruent with the principles developed previously in this litigation for the admission of public records and reports under F.R.E. 803(8)(C). *See* Public Records Opinion, 505 F.Supp. 1125, at 1143-1150. Moreover, any other result would open the door to the wholesale admission of otherwise

[11] Indeed, the court's assessment of the qualifications of an expert witness, which results in a determination of the witness's ability to give certain types of testimony, can be seen to include a determination under Rule 703.

inadmissible evidence before the jury, not, to be sure, as probative of the truth, but to explain the basis of the expert's opinion. Such a result could not have been contemplated by the rule.[12] We turn then to the standards to be employed in making the Rule 703 judgment.

4. *Standards for Assessing Reasonable Reliance*

The case law under F.R.E. 703 is not particularly enlightening on the subject of standards to be employed in assessing an expert's reliance. Defendants do not dispute that the cases cited by plaintiffs were correctly decided. *United States* v. *Genser*, 582 F.2d 292 (3d Cir. 1978), *cert. denied*, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979), for example, permitted an I.R.S. agent to testify in a criminal tax evasion conspiracy case based in part upon his own examination of defendants' records and in part upon an audit conducted by other agents. Similarly, the court in *Bauman* v. *Centex Corp.*, 611 F.2d 1115 (5th Cir. 1980), a securities fraud action, admitted the testimony of an accountant who based his opinion on information gleaned from defendants' files and financial statements, his own background and experience as a CPA and management consultant, and "all available information in [the University of Houston] library." These cases are within the mainstream of the Rule as it was conceived by the Advisory Committee, described *supra*. Similarly, *United States* v. *Williams*, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954, 92 S.Ct 1168, 31 L.Ed.2d 231 (1972) (*en banc*), discussed *supra* at 1322, dealt with the valuation of oil and gas properties based upon various records of, *inter alia*, the companies' prices, operating costs, well records, and past production performance. This extension is a logical outgrowth of the traditional exception to the hearsay rule for expert opinion concerning land valuation.

[12] We note that virtually the same result could be reached under F.R.E. 403 by excluding the expert testimony on the grounds that admission of the underlying basis, when otherwise inadmissible, would amount to unfair prejudice. Rule 403 might be an alternate basis for exclusion of a number of expert opinions addressed (and excluded) herein, but we shall not reach it.

See United States v. *60.14 Acres of Land*, 362 F.2d 660 (3d Cir. 1966); *Standard Oil Co.* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958).[13]

All of these cases present a picture of an expert testifying to an opinion formed on the basis of a number of sources, some of them hearsay, but all of them either intimately connected with his immediate sphere of expertise, such as in the co-worker audit of the *Genser* case, or upon unquestionably permissible documentary research materials.[14] In none of these cases were the courts faced with the question facing us, whether matters offered into evidence but excluded by the court may properly serve as fodder for an expert's opinion.

The Advisory Committee note to Rule 703 offers little more guidance, pointing out merely that the requirement of reasonable reliance by experts in the field would prevent undue expansion of the rule. *See* note 7 *supra*. By way of example, the Committee points out that an "accidentologist" who attempted to testify as to the point of impact of a collision would not meet the "reasonable reliance" requirement if he based his testimony on the statements of bystanders. Defendants, as we have noted, suggest that the experts in this case are "conspira-

[13] Plaintiffs also cite the equally uncontroversial mainstream cases of *United States* v. *Golden*, 532 F.2d 1244 (9th Cir.), *cert. denied*, 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976), in which a special agent was permitted to testify to the market price of heroin based upon information received from other narcotics agents; *Frazier* v. *Continental Oil Co.*, 568 F.2d 378 (5th Cir. 1978), which found it appropriate for a civil engineer to testify as to an industry's standard of care based in part upon publications such as safety codes; and *United States* v. *Sims*, *supra* note 10.

[14] Defendants have suggested that the underlying information in these traditional cases is at least potentially admissible. The exception to permit an expert's reliance on such hearsay can then be seen as a matter of convenience to avoid the presentation of authenticating witnesses. *See* transcript, PTO 281, at 112-13. There may be merit in this suggestion.

cyologists" attempting to testify in a similarly impermissible manner."[14]

Turning then to cases cited by defendants, *Pittsburgh Press Club* v. *United States*, 579 F.2d 751 (3d Cir. 1978), could conceivably be read as holding that if the foundation for expert testimony is held to be unreliable, the expert testimony is held to be unreliable, the expert testimony itself is *a fortiori* excludable. *Pittsburgh Press* involved a survey, which was excluded because its methodology was unsound — "neither objective, scientific, nor impartial." 579 F.2d at 759. With regard to the testimony of an economist/statistician and an accountant, the court continued:

> The survey — which we have just held to be inadmissible — was the foundation for certain of the plaintiff's exhibits, and for much of Dr. Kenkel's testimony. Since this second survey should have been excluded, it follows that the evidence based on the survey should have been excluded as well. In particular, Dr. Kenkel's determinations as to amount of outside income and the percentage of gross receipts attributable to outside affairs could not have been admitted into evidence once the foundation for that testimony was excluded. For the same reason, the exhibits prepared by PPC's accountants and the testimony of accountant Di Mario, respecting the Club's net profits attributable to outside business, should not have been admitted into evidence.

Id. at 760.

This language — and it is from a Third Circuit opinion — is extremely supportive of defendants' position, and corroborates our thesis that 703's roots are in the hearsay notions of trustworthiness and reliability. However, we decline to read the *Pittsburgh Press* language so broadly as to automatically exclude from an expert's consideration all matters which have

[14] We deem the Advisory Committee to have used the term "accidentologist" to mean a qualified accident reconstructionist. To the extent, however, that the term may be interpreted to convey opprobrium, it may have the unfortunate result of creating confusion between Rules 702 and 703.

been excluded from evidence at trial. In *Pittsburgh Press*, the expert economist/statistician had participated in the preparation and execution of the survey found to be unreliable. His calculations and exhibits, as well as those of the accounting expert, were extrapolated virtually entirely from that unreliable survey. But while the special factual context and the lack of any specific language make us skeptical that the Third Circuit intended to create any *per se* rule of exclusion in *Pittsburgh Press*, the case does plainly demonstrate that certain materials, excludable at trial because of unreliability, are impermissible bases for an expert's opinion, despite the fact that the expert himself may have deemed them reliable.[15]

Pittsburgh Press is the only case we have found which deals directly with an opinion based upon information actually tendered as evidence at trial. The cases cited by plaintiff and discussed *supra* involved identifiable bases of information, concededly hearsay for the most part, which were never independently proffered in evidence. A number of cases urged upon us by defendants deal with a different class of expert opinion altogether — cases in which the expert opinion was excluded because it was based upon faulty assumptions or unfounded conclusions. *See Punnett* v. *Carter*, 621 F.2d 578

[15] Plaintiffs have suggested that this inquiry amounts to an unfair retroactive application of our evidentiary rulings, but that suggestion is plainly without merit. First, plaintiffs' counsel, who supplied the experts with the bulk of the materials upon which they relied, knew that those materials would be subject to evidentiary review, for the materials had already been challenged in submissions by defendants. Moreover, since plaintiffs eschewed the taking of depositions to establish evidentiary foundation, they knew, or should have known, that the risk of exclusion was high. But the major reason that this argument lacks merit is because we are not applying our evidentiary rulings retroactively at all. As discussed *supra* in our analysis of F.R.E. 703, our exclusion of certain materials from evidence on trustworthiness grounds is one of a number of factors to be taken into consideration in determining whether the foundation for an expert's opinion is reliable. To suggest that use of this factor constitutes retroactive application of our rulings is to imply that an expert may be given *carte blanche* to decide what materials he may reasonably rely upon, a proposition which we rejected *supra*.

(3d Cir. 1980); *Drayton* v. *Jiffee Chemical Corp.*, 591 F.2d 352 (6th Cir. 1978); *Bryan* v. *John Bean Division*, 566 F.2d 541 (5th Cir. 1978); *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666 (D.C.Cir.1977); *Scheel* v. *Conboy*, 551 F.2d 41 (4th Cir. 1977); *Berguido* v. *Eastern Air Lines, Inc.*, 317 F.2d 628 (3d Cir.), *cert. denied*, 375 U.S. 895, 84 S.Ct. 170, 11 L.Ed.2d 124 (1963); *Tabatchnick* v. *G. D. Searle & Co.*, 67 F.R.D. 49 (D.N.J.1975). The theory of these cases appears to be that a reasonable expert would not rely on unsupported assumptions in forming his opinion, and that an opinion so based must be excluded.

These cases arose in a variety of procedural contexts — some on review of trial proceedings, some on review of summary judgment proceedings, and one (*Punnett* v. *Carter*) on review of denial of a preliminary injunction. It is frequently unclear whether the court is making a judgment as to admissibility, or whether it is deciding whether the expert testimony raises a material factual issue under F.R.Civ.P. 56 (although that would have to result from admissible evidence, *see* Rule 56), or whether it is making a judgment on an abuse of discretion standard. Even when the issue is plainly admissibility, it is not always clear what rule is used as the basis for the court's decision. For example, as alternative theories, some courts deem an opinion based on unsupported assumptions to be unhelpful to the jury under F.R.E. 702, discussed *infra*, or to be so misleading as to be excludable under F.R.E. 403, instead of being unreliably based under F.R.E. 703. In any event, all of the above-cited cases refuse to countenance expert testimony based upon what the courts determine to be unreasonable assumptions. Despite the variety of procedural contexts and variety of F.R.E. pigeon-holes, they indicate that the assumptions which form the basis for the expert's opinion, as well as the conclusions drawn therefrom, are subject to rigorous examination. We turn to a brief discussion of these cases.

In *Merit Motors*, *supra*, one of the more thoroughly reasoned of the cases cited, plaintiffs had attempted to prove antitrust injury by way of an expert report detailing the "inherent" economic effects of defendant's system. Defendants attacked the expert's theories on their motion for summary judgment, arguing that the theories were "abstract speculation" and that the expert was, by his own admission, unfamiliar with the record of the case. The district court agreed, dismissing the expert's theory "since his opinion [was] unsubstantiated by any evidence in the record." 569 F.2d at 672, *quoting* 417 F.Supp. at 272. On appeal, the D.C. Circuit, in an opinion by J. Skelly Wright, J., affirmed, observing:

> Even Rule 703 requires that the grounds relied on by an expert must be "a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." While appellants claim that Staelin has merely applied "standard economic theory" to "a factual basis which is uncontroverted," it is obvious that [the expert] makes unsupported assumptions about the elasticities of demand in various markets and that he virtually ignores the impact of the dominant forces in the automobile market: General Motors and Ford.

569 F.2d at 673 (footnotes omitted).[16]

Punnett v. *Carter*, *supra*, the most recent Third Circuit discussion of the topic, arose on a motion for a preliminary injunction, and so it is not strictly applicable to the present

[16] *Merit Motors* is also important to this case for its comments regarding the relationship between expert opinion testimony and summary judgment. Bracketing the portion quoted in text, the court stated:

> On appeal appellants attempted to salvage their expert's opinion by relying on cases applying Rule 703 of the Federal Rules of Evidence, adopted in 1975. This rule was intended to broaden the acceptable bases of expert opinion, but it was not intended, as appellants seem to argue, to make summary judgment impossible whenever a party has produced an expert to support its position. . . . To hold that Rule 703 prevents a court from granting summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out of the record than Staelin's theoretical speculation would seriously undermine the policies of Rule 56.

569 F.2d at 672-73 (footnotes omitted). We shall have occasion to discuss this point again when we address the question whether the expert reports create a genuine issue of material fact in our forthcoming opinion addressing defendants' motions for summary judgment as to plaintiffs' conspiracy claims.

litigation. In that case, which requested relief for alleged mutagenic dangers stemming from nuclear testing in Nevada in the 1950's and 1960's, radiation dosage levels were pivotal to a showing of likelihood of success on the merits. After analyzing the expert's testimony, the district court had concluded that the assumptions upon which the expert relied were not supported by the evidence or by the methodology. The Third Circuit upheld the district court's refusal to grant the injunction because of the unconvincing nature of plaintiffs' scientific evidence. There was no reference to the rules of evidence, for admissibility was not at issue. Nonetheless, the case demonstrates a willingness in this circuit to question expert assumptions and to disregard them when appropriate.

In *Berguido* v. *Eastern Air Lines, Inc., supra*, a pre-F.R.E. wrongful death action in this circuit, experts testified to their opinions as to the behavioral character of the plane's pilot (in particular, degree of risk and intent to violate regulations), based upon assumptions presented in a hypothetical question. The assumptions had been drawn from the report of the CAB investigating team, which was in turn based upon calculations by an engineer not before the court. Because it was revealed that the engineer must have made "certain assumptions and choices relative to the physical facts found at the crash scene before he could reach the final computation state," 317 F.2d at 632, and because he was not available for cross-examination to test the basis of his computations, it was held to have been prejudicial error to have permitted the second expert to base his conclusions upon those calculations.

Bryan v. *John Bean Div., supra*, similarly addressed a situation in which the testifying expert relied upon reports of non-testifying experts. The expert in that products liability case had utilized the data reported by another, but had reached a contrary conclusion. The court held that cross-examining counsel's extensive impeachment use of the written conclusions of the previous expert, who did not testify, was impermissible despite F.R.E. 705, although the expert's use of the underlying data was apparently proper. While basing its deci-

sion primarily on lack of trustworthiness, the court noted in passing that the jury's attention could have been drawn to the reports by bringing those experts before the court.

Tabatchnick v. *G D Searle & Co., supra*, refused to permit an expert to testify when he expressed bare conclusions based in part upon "facts" contradicted by the record. *Drayton* v. *Jiffee Chemical Corp., supra*, and *Scheel* v. *Conboy, supra*, both rejected economists' damage calculations as based on unreasonable or speculative assumptions.

We believe these cases to have been soundly decided, but all were decided on their individual factual patterns and none provide us with a conceptual framework for assessing reasonable reliance. Drawing on these cases, on Rule 703 itself, on the Advisory Committee Note, and on the history of the Rule, including the pre-Rules cases, we have concluded that the following factors should guide our determination as to the reasonableness of reliance in cases outside the "mainstream" of Rule 703 as we have explained it:

1. The extent to which the opinion is pervaded or dominated by reliance on materials judicially determined to be inadmissible, on grounds of either relevance or trustworthiness;

2. The extent to which the opinion is dominated or pervaded by reliance upon other untrustworthy materials;

3. The extent to which the expert's assumptions have been shown to be unsupported, speculative, or demonstrably incorrect;

4. The extent to which the materials on which the expert relied are within his immediate sphere of expertise, are of a kind customarily relied upon by experts in his field in forming opinions or inferences on that subject, and are not used only for litigation purposes;

5. The extent to which the expert acknowledges the questionable reliability of the underlying information, thus indicat-

ing that he has taken that factor into consideration in forming his opinion;[17]

6. The extent to which reliance on certain materials, even if otherwise reasonable, may be unreasonable in the peculiar circumstances of the case.

We add that if, for example, an inadmissible document were one of a myriad of sources consulted by an expert, and if it were clear that the expert was cognizant of and took into consideration the questionability of that lone source, the opinion would likely be admissible. If, on the other hand, the expert's opinion is so dominated or pervaded by his reliance on materials which have been excluded for reasons which bear on their reliability, or is rife with similarly unreliable unsupported conclusions, having no support in the record, that opinion must also be excluded. In short, it is a balancing process. We will thus examine the sources of plaintiffs' expert opinions with these factors in mind, and will exclude those portions which prove to be pervaded with reliance upon unreliable sources.

We turn to the issues presented under F.R.E. 702 and 704.

B. *Rules 702 and 704*

The parties are also in sharp dispute over the proper interpretation of Rules 702 and 704. F.R.E. 702, which for the most part codifies existing common law, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The foundation of this basic rule concerning expert testimony is that testimony must be helpful to the jury. As defined by the Advisory Committee, the helpfulness inquiry is " 'whether the untrained layman would be qualified to determine intelligently

[17] We would limit applicability of this criterion to close cases of admissibility. An expert who was a true "hired gun" could always surmount it.

and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.' " *quoting* Ladd, *Expert Testimony*, 5 Vand.L.Rev. 414, 418 (1952). The rule thus expands slightly the practice of most jurisdictions of permitting expert testimony only when the subject matter was otherwise beyond lay comprehension. *See generally* S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 413 (2d ed. 1977). Another expansion from the common law is the final "or otherwise" clause, which permits an expert not only to render an opinion, but, as described by the Advisory Committee, to "give a dissertation or exposition of scientific or other principles relevant to the case" as well. This would leave the trier of fact to apply the principles to the facts as they develop and obviate the need for a hypothetical question. Of course, the dissertation or exposition must still meet the "helpfulness" standard that is central to the rule.

In addition to helpfulness, F.R.E. 702 requires that an expert witness be qualified by scientific, technical, or other specialized knowledge. Without such specialized knowledge, his testimony would not be helpful to the jury. For example, if the expert's qualifications are suspect, he would be no better than the average juror at interpreting matters upon which his expertise is expected to bear. Similarly, if no specialized knowledge is needed, the jury will not be assisted by expert testimony which merely tracks the same analytical process which they as jurors are capable of carrying out.

Under the common law, no witness could testify to matters which would usurp the province of the jury by expressing an opinion on the ultimate issue in the case. Following a growing trend to permit such testimony when it is helpful, the "ultimate issue" rule was abolished for the federal courts in Rule 704:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The framers of the rule had in mind testimony on such questions as sanity, testamentary capacity, intoxication, speed,

and value. *See* Advisory Committee Note to Rule 704. Because of the plain language of the Rule, it cannot be disputed that testimony concerning the ultimate issue in the case is permitted only if otherwise admissible. Ultimate issue testimony which does not assist the trier of fact is not rendered magically admissible by Rule 704; rather, if such testimony is helpful, it is no longer automatically excluded under the common law. Indeed, even helpful ultimate issue testimony is not automatically admissible. As explained by the Advisory Committee:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.

Defendants in this litigation do not dispute that, in an appropriate case, an expert witness may opine on an ultimate issue. They argue, however, that in this instance, plaintiffs' experts have gone beyond the types of testimony contemplated by the Rule and have entered the province of "oath-helping" by merely interpreting the evidence which will be before the factfinder, explaining, in effect, what result should be reached. Plaintiffs counter that testimony on an ultimate issue is plainly admissible and that their experts' specialized knowledge will indeed help the factfinder to interpret the evidence before it. Thus, as we see these arguments, there is no real issue under Rule 704 in this case; instead, we are asked to determine, pursuant to Rule 702, whether (a) these experts' reports do provide "scientific, technical, or other specialized knowledge";[18] and (b) whether that specialized knowledge will

[18] At this time there is no challenge to the professional qualifications of the experts. The question is whether they have utilized that expertise in the preparation of their reports, or whether they have gone beyond the realm of that expertise and drawn impermissible legal conclusions or presented what are in actuality lay interpretations of the documents in the case.

assist the jury, or whether it invades the jury's function and becomes "oath-helping."

Standards for determining whether particular expert testimony will assist the jury have not, to our knowledge (and indeed could not have) been developed with any precision beyond what was described by the Advisory Committee, quoted *supra*. Rather, courts have necessarily approached the question on an *ad hoc* expert-by-expert basis. Nonetheless, the cases which have considered the question are instructive insofar as they define the contours of the types of information which are considered helpful to the trier of fact.

It has been held that it is helpful to a jury for an expert to interpret jargon or methodology peculiar to particular enterprises, and for the expert to form an opinion as to a given defendant's role in the operation based upon evidence in the record. *See United States* v. *Scavo*, 593 F.2d 837 (8th Cir. 1979) (gambling); *United States* v. *Milton*, 555 F.2d 1198 (5th Cir. 1977) (gambling); *United States* v. *Jackson*, 425 F.2d 574 (D.C.Cir. 1970) (pickpockets). Similarly, expert testimony was permitted in *United States* v. *Jenson*, 608 F.2d 1349 (10th Cir. 1979) (securities fraud action), to interpret certain rules of the National Association of Security Dealers, including the effect of these rules on certain computations. Because the rules were the private rules of a self-regulating association, their interpretation was held not to be a legal conclusion within the province of the court, and was helpful to the jury.

On the other hand, expert testimony was excluded in *Marx & Co.* v. *Diners Club, Inc.*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). In that case, also involving securities fraud, an expert on securities law testified as to the legal construction of the contract at the heart of the action, and expressed his opinion as to the reasonableness of defendants' behavior.[19] In ruling that the testimony was

[19] Defendant Diners Club had acquired the assets of plaintiff's company in return for unregistered Diners stock and other consideration pursuant to an agreement which provided that, upon notification from plaintiffs of a desire

erroneously received, the Second Circuit took the time to discuss generally the types of expert opinion appropriate in a complex case. In *Marx* the expert would have been competent to explain to the jury, under the "or otherwise" clause of F.R.E. 702, the customary practices followed in registering an issue of stock with the SEC. He could not testify, however, as to the legal consequences he believed could be derived from an acquisition contract, for it is for the court, not a witness, to instruct the jury as to applicable legal principles. Furthermore, the expert was qualified only as an expert in securities regulation; contract law was held to be outside his area of expertise. Perhaps most damaging, the expert had testified that defendant had no legal excuse for nonperformance of the contract, basing his conclusion on his examinaton of documents and correspondence which were before the court. The Second Circuit held this testimony to be superfluous, and continued:

> As Professor McCormick notes, such testimony "amounts to no more than an expression of the [witness'] general belief as to how the case should be decided." *McCormick on Evidence*, § 12 at 26-27. The admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case. *McCormick on Evidence*, § 12, at 27. It is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum.

550 F.2d at 510. Finally, the court warned against allowing jury trials in intricate cases to become "battles of paid advocates posing as experts on the respective sides concerning matters of domestic law." *Id.* at 511.

In *United States* v. *Fosher*, 590 F.2d 381 (1st Cir. 1979), a criminal action, defendant sought to introduce expert testimony concerning the unreliability of eye-witness testimony.

therefor, Diners would file a registration statement for the stock and would use its "best efforts" to cause the registration statement to become effective. Plaintiffs contended, *inter alia*, that defendants had failed to use their best efforts to make the registration effective as part of a manipulative scheme to prevent plaintiffs from offering their shares for sale, to plaintiffs' detriment.

The Court upheld the trial court's refusal to permit the testimony, pointing out that issues of credibility are traditionally jury matters, and that a jury, aided by the traditional cautionary instruction, is perfectly capable of assessing an eyewitness's ability to perceive and remember without scientific testimony on matters such as the rate of memory decay. In short, the subject matter was not sufficiently beyond the ken of lay jurors to justify introduction of material of questionable scientific validity with potentially prejudicial effect.

Similarly, the court in *United States* v. *Pacelli*, 521 F.2d 135 (2d Cir. 1975), *cert. denied*, 424 U.S. 911, 96 S.Ct. 1106, 47 L.Ed.2d 314 (1976), refused to permit a psychiatrist to testify that the major prosecution witness was psychopathic and incapable of telling the truth. The testimony would not have been helpful to the jury, which already knew about the witness's bizarre behavior and status as an accomplice. These facts were held to be enough to permit the jury to assess credibility, for even the psychiatrist admitted that twelve average people would recognize that the witness's testimony must be carefully reviewed. *Cf. United States* v. *Collins*, 395 F.Supp. 629 (M.D.Pa.), *aff'd mem.*, 523 F.2d 1051 (3d Cir. 1975), *cert. denied*, 423 U.S. 1060, 96 S.Ct. 797, 46 L.Ed.2d 651 (1976) (expert testimony on reliability of eyewitnesses excluded on relevancy grounds).

In *Webb* v. *Fuller Brush Co.*, 378 F.2d 500 (3d Cir. 1967), a pre-F.R.E. case, a physician was not allowed to testify to his opinion whether a jar of cream should have contained a warning, for once the facts regarding the cream's dangerous character were in evidence, the jury needed no expert guidance in reaching a further conclusion.

And, in a copyright infringement suit brought by the sons of Ethel and Julius Rosenberg over quotation of their parents' letters, expert testimony by literary authorities concerning the qualitative impact of the letters on the quoting publication, a question relevant to the fair use issue, was held to be unhelpful to the jury in its deliberations. The jury was held to be "fully

competent to understand the subject matter of the work and to evaluate the qualitative importance of certain materials to the presentation of that subject," especially in this "famous and controversial" context. *Meeropol* v. *Nizer*, 417 F.Supp. 1201, 1211 (S.D.N.Y. 1976), *aff'd in part and rev'd in part on other grounds*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978).

The cases discussed under F.R.E 703, *supra* at 1328-1330, which refused to accept expert opinion based upon faulty assumptions and unfounded conclusions, are also instructive in this context.

Although the case law is limited, and adds little beyond examples to the Advisory Committee Note and the Rule itself, it makes several things plain. First, expert opinion must be approached on an expert by expert, or even opinion-by-opinion, basis, and the court must, as with the data underlying an expert opinion discussed *supra*, carefully examine each opinion offered by the expert to assess its helpfulness to the jury. Second, while it is not immediately obvious whether the inquiry should proceed under F.R.E. 702, 703, or 403,[20] it is clear that the court may—indeed must—carefully scrutinize the underlying assumptions, inferences drawn, and conclusions reached by the experts before reaching a decision on admissibility of the expert's opinion. Opinions which contain inferences which cannot logically be drawn are no more helpful to the jury than are opinions based upon unreliable information. Third, and of critical importance here, opinions do not assist the jury when they are cumulative of evidence already before the jury, or when the expert has sifted through that evidence reaching a conclusion which in essence attempts to tell the jury how it should decide the case. Rather, the expert

[20] It has also been suggested that the inquiry could proceed under F.R.E. 401, for opinions with faulty assumptions, inferences, or conclusions arguably have no "tendency to make the existence of any fact" in issue more probable than not, and are hence irrelevant. If that were true, however, F.R.E. 703's helpfulness requirement would be rendered largely superfluous.

must utilize specialized knowledge, not ordinarily possessed by the layman, to reach an opinion which truly aids the jury in understanding the evidence or in determining a fact in issue.[21] We think one of the best expressions of this principle is contained in Stern, *Toward a Rationale for the Use of Expert Testimony in Obscenity Litigation*, 20 Case Western L.Rev. 527, 546 (1969): "The expert should strive to instruct the court *in the ways of his work*, whether it be psychology, literature or whatever, and to explain the nature of the judgments made in that work" (emphasis added). We shall refer to this formulation from time to time.

If, as defendants contend, the expert opinions in this litigation stem merely from a rehash of the evidence already before the trier of fact without adding a component of expertise, *i.e.*, without instructing the trier of fact "in the ways of his [the expert's] work," those portions will be found inadmissible because they are the unhelpful "oath-helping" of a "conspiracyologist." If, on the other hand, the experts' economic sophistication enables them to explain the evidence to the jury in a permissible manner otherwise beyond the jury's sphere of knowledge, the opinion would be admissible. We note that expert testimony may not be used merely to interpret a factually complex record. The test for admissibility of an expert's opinion turns not on complexity but on the subject matter of the opinion, *i.e.*, on whether the expert's specialized knowledge enhances the jury's understanding.

The task of the court is to sift through the reports, parsing out those portions which will aid the jury. We reiterate that we are not considering the admissibility of these reports *qua* reports as documents to be admitted into or excluded from evidence. Rather, we are assessing the admissibility of the key opinions expressed in the reports, purged of their rhetoric and stylistic devices, as though they were being carefully framed at

[21] As discussed *supra*, relevance issues, including those of unfair prejudice and waste of time under F.R.E. 403, will be deferred for consideration until the opinion addressing the issue of conspiracy.

trial.[22] We turn first to the report prepared by DePodwin Associates, Inc.

III. *The DePodwin Report*

A. *Introduction*

The DePodwin Report,[23] "Economic Study of the Japanese Television Industry," is by far the most careful, scholarly, and disinterested of the reports submitted by the plaintiffs' expert witnesses.[24] The meat of the three-volume report appears in

[22] We do not intend to consider all the opinions expressed in the reports. Rather, we will restrict our inquiry to those opinions germane to the summary judgment motion and the 104(a) determination on the conspiracy claims.

[23] Dr. Horace J. DePodwin is president of Horace J. DePodwin Associates, Inc., a team of industrial economists. He holds a Ph.D. in economics from Columbia University, and is Dean of the Graduate School of Business Administration at Rutgers University. He was also consultant to the U.S. in the General Agreement on Tariffs and Trade (G.A.T.T.) negotiations and chairman of the Business-Economics Section of the American Statistical Association. He has published widely and has served frequently as an expert witness in various antitrust and trade matters.

Also contributing to the DePodwin report were Dr. David Schwartzman and Marcio Teixeira. Dr. Schwartzman holds a Ph.D. in economics from the University of California at Berkeley. He has held numerous teaching and consulting positions in the United States and Canada, and has published widely. The record contains no biographical data on Mr. Teixeira.

[24] By its very phraseology, this comment is comparative in nature. However, we refer herein only to the report, and not to the lengthy affidavit filed by Dr. DePodwin on September 23, 1980. This affidavit is in the nature of a point by point refutation of contentions raised by defendants during argument of the summary judgment motions, with, on some points, a total change of theory. We will comment upon the substance of the affidavit in our opinion on the sufficiency of plaintiffs' conspiracy claims. What is noteworthy here is its tenor and its style, for the affidavit does not present an economist's opinion; rather, it is a lawyer's brief. As such it not only demeans itself, but also calls into question the objectivity of the remainder of Dr. DePodwin's work, raising questions as to whether he is in fact acting as an economist or as an advocate. We note with reference to Dr. DePodwin's credibility that all inferences must be taken in favor of plaintiffs in our consideration of the summary judgment motions. That is not the case, however, with the determination to be made as to the sufficiency of plaintiffs' proof of conspiracy under F.R.E. 104(a).

Volume I. Volume II is a statistical appendix, and Volume III is a compilation of damage calculations for plaintiff National Union Electric Corporation.[25] As described in the introduction, the report "presents the preliminary results of a continuing economic study of the Japanese television industry undertaken at the request of plainfiffs' counsel" in this litigation. The study focuses on:

> the unusual sales increases achieved by the defendants in the United States market. It seeks to determine how the growth and development of Japanese television sales in the United States were related to the agreements and arrangements among Japanese producers, United States importers and mass merchandisers, distributors and others. In particular, the study seeks to determine whether certain restrictive trade practices engaged in by the defendants and others resulted from concerted activity, and whether they constituted an unreasonable restraint on the trade and commerce of the United States. Additionally, the study seeks to determine the economic significance and impact of pricing practices on the marketing of television manufacturers and their affiliates, [and] whether the use of restrictive trade practices by them represented the exercise of concerted market power with the intention of affecting the United States industry.

DePodwin Report at I-1. Finally, the study assesses the injury to and damages incurred by plaintiff NUE.

The first thing that strikes one about the stated objectives of the DePodwin study is the concern with determining the existence of a conspiracy and of conspiratorial intent. Those are not the kinds of concerns one thinks of at first blush as being

[25] We will not reach issues relating to damages at this stage of the litigation.

In addition to the three-volume report and the recent affidavit discussed in note 24, *supra*, Dr. DePodwin submitted an affidavit in August 1980 clarifying his position with regard to certain price differentials originally set out in Appendix B to Chapter VI of his report. The August 1980 affidavit was filed in response to an affidavit submitted in May by Kenji Yamagishi, a Matsushita employee, which had taken issue with DePodwin's assumptions. These matters are discussed at 1356-1363, *infra*.

within an economist's purview. We merely note this point now, reserving fuller consideration for later, and turn to an equally disconcerting matter, the fact that the report begins with a number of assumptions which are themselves matters of dispute among the parties. For example, the report assumes the existence of agreements among the Japanese manufacturers, as well as the existence of certain restrictive trade practices.[26] These introductory comments serve as a warning to the reader to be wary of unsupported assumptions while proceeding through the report.

As described by DePodwin in his summary submitted in connection with the evidentiary hearings, *see* note 2, *supra*, the principal conclusion which he reached is that

> by means of a broad range of anticompetitive practices, Japanese manufacturers of television receivers, particularly the defendants, succeeded in gaining a large share of the United State market. To achieve this objective, they carved out a substantial portion of that market and proceeded to saturate it with sales promoted through a variety of anticompetitive devices, all the while "respecting" each other's territory.
>
> * * *
>
> Japanese television manufacturers, particularly the defendants, operated as a cartel, setting prices for both the Japanese domestic market and the United States. They acted in concert, exercising market power through trade associations, industry committees, and other groups. In doing so, they intensified the competition which United States manufacturers experienced, while attenuating, if not eliminating, competition among themselves.

[26] Whether these assumptions amount to bias is a question to be considered by the trier of fact, after cross-examination, as it assesses the weight to be given an expert's opinion. One must acknowledge that some built-in bias is an inevitable by-product of the use of expert testimony in an adversarial process.

> That the cartel operated in domestic as well as export markets is emphasized. Control over prices in the domestic market, to which entry was effectively barred, provided the protective umbrella which enabled the Japanese firms to engage in predatory pricing abroad. If competition had prevailed in the domestic market, then predatory pricing in the United States would have been more difficult.
>
> Had free and fair competition prevailed between United States and Japanese producers, production capacity in each country would have adjusted properly to the size of the combined markets, and been allocated properly between the United States and Japanese industries. The size and profitability of each nation's industry would have been determined by free and fair competition, rather than by the Japanese cartel. Finally, Emerson/NUE would not have suffered the damages specified.[27]

In order to determine whether these conclusions are permissible expert testimony, we must proceed step by step through the report, examining the bases for the opinions rendered according to the principles discussed under F.R.E. 703, Part IIA, *supra*, as well as analyzing the assumptions, inferences, and conclusions as an aid to considering whether the opinion assists the jury as required under Rule 702. We reiter-

[27] Attached to this summary, Dr. DePodwin provided a chart entitled "Combined and Concerted Actions of Japanese Manufacturers, Particularly the Defendants, Gains Realized by Them and Adverse Impact on the United States Television Industry," which was also included in Part I of his report. In addition to the items listed in the title, the chart conveniently contains a column telling the reader what provision of the United States law is violated by each of the "combined and concerted actions" listed. Plaintiffs concede that Dr. DePodwin is not proffered for the purpose of rendering a legal opinion, *see* Pretrial Order No. 281 at 150, implying that they agree that the chart would be inadmissible. The point is worthy of mention, however, because it is characteristic of the advocatory nature not just of the DePodwin report, but of all the expert reports under consideration. Legal conclusions are never appropriate for expert testimony, *see, e.g., Marx & Co. v. Diners Club, Inc., supra*, and to the extent that these reports attempt such conclusions, they will be disregarded.

ate that we are *not* considering the admissibility of the reports as written, but of those opinions and background material contained therein that are of importance to our summary judgment and *in limine* determinations.

B. *Outline of the Economic Analysis*

Part I of the DePodwin Report outlines the economic analysis which underlies the conclusions reached. As such, it summarizes the evidence considered by the experts, sets forth some basic economic principles which inform the conclusions reached, and summarizes the ultimate conclusions. To the extent that this section summarizes either evidence or conclusions, we need not consider it separately here, but will address those opinions as they appear in detail in subsequent sections. To the extent, however, that it presents the analytical framework for the opinions to follow, it must be examined at this juncture.

Dr. DePodwin would plainly be permitted to testify concerning the methodology by which he reached his conclusions; we believe this to be undisputed by defendants. Such methodology would, of course, be relevant only to the extent that the data to which methodology is applied is deemed reliable under Rule 703, as discussed *supra*.

As part of the outline of the economic analysis, the report discusses, as background, some basic economic principles. Specifically, Dr. DePodwin outlines the practices of the classical cartel, citing economic literature, including the studies of Professor Ervin Hexner, and discusses the conditions necessary to make price discrimination possible and profitable. This material is also unchallenged except on relevancy grounds, and we find it plainly admissible as an expert "dissertation" permitted under the "or otherwise" clause of F.R.E. 702.

Thus, in sum, assuming relevancy, part I is admissible insofar as it lays out information. Because it is clear that Dr. DePodwin would not attempt to testify to his ultimate opinions in as conclusory a fashion as his summary might imply, we need

not consider the form of the conclusions presented here. Rather, we see this section as a preface to the weightier analysis to follow, and will consider the opinions in their subsequent context.

C. *Industry Background Materials*

Part II of the DePodwin report, entitled "Background on the Television Manufacturing Industry in the United States and Japan" and Part III, "Japanese Television Industry," set forth basic background materials in a straightforward discursive manner. Part II concentrates on the history of television technology and production, with emphasis on the fact that American firms were primarily responsible for technology under various patent agreements. Part III is heavily statistical, discussing industry concentration, production and export data, production capacity, investment, and facilities expansion for the industry as a whole and for individual defendant companies.

Defendants do not complain about the vast bulk of information contained in these two sections, except to question its relevance. Thus we will not tarry over the potential fine points of analysis, deferring judgments as to individual items until trial. We find the information useful as background, although we are not certain that an economist is necessary or qualified to expound to the jury on technological development. However, as a prologue to or basis for the economic analysis to follow, the background, which appears drawn from legitimate sources, can give the jury a framework within which to fit other pieces of evidence.

A few individual items in Parts II and III should be mentioned as problematic. Part II includes a discussion of the mechanics of patent licensing by the Japanese, reputedly organized through the Electronic Industries Association of Japan (EIAJ), a trade association. According to the DePodwin narrative, the Japanese manufacturers jointly negotiated their patent licensing agreements with United States firms, thereby

eliminating internal Japanese competition for imported technology. DePodwin Report at II-23 to II-26. This section is followed by a brief "Appendix to Part II" which explains that "[t]he radio and television industry has a notorious history of using patent licensing agreements to restrain trade." Because we consider these ideas to be of only tangential relevancy to the question of the unitary export conspiracy among the defendants charged in this litigation, or even of the alleged home market facet of the alleged conspiracy, because they are certainly insufficient to create a material issue of fact given the gravamen of plaintiffs' case, and because the defendants do not at this time seriously contest the underlying information, we will not address the Article VII issues related thereto.[28]

Part III, while primarily statistical and unobjectionable, contains two portions which must be excised. First, in connection with a discussion of capacity expansion and exports, the report opines:

> Two things are clear when we examine Japanese statements on adding to production capacity during the 1965-1970 period. One is that the companies sought to avoid competition with one another when adding to production capacity. The other is that the additions to capacity were intended largely to support increases in exports to the United States.

DePodwin Report at III-33.

There is plainly nothing wrong in and of itself with adding to capacity to support exports; to that extent the opinion is irrelevant if intended to support an inference of export conspiracy. The bald statement that the companies sought to avoid competition when adding to production capacity is sup-

[28] We note, however, that the report relies heavily on such questionable sources as *Television Digest*, various unauthenticated internal documents of defendants, and minutes of the EIAJ of the type which we excluded from evidence in our Japanese Materials Evidentiary Opinion. The Appendix portion relies upon some plainly legitimate sources, but concludes with five pages lifted almost verbatim from plaintiffs' preliminary pretrial memorandum. There are thus significant problems under F.R.E. 703.

ported solely by a statement by a single Japanese executive—a statement of otherwise doubtful admissibility as to that executive's company and inadmissible as to the other defendants.[29] DePodwin's opinion, coming as it does out of thin air, is simply unsupported either in the report or in the record, and cannot be admitted. At best, if the executive's statement were to be deemed admissible, its interpretation would be a matter for the jury to consider along with the other pieces of the puzzle, rather than a matter for expert analysis. It is simply not reasonable for an expert to base such a sweeping conclusion on a single disputed essay; nor is it helpful to the jury, in that there has been no application of expertise.

A second problem area in Part III discusses the alleged subsidization of Far East subsidiaries (in Korea, Hong Kong, and Taiwan) of Japanese manufacturers, in an attempt to imply that the Japanese companies' participation in the United States market was predatory. DePodwin Report at III-36 to III-43. This section is entirely supported by documents pro-

[29] The statement in issue, by Konosuke Matsushita, Chairman of defendant Matsushita Electrical Industrial Co., Ltd., as recited by DePodwin at III 33, reads:

> We must not have excessive competition for plants and facilities even if we do enter a period of prosperity. Of course we should expand equipment fully and steadily step by step. But, in the future, expansion that produces the effect of competition among rival companies must not be permitted. In a Japanese wrestling match, victory or defeat is important. But we do not compete for victory in business.
>
> In recent years, mass media has often reported on the rivalry among companies and predicted the victory or defeat of a company over the others. I think this is outrageous.

Even assuming that the quotation is accurate (the statement, as quoted by DePodwin, is found in an EIAJ publication entitled "Denshi Electronics" which was produced by Sharp), it is doubtful whether this statement would qualify as an admission against Matsushita. *See* Japanese Materials Evidentiary Opinion at pp. 98 n.71 & 254. At all events, the statement is plainly hearsay as to all other defendants, and plaintiffs, despite challenge to the document at pretrial evidentiary hearings, have laid no foundation for its admission as an exception to the hearsay rule. The several speeches and newspaper articles upon which plaintiffs rely in part to show intent to collude will be discussed in greater detail in our final conspiracy opinion.

duced in this litigation, and there are serious questions of admissibility under both F.R.E. 702 and 703.[30] Defendants do not strenuously urge an Article VII objection to this information, preferring to stress a relevancy objection. Accordingly, we shall defer consideration of this point until our decision on the conspiracy motions.

The crucial part of the DePodwin report begins with Part IV, to which we now turn.

D. *The Japanese Television "Cartel" and Its Operation*

1. *Introduction*

Parts IV and V coherently lay out for the reader the essence of plaintiffs' antitrust conspiracy case. The reader is not left in suspense about the conclusion to be reached, for Part IV is entitled "Japanese Television Industry Cartel," and Part V, "Operation of the Japanese Television Cartel." The conclusions reached in Part IV are starkly summarized in the first paragraph of the chapter:

> Japanese manufacturers of television receivers achieved their phenomenal success in exports, particularly to the United States, through concerted collusive action. The manufacturers colluded through various associations and committees. It will be shown that they engaged in a concerted drive to attain and keep a large share of the United States market by means of agreed upon predatory prices designed to eliminate domestic manufacturers. Japanese manufacturers, particularly the defendants in the Japanese Electronic Products Antitrust Litigation, priced exports to the United States well below the price at which they sold comparable products in their home market, they agreed to allocate United States customers

[30] The documents upon which the analysis rests include many internal memoranda of both defendants and non-parties to this litigation, the admissibility of most of which is challenged by defendants on both authentication and hearsay grounds, thus calling into question admissibility of the opinions based thereon under F.R.E. 703. Furthermore, the section is merely narrative, with a striking paucity of economic analysis, leading us to note its potential inadmissibility under F.R.E. 702 as well.

> among themselves, they freely exchanged information on their corporate production, inventories, shipments, and prices, and they engaged in many other acts designed to reduce, if not eliminate competition among themselves.

DePodwin Report at IV-I.

Part IV describes in detail the various groups and associations through which defendants are alleged to have conspired; Part V discusses the mechanics of the conspiracy. It is undisputed that the Japanese defendants were members of the various trade associations and groups delineated in the report; it is what occurred at those meetings that is in dispute, as well as the inferences to be drawn therefrom. Dr. DePodwin's format, which separates a description of the groups from a description of their operation, strikes us as somewhat awkward, and his order of description, which differs from that of plaintiffs PPTM and FPS, is not entirely logical. However those are matters of no importance and we shall proceed according to the organizational structure of the report. We shall not catalogue all of the materials relied upon by DePodwin in preparing his report, but we shall cover the highlights, quoting liberally when appropriate.

2. *Conspiratorial Groups*

Dr. DePodwin begins with a brief discussion of the Electronic Industries Association of Japan (EIAJ), an umbrella trade association of which certain Japanese defendants and numerous other corporations are members.[31] The EIAJ has a large number of committees relating to the television industry, including one which DePodwin identifies as the Committee of TV Exports to the U.S. We are informed that the EIAJ provided facilities for the Television Export Council, described in conclusory terms, without source reference, as the "administrative body of the manufacturers export cartel," and that the offices were the same as those of the Market Stabilization Council, "the body which implemented the domestic television

[31] Many of the non-defendant members are alleged to be co-conspirators.

cartel agreement." Except for the EIAJ membership list, which was produced in discovery in this litigation, none of this information is supported by any citations at this point in the report, although much of it is fleshed out in subsequent sections, which will be addressed as we reach them.

The report next launches into a detailed discussion of the Market Stabilization Council and a number of other industry groups alleged to have facilitated market control, among them the Okura Group, the Palace Group, the Palace Preparatory Group, the Tenth Day Group, the MD Group, and the Hibiya (or Twentieth Day) Group. According to DePodwin, the purpose of the Market Stabilization Council was to control the domestic market for electrical appliances, whereas the other groups, representing various levels in the corporate hierarchy, implemented that goal in the television industry by agreeing upon volume of production, price levels, projected volume, shipment, and inventory levels.

There are a number of problems with this narration, and we have no difficulty holding this portion of DePodwin's analysis to be inadmissible. First, with regard to the basis for the testimony under F.R.E. 703, except for the facts that the groups indeed existed and that executives of certain defendants were members and attended meetings thereof, matters which are conceded by defendants, all other matters are supported almost entirely by sources which were ruled inadmissible in our two previous evidentiary opinions. For matters related to the Market Stabilization Council, DePodwin relies entirely upon two sources: plaintiffs' answers to defendants' interrogatories and materials relating to an investigation into the Council's activities by the Japanese Fair Trade Commission (JFTC). Plaintiffs' answers to interrogatories, although sworn, are essentially statements of plaintiffs' contentions with respect to the Council, and, as such, are certainly not appropriate material to serve as a factal basis for an expert's opinion. We explained in detail in our Public Records Opinion that the JFTC investigation into the Market Stabilization Council's affairs was extremely preliminary, ending in a Rec-

ommendation Decision, or consent agreement, prior to the holding of any hearings, and that documents related to that investigation were not probative of the truth of the matters set out therein. Accordingly, we ruled the only document tendered, the Recommendation Decision, inadmissible. While it is unclear precisely what materials Dr. DePodwin considered from the JFTC record of this investigation, it is plain that his primary reliance was upon this Recommendation Decision, or consent agreement, which we have since found to be untrustworthy.

As to the other industry groups, the fact that representatives of the defendants participated in regular meetings is permissibly gleaned from defendants' answers to plaintiffs' interrogatories, and is, as we have noted, undisputed by defendants.[32] Information on which DePodwin bases his conclusions that the meetings were used to exercise market control, however, comes from more suspect sources. The most frequently referenced document, cited some sixteen times between pages IV-9 and IV-13, is the diary of S. Yajima, a Toshiba employee, which had been seized by the JFTC in its price-fixing investigation in the so-called "Six Company Case," and which is discussed in detail in our Japanese Materials Evidentiary Opinion. We ruled the diary inadmissible on a variety of grounds, mainly related to trustworthiness, in that same opinion.[33]

In addition, Dr. DePodwin consulted an "initial decision" or "draft of decision" rendered by the JFTC in the same case. That document was withdrawn from our consideration at the

[32] DePodwin also relies in part for this basic background information on certain testimony before the JFTC in connection with the so-called Six-Company Case, discussed in detail in our previous evidentiary opnions. In our Japanese Materials Evidentiary Opinion we ruled that only portions of this testimony were admissible, and at that against only six of the twenty-four defendants. With minor exception, all "export" references were excluded.

[33] DePodwin also relies upon other diaries which were excluded in the Japanese Materials Evidentiary Opinion.

evidentiary hearings, presumably because the full Commission, in an action taken subsequent to the issuance of the initial decision by the trial examiner, terminated the proceedings for lack of evidence.[34] We have no doubt that, had the document been considered, we would have ruled it inadmissible for reasons similar to those which informed our exclusion of a similar initial decision in a resale price maintenance case brought against Matsushita. *See* Public Records Opinion, 505 F.Supp. 1125, at 1181.[35]

The final sources of DePodwin's information related to the structure of industry groups are lectures and interviews by Konosuke Matsushita, Matsushita's founder and Chairman, to the effect that industry executives "have summit talks" to encourage cooperative management, and a report in the periodical *Industrial Japan* to the effect that industry stabilization is of concern to the industry. The personal views of one industry executive and an unsigned, heretofore unauthenticated periodical article, all of questionable independent admissibility,[36] simply do not appear to us to be the type of

---

[34] We discussed at some length in our Public Records Opinion the role of an initial decision (or draft of decision) in a JFTC proceeding. In essence, following hearings, the hearing examiner prepares a document which is fully reviewed by the Commission before official action is taken. In the Six-Company Case, the Commission refused to adopt the hearing examiner's draft. *See* Japanese Materials Evidentiary Opinion, 505 F.Supp. 1190, at 1209, n.2.

[35] In the resale price maintenance case, the initial decision was superseded by a consent agreement; in the Six-Company Case, the superseding document was a termination by the Commission. If anything, the Six-Company Case document presents a stronger argument for exclusion.

[36] At most, Chairman Matsushita's statement would be admissible only against Matsushita among the twenty-four defendants. *See* note 29, *supra*. We take this opportunity to incorporate by reference our frequent comment in the Japanese Materials Evidentiary Opinion to the effect that plaintiffs have now been victimized by their own pretrial and trial strategy of failing to take depositions to lay the foundation for the documents which they have proffered in the FPS, the authentication and admissibility of many of which defendants have challenged.

information reasonably relied upon by economists to determine whether firms agreed on price and output.

But even without deciding whether Dr. DePodwin placed "reasonable reliance" on any individual item, the entire section is so utterly dominated by materials which we have found to be totally unreliable — principally the JFTC materials and especially the Yajima diary — that under the principles developed in Section II, *supra*, the opinions based on such materials must be excluded as not reasonably based under F.R.E. 703.

It is arguably incorrect to view the materials considered by the experts as materials upon which they "relied." Instead, what they have actually done is set forth in an orderly manner the "evidence" before them. In so doing, they have in essence created for themselves a hypothetical question of a traditional sort, *i.e.*, they have laid out in narrative fashion the bases for their opinions, as gleaned from various sources. But at common law, a hypothetical question had to be supported by evidence in the record. *See, e.g., McCormick on Evidence* § 14, at 33 (2d ed. 1972). What has happened here is that plaintiffs have attempted, via the mechanism of an expert's report, to insinuate reams of otherwise inadmissible evidence into the record by having the expert "rely" on it and provide a dissertation on defendants' practices on that basis. This is a fallacy which crops up throughout all of the expert reports, and is one which we cannot countenance.

In his post-hearing affidavit, *see* note 24, *supra*, DePodwin seeks to justify his reliance upon the diaries, minutes of meetings, etc. by invoking the work of Professor Oskar Morgenstern:

> There is a vast body of important material currently used by economists which is non-numerical. It is either historical-descriptive in nature, or it consists of direct qualitative empirical observations by a given investigator who lives in a certain economic milieu or who participates in economic activities and business decisions. Some further information is derived from introspection, and this too has played a considerable role in the development of

> various branches of economic theory. All of these sources of information have, of course, various kinds of error for which allowance should be made, if only the source and extent of the error were known. This is of especial importance when this type of evidence is brought into contact with that which appears in numerical form. Such combinations are inevitable and are therefore highly characteristic of economics.

DePodwin affidavit at 1.5, quoting O. Morgenstern, *On the Accuracy of Economic Observations* 3 (2d ed. 1963). Dr. DePodwin continues:

> Numerous studies rely on the kind of economic evidence, such as diaries, memoranda, minutes of meetings, rationales for agreement, and other qualitative empirical information, found in the DePodwin Report and which Professor Morgenstern deems appropriate economic data.

To describe the diaries, minutes of meetings, etc. which we have excluded in the second opinion in this evidentiary trilogy as "direct qualitative empirical observations" is, in the wake of the *ratio decidendi* of that opinion, no less than farcical.[57] We

[57] Such a description also lacks fidelity to Morgenstern's own prescription that allowance be made for "error." To the extent that DePodwin's reference to Morgenstern means that he maintains his opinion notwithstanding acknowledgement of reliance upon materials of questionable reliability, *see* point 5 at p. 1330, *supra*, he has gone far beyond the pale.

The parties have engaged in an extensive post-summary judgment argument exchange of correspondence regarding the integrity of Dr. DePodwin's report. We shall not chronicle that exchange here, but we do note the latest and most trenchant defense of Dr. DePodwin, that contained in the letter of November 19, 1980, from Edwin P. Rome. In justifying DePodwin's reliance upon materials claimed to be "historical-descriptive" in Morgenstern's terms, Mr. Rome writes:

> Defendants have mistakenly assumed that the "economist" and the "investigator" cited by Morgenstern must be one and the same. Yet the Japanese and the American executives who participated at meetings where business decisions were made are bona fide observers of economic evidence and the notes, letters, and diaries generated at or as a result of such meetings are proper qualitative empirical observations or records of the conduct and agreements reached during them. If economists were restricted to the use of material generated during the course of their personal participation in economic activities or business decisions,

reject DePodwin's justification and hold that his exposition and opinions regarding conspiratorial groups, recorded in his report at IV-1 to IV-21, are inadmissible.

As an alternative and co-equal basis for our holding of inadmissibility, we find these sections relating to conspiratorial meetings to be impermissible as expert testimony under F.R.E. 702.

What Dr. DePodwin has done is to step into the shoes of the factfinder and set forth in narrative fashion what he believes the "evidence" — *i.e.*, the materials he consulted — shows. He has described the Market Stabilization Council and the various industry groups as they appear from plaintiffs' documents, accepting the interpretation of those documents that plaintiffs have espoused throughout this litigation in their briefs and arguments, and concluding that certain activities of a conspiratorial nature — primarily exchange of information — occurred at industry group meetings. These activities are said to have consitituted exercise of market control in the Japanese domestic television market. There is in this exposition no evident application of any economic expertise whatsoever. Dr. DePodwin, in the process of reaching his conclusion, has not instructed us in any degree in "the ways of his work." Instead, he has done exactly what the jury is supposed to do—he has sifted through materials provided by plaintiffs, analyzed them factually, and reached certain conclusions regarding culpability of the defendants. This is precisely the oath-helping "conspiracyology" defendants object to so strenuously. It lends an

> or restricted to things directly observed in a certain milieu, the majority of economic treatises now existing would not have been written. Under this narrow premise, advanced by defendants, economists would be barred from writing studies in the field of economic history; works in the field of institutional economics would disappear; and one generation of scholars would be barred from analyzing and/or reviewing the economic facts of prior generations.

The obvious answer is that an economist would be barred only from serving as an expert witness when he grounds his opinion on such matters, where they are demonstrably untrustworthy, and not from otherwise practicing his profession.

unwarranted aura of scientific reliability to the arguments of plaintiffs' attorneys. We agree with defendants that such testimony neither utilizes special expertise nor assists the trier of fact, and that it is therefore inadmissible.

The groups discussed so far concerned themselves, in plaintiffs' submission, with control of the Japanese domestic television market. As will be explained at length in our forthcoming opinion addressed to the issue of conspiracy, plaintiffs contend that this "Japan-side" conspiracy to fix high prices in Japan was essential to the scheme to flood the United States market with electronic products priced at an artificially low level, in that it provided defendants with the necessary financial cushion. The balance of Chapter IV of the DePodwin report shifts its focus from the home market to the alleged export conspiracy, and it is to that claim of plaintiffs that we now turn.

3. *The Manufacturers' Agreements and the Japan Machinery Exporters Association (JMEA) Rules*

For reasons that will appear, DePodwin's discussion of the Japan Machinery Export Association (JMEA) and its alleged mechanisms for controlling the export market suffers from many of the same faults as the description of home market groups.

Defendants do not dispute membership in the JMEA; as with the domestic industry groups, however, they dispute the motivation for and results flowing from their participation in JMEA activities. DePodwin summarizes his discussion of the JMEA as follows:

> The JMEA served as a vehicle through which certain aspects of defendants' controls over exports were organized and implemented. For example, defendants utilized the JMEA as a forum for the discussion and coordination of the pricing of consumer electronic products exported to the United States. They entered into agreements and adhered to rules expressly designed to implement such agreements, the objectives of which were to facilitate the coordinated and concerted dumping campaign in consumer electronic products exported to the United States. The export program included the setting of price levels of television receivers and radios to be exported to the United States, limitations on the number of United States customers to whom each manufacturer or exporter may sell, customer boycott provisions, joint standardization of consumer electronic products, establishment and allocation of quotas for export of consumer electronic products, and the setting of export goals for consumer electronic products.

DePodwin Report at IV-23.

The JMEA supposedly achieved control through two primary mechanisms: "Manufacturers' Agreements," referred to by plaintiffs as "cartel agreements," and rules of the association.[38] These are the only sources relied upon by Dr. DePodwin in this section of the report. The admissibility of the Manufacturers' Agreements and the JMEA rules is not contested, and we can assume that they are appropriate bases for Dr. DePodwin's opinion under F.R.E. 703. We nevertheless find the opinions based thereon—or interpretations thereof—impermissible expert testimony according to the standards developed under F.R.E. 702.

As with the discussion of industry groups outlined in the previous section, DePodwin analyzes the evidence to be pre-

[38] The agreements discussed were all entitled "Agreement on Manufacturers' Domestic Transactions Relating to Exportation of Television Sets." There were seventeen such agreements, covering consecutive time periods between 1963 and 1973. The JMEA rules that are the subject of DePodwin's analysis were in existence during the same ten-year period. Defendants concede the existence of these agreements and rules, but have long maintained that plaintiffs have no standing to attack them, contending that the agreements (also known as "reference price agreements" or "check-price agreements"), which established *minimum* prices for export of television receivers into the United States, could not have injured U.S. television manufacturers. Furthermore, defendants contend that the agreements were entered into at the mandate of the Japanese Ministry of International Trade and Industry (MITI) as part of MITI's industry regulation to avoid upsetting trade relations with the United States, and that the agreements are thus protected under the doctrines of act of state, sovereign compulsion, and international comity.

sented to the jury and tells the reader—or the jury—what it means. The analysis is not economic, but factual. Phrases such as "[o]ne of the principal purposes of the Manufacturers' Agreements was . . ." (IV-25) and "[t]he general purpose of the 'Manufacturers' Agreements' was . . ." (IV-24) abound. Most of the section is made up of quotations from and paraphrases of the agreements and JMEA rules, with occasional conclusory terms appended to "explain" what these documents mean.

A few examples will suffice to illustrate the problems rampant in this portion of the report. A subsection entitled "Television Export Cartel Agreements," which cited only plaintiffs' PPTM, begins by defining the "general purpose" of the Manufacturers' Agreements," which DePodwin describes as "written price agreements," as being "to govern price levels and conditions of sales on transactions between Japanese manufacturers of television receivers and the exporters of such receivers to the United States market." After discussing the "fact" that the primary target of the agreement was the United States, a fact gleaned from a quote from article 4 of the agreement and conceded by defendants, the report continues:

> One of the principal purposes of the Manufacturers' Agreements was to create an active forum for discussions of and agreement upon the price levels of television receivers for export to the United States and to implement the agreed on relation between such price levels and those established during price-fixing activities relating to television receivers sold by them in Japan. The question of prices was the specific subject of Article 8, which provided that the Television Export Council, the cartel's policing body expressly created to implement the Manufacturers' Agreements, had the ability to discuss and determine the price levels for television receivers for exportation to the United States.

DePodwin Report at IV-25. DePodwin's opinion, framed in terms of these conclusory statements, is supposedly "proved" by the ensuing direct quotation from the agreement:

> *(Prices)*
>
> Article 8
>
> 1. The Council, if it is going to establish minimum selling prices to export businessmen of these goods which are specified in Attached Schedule 2, or amend same, shall serve prior notice upon the Minister of International Trade and Industry.
> 2. The parties to this agreement shall not sell to export businessmen those goods which are specified in Attached Schedule 2 at prices lower than the prices established in accordance with the above paragraph.
> 3. The parties to this Agreement shall strive to refrain from such dumping as may cause a market disturbance in the United States.

Id. (footnotes omitted).

Turning from the "cartel agreements" to the JMEA rules which allegedly governed enforcement of the agreements, DePodwin informs us:

> The provisions fixing the export price levels for television receivers to be exported to the United States are contained in Article 10 of the 1963 JMEA Agreements. Article 10 makes specific reference to the price levels established in the television "Manufacturers' Agreements" and employs them as the basis on which the export price is to be mechanically calculated. Article 10 sets the television export price levels at the prices set by the "Manufacturers' Agreements" plus commissions and expenses and specifies that notification be given to the Television Export Examination Committee of the JMEA of these prices:
>
> "*(Export Prices)*
>
> Article 10
>
> "The members of the Association, when they export to the applicable area those models of applicable goods for which the shipment prices have been established by the Agreement on Manufacturers' Domestic Transactions Relating to Exportation (hereinafter referred to as the 'Manufac-

> turers' Agreement'), shall export at a price higher than the sum of said shipment price plus the appropriate expenses and commissions relating to the exportation; and furthermore, shall notify the Association of the export prices (FOB) for the goods."

DePodwin Report at IV-32 (footnote omitted).

A particularly striking example of DePodwin's conclusory style appears on page IV-33, where he unequivocally states:

> The JMEA "Rules" on television receivers were designed to eliminate all competition among the defendants in the export of television receivers and to concentrate the injurious impact of defendants' joint, manipulated pricing levels against United States manufacturers. One of the principal objectives of the defendants' conspiracy, as applied to television exportation, was to get the business, to achieve "steady expansion of exportation" to the United States, to capture increasingly larger shares of the total sales in the United States utilizing what defendants termed "*a system of harmonious exportation*." Examples of the techniques used unlawfully to achieve this result may be found in the cartel members' employment of these trade restraints:
>
> 1. the so-called "Five-Company Rule" for television receivers;[59]
> 2. the prohibition against changes in export customers during the period of the JMEA "Rules"; and
> 3. the restriction prohibiting two cartel members from selling to the same customers.

The report then goes on to discuss the three techniques listed above in a manner similar to the sections quoted *supra*. Further quotation would be redundant, for it is plain that the "analysis" undertaken in this section of the DePodwin report in no way resembles economic analysis. It cannot possibly be construed as instructing the trier of fact in "the ways of [DePodwin's] work." This is factual analysis: DePodwin has

[59] DePodwin again discusses the Five-Company Rule in Chapter V. *See* p. 1349, *infra*.

quoted the documents—documents we have assumed to be in evidence and which are of a type that is traditional fodder for jury deliberation—and has overlaid those quotations with his own gloss on their meaning. There is nothing in this section which aids the trier of fact in drawing any conclusions that it could not independently draw, and there is much that is potentially highly misleading.[60] According to the principles outlined in Part II.B., *supra*, this section must be deemed to be the work of an oath-helper, and therefore inadmissible under F.R.E. 702.[61]

4. *Information Exchange and Voting*

Part V of the DePodwin report, which discusses the operations of the Japanese television "cartel," begins with a discussion of the information allegedly exchanged among members of the groups described in Chapter IV. The chapter describes "in detail the collection, tabulation, and dissemination of information on production, inventories, and domestic and export shipment." DePodwin Report at V-1. Once such information was exchanged, members were in a position to vote "regularly on the volumes of production and shipments, adjustments in production, and inventory levels." *Id.*

DePodwin's discussion of information exchange is comprised entirely of references to certain reporting forms, produced by

[60] We will deal at length with this point and with the legal sufficiency of this material in our opinion addressing the conspiracy issues.

[61] Alternatively, despite DePodwin's reliance upon trustworthy documentary sources, it can be argued that his opinions must nonetheless be excluded under F.R.E. 703 because his assumptions concerning those documents are demonstrably false, in that the conclusions do not follow from the documents. For example, the conclusion suggesting a broad range of export price fixing activity which DePodwin based upon Article 8 of the Manufacturers' Agreements and which we quoted at 1344-1345 *supra* constitutes a misleading version of the minimum price language on the face of the agreement. Moreover, as will be seen *infra*, his interpretation of the Five-Company Rule is contrary to the record developed before us. Thus, even his factual analysis—his practice of conspiracyology—is flawed. However, we need not reach this 703 analysis.

the defendants in this litigation, which were submitted by the Japanese manufacturing defendants to the EIAJ on a regular basis, and which detailed monthly production, shipment, export, and inventory information, as well as references to EIAJ's monthly industry-wide summary forms. We have not considered the admissibility nor the trustworthiness of these documents, and for the purpose of this opinion we will assume their independent admissibility and their reliability for Rule 703 purposes. With regard to voting by the defendant companies on shipment, production, and inventory levels, however, DePodwin relied upon three very different sets of documents. The first is the Yajima diary, which was discussed *supra* in conjunction with our ruling on the meetings of conspiratorial groups. The second is a group of documents which DePodwin refers to as "Toshiba notes on meetings" (V-19), and which he has included in an appendix. The documents which he has appended, however, do not fit that description; most of them are pages from the diary of M. Yamamoto, a Hitachi employee, which we held inadmissible in the Japanese Materials Evidentiary Opinion on the same grounds as the Yajima diary. Two additional documents appended under the rubric of "pages from Toshiba notebooks" are unauthenticated documents produced by Hitachi, one purporting to be minutes of a meeting of the Tenth Day Group, and the other a meeting notice and agenda for a meeting of the MD Group apparently circulated by Nippon Columbia Co., Ltd. The final document upon which Dr. DePodwin relies in this section is a similarly unauthenticated document produced by the Japan Victor Co. regarding balloting results of the MD Group in 1970. This is not the Japan Victor document excluded in our Japanese Materials Evidentiary Opinion, but a document we have not before considered. All of these latter documents suffer from the same flaws as the numerous documents excluded in the Japanese materials Evidentiary Opinion.

For information on joint forecasting, DePodwin uses three sources. He quotes verbatim the "Shimizu memorandum," which we ruled inadmissible in our Japanese Materials

Evidentiary Opinion. He quotes from a statement by Konosuke Matsushita, similar to that which we discussed *supra*. Finally, he refers to a document which we have not previously considered, one which he describes as "prepared by or at the behest of the TV Export Council" entitled "The Status of TVs shipped to the United States (First Half of 1967)."[42] This document, produced by Matsushita, has never been authenticated, and it suffers from the same flaws as other documents which we have already ruled inadmissible.

This segment is dominated by reliance on untrustworthy materials, either already excluded or demonstrably excludable; hence, the opinions expressed therein are inadmissible under Rule 703 for lack of reasonable reliance. Moreover, the entire section covering information exchange, voting, and forecasting is inadmissible under F.R.E. 702. This section is the same type of narrative, factual analysis of documents otherwise potentially before the court, without the use of special expertise which could assist the trier of fact, as discussed in the previous section. DePodwin has not analyzed the information contained in the reporting forms and other documents; he has merely recited that information, telling the trier of fact what he believes it represents. This is not "helpful" within the meaning of Rule 702.

We wrap up our discussion of information exchange with a final illustration, one paragraph on page V-2, which reads:

> As pointed out in Part I, Outline of the Economic Analysis, a cartel's efficacy is enhanced if its members are provided with detailed information to reduce uncertainty, promote collusion, and police the observance of cartel agreements. The Japanese television cartel collected, organized, and distributed an extraordinary amount of information to its members.

---

[42] We note that this document is not in the document depository and should not therefore be considered under PTO 219. Nor was it tendered at the pretrial evidentiary hearings. DePodwin has included a copy, with translation, in an appendix.

The first sentence of this paragraph refers to Part I of the report, which outlined the economic methodology in reaching a conclusion, and as such we believe it to be permissible expert testimony under Article VII. The second sentence, however, is not permissible expert testimony for the reasons above discussed: it is a factual conclusion totally within the province of the factfinder. If there were at trial sufficient evidence in the record to support a finding in accordance with the second sentence of the quoted paragraph, the expert could assume the truth of the evidence presented and base a conclusion thereon. However, in this situation, the expert has not *assumed*, based on evidence in the record, that the Japanese defendants performed certain acts; he has simply categorically stated so. This he may not do.

5. *Price-Fixing Activities in Japan*

In the next section of the report, "the fixing of prices for the domestic market by the cartel is described in detail. It shows the extent to which prices, and wholesale and retail margins were rigged for the benefit of cartel members." DePodwin Report at V-1. Plaintiffs have contended that an agreement to fix high prices in the Japanese domestic market is of importance to the alleged export conspiracy because it enabled the defendants to amass a "war chest" to fund their low-price entry into the American market.

This section is inadmissible on both F.R.E. 703 and 702 grounds. First, with respect to Rule 703, the entire discussion is based upon documents related to the "Six Company Case" before the Japanese Fair Trade Commission, discussed *supra* and in our previous opinions. Essentially, what Dr. DePodwin has done is to second-guess the JFTC, for that body, after reviewing the same materials examined by DePodwin, terminated the proceeding against the six companies for lack of evidence. As we discussed at length in our Public Records Opinion, preliminary investigative reports that are superseded by contrary official actions, as in this situation, are inadmissible because they lack the necessary indicia of trustworthiness

required to come into evidence under an exception to the hearsay rule. The same reasoning compels us to find that the investigators' reports are not reasonably relied upon by an expert witness under F.R.E. 703.

In addition to the investigators' reports, DePodwin relied in this section upon the diaries of defendants' officials which had been seized by the JFTC in conjunction with the Six Company Case, virtually all of which were ruled inadmissible on trustworthiness grounds in our Japanese Materials Evidentiary Opinion, and which we have discussed *supra*. Finally, Dr. DePodwin relied upon testimony before the JFTC and protocols submitted to the JFTC, again in conjuntion with the Six Company Case. We ruled these materials to be admissible against some defendants, with the exception of certain "export references." However, whatever reliance DePodwin may have placed on these materials is totally overshadowed by his reliance on the documents we have said to be unreliable. This segment of the report is so permeated by reliance upon untrustworthy materials that it cannot be admitted under F.R.E. 703.[43]

Moreover, this section is written in precisely the same discursive factually informative style as those sections discussed previously. Once again, we are told "what happened" with reference only to documents otherwise before the court. Once again Dr. DePodwin has stepped into the shoes of the factfinder, rendering his opinion inadmissible under F.R.E. 702.

6. *Export Reference Prices*

Having already, in Chapter IV, discussed the Manufacturers' Agreements to which defendants were signatories, Dr.

[43] We note that one small segment of this section, at pp. V-29 to 30, presents calculations showing that an agreement on minimum retail prices coupled with common retail and wholesale profit margins, plus common rebate policies, is equivalent to an agreement on the exfactory price. This analysis, if relevant, would be admissible, but only if there were sufficient extrinsic evidence in the record to support the premise.

DePodwin in this section examines the prices allegedly established by those so-called "check-price" or "reference-price" agreements. He informs us, first, that reference prices were set by the TV Export Council through trading companies, but he offers no support for that statement. He next recites, in tabular form, reference prices established pursuant to the Manufacturers' Agreements for July and August 1964, basing those prices upon notifications to MITI.[44] He continues reciting reference prices as contained in his Table V-6 and V-7,[45] and compares those prices with domestic prices, making adjustments for wholesale and retail margins, and concluding that the domestic prices were considerably higher.

DePodwin relies for domestic prices upon the draft of decision in the Six Company Case, which we have discussed *supra*. While we explained that that document would not be independently admissible, and that it could not support an expert's inference of conspiratorial activity, we cannot say that the price levels contained therein are unreliable. Some of the price data received by the JFTC came from testimony and protocols, which we have found to be admissible and upon which an expert could reasonably rely. We do not know where the rest of it came from. Accordingly, we think this calculation might be reliably based and admissible. In order for us to rule

[44] Defendants do not dispute that they reported to MITI pursuant to the Manufacturers' Agreements. Indeed, their sovereign compulsion and act of state defenses, *see* n.38, *supra*, rest in part upon the reporting requirement.

[45] The figures gathered in Tables V-6 and V-7 were drawn from two types of sources. Some of the prices were drawn directly from schedules attached to the Manufacturers' Agreements, which we have posited to be reliable. The rest, however, were obtained from internal Sony memoranda which were not addressed in our pretrial evidentiary hearings. We note that plaintiffs have laid no foundation for admission of these documents, and they are plainly of a piece with the many unauthenticated, hearsay documents excluded in our Japanese Materials Evidentiary Opinion. Nevertheless, because DePodwin's calculations are based also on the Agreements, and because the check price levels are generally not disputed, we will not attempt to determine whether his opinion as to the check price levels is dominated or pervaded by his reliance on questionable documents for F.R.E. 703 purposes.

definitively, however, the basis for the domestic price levels would have to be more explicitly stated. We thus defer ruling upon the admissibility of the calculations based upon these prices.

DePodwin goes on to point out that his estimates are supported by the Yajima diary. That paragraph is inadmissible under F.R.E. 703, for reasons which need not be reiterated.

7. *Rebates and Kickbacks*

After discussing the allegedly fixed export prices, Dr. DePodwin continues to narrate plaintiffs' theory of the case by explaining that defendants did not actually sell their products in the United States at that fixed price. Instead, they allegedly engaged in a scheme of discriminatory rebates and kickbacks. The evil of this sytem, in DePodwin's submission, was that it "enabled defendants to win the patronage of special customers, and to take sales from American manufacturers." DePodwin Report at V-39.

This section of the report describes the mechanics of the rebate system, discussing the need for fictitious customs declarations, overbilling and underbilling procedures, and the various euphemisms designed to "cover up" the rebate practices. He details which customers supposedly received rebates, and suggests that the "cartel members" were aware of one another's rebating systems and that all parties knew the practice to be illegal.

We will again pass over the Rule 703 issue presented by the rebate discussion, noting only that the source most frequently cited is that compendium of lawyers rhetoric, Plaintiffs' PPTM. Dr. DePodwin claims, at V-40, that there is "abundant evidence to support" his assertions, and that he has referred to only a small part of the available evidence. We will assume for F.R.E. 703 purposes that Dr. DePodwin reasonably relied upon the materials which he examined. However, this discussion repeats the vices of previous sections by merely reciting the evidence which the factfinder would have before it,

explaining, as one subheading at V-40 describes it, "How the System Worked." This is factual analysis, which usurps and derogates the function of the factfinder, and is accordingly inadmissible under F.R.E 702.

8. *Five-Company Rule*

The "Five-Company Rule" refers to a provision of the previously discussed JMEA rules, in effect from 1967 to 1973, which restricted each Japanese exporter to five U.S. customers. The rule was enforced by a registration and reporting requirement. Once again, DePodwin merely describes the rule and its use. The existence of and adherence to such a rule is not a matter which requires the application of specialized expertise, but is instead a matter uniquely within the competence of the factfinder. Factual recitation such as that provided by Dr. DePodwin is not helpful to the trier of fact, hence excludable under F.R.E. 702.[46]

We note that once independent evidence supports a finding that such a rule was adhered to, an expert could appropriately opine as to such a rule's potential effects on competition. This type of economic analysis is what DePodwin contemplated in his Outline of Economic Analysis in Chapter 1, discussed *supra*.[47] It is not, however, what he has done.

---

[46] We have already posited the reliability of the Manufacturers' Agreements and the JMEA rules, upon which DePodwin relies in this section. *See* p. 1343, *supra*. We assume that he also relied upon reporting and registration forms, although he did not explicitly so state; because it is uncertain what materials DePodwin consulted, and because this section is inadmissible under F.R.E. 702, we will not address the F.R.E. 703 question. We note, however, that the Five-Company rule did not operate to restrict competition in the manner DePodwin suggests, for American subsidiaries of the Japanese manufacturers could be included as one of the five customers. The subsidiaries could then sell to anyone. Moreover, to the extent that the rule limited the number of Japanese manufacturers who could sell to an American importer, that could only keep prices up, benefiting plaintiffs.

[47] An expert may not, of course, so testify in derogation of the facts. *See* note 46, *supra*.

9. *Summary*

Although we have dissected each discrete section of chapters IV and V of Dr. DePodwin's report, we still believe it would also be useful to examine the overall thrust of the opinions expressed in those chapters, as well as the manner in which they are expressed. What DePodwin has in essence done is to examine the myriad documents supplied to him by plaintiffs' counsel, to quote liberally from those documents, and to conclude, "Aha! Cartel! Conspiracy! Illegal concerted action!" Defendants maintain that a conclusion of conspiracy is never appropriate for an economist to draw, pointing out that they have, despite diligent effort, found no case which permitted an expert to testify in such manner. Drawing a distinction between conduct of defendants and industry structure, defendants offer the following quotation, which we find highly useful:

> The role of the economist as an expert depends upon the emphasis of the various antitrust statutes, with the scope of that role widening as the focus shifts away from conduct and towards structure or performance. An emphasis upon conduct will focus the attention of the trier of fact . . . upon whether particular acts were committed by the defendant. *(Collusion, for example, is not particularly the subject of economic expertise.)* In contrast, an emphasis upon the structure of an industry or firm or upon the performance of an industry—or of a firm within an industry—will focus the attention of the trier of fact upon economic issues that are the special subject of economic expertise.

O'Hara, "The Economic Expert in the Antitrust Arena," 12 *Antitrust L. & Econ. Rev.* 17, 19-20 (1980) (footnotes omitted) (emphasis added).

We need not decide whether an expert may ever testify that, in his opinion, based upon his economic analysis of certain behavior of defendants, a conspiracy exists, for, as we have discussed in some detail, Dr. DePodwin's analysis adds no increment of economic expertise which would aid the jury, and his analysis is further flawed by reliance upon a considerable body of untrustworthy materials. In short, there is no "economic value added."

In an apparent effort to shore up his waning credibility in the wake of the summary judgment argument, Dr. DePodwin submitted the affidavit described in note 24, *supra*. Noting the paucity of documentary evidence of conspiratorial conduct, he asserts that "[w]here such evidence exists it is widely quoted in economic textbooks."[48] Dr. DePodwin invokes two examples to illustrate this point. First he notes that in his discussion of agreement among sellers, Professor Richard Caves stated:

> In the United States, the antitrust laws discussed in Chapter 6 make cartel agreements illegal in most industries. However, the law enforcers continue to turn up a number of less extensive agreements involving price fixing among competitors and the division of markets, the latter especially in connection with bids for United States government contracts. The most spectacular price-fixing conspiracy to come to light in recent years involved the companies making heavy electrical equipment. . . ."

Caves, *American Industry: Structure, Conduct, Performance* 56 (4th ed. 1977). Second, he quotes Professor Fritz Machlup, who reported the connection between the notorious "Gary dinners" and Adam Smith's famous statement on sellers' agreements:

> The gentlemen's agreement holds its special place in the history of collusion chiefly for two reasons. One is the famous statement made by Adam Smith in 1776 and quoted with great regularity in all discussions of this kind. He said: 'People of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public, or on some contrivance to raise prices.' The other reason is the fame of one of the best known American examples of such gentlemen's conversations, the so-called Gary Dinners, where the leaders of the steel industry met from time to time, during the years 1907-1911, to discuss—for "merriment

[48] He continues.

Thus, while discussing collusion, cartels, and conspiracy, economists frequently rely on two landmark cases of collusion among business executives: The notorious "Gary dinners" and the heavy electrical equipment conspiracy.

> and diversion"—by way of after dinner speeches, the market situation and the most appropriate prices for their products. Since price-fixing agreements were unlawful in the United States, those gentlemen believed themselves to be within the law when they avoided formal agreements. But if the main speaker submitted that the market situation warranted, in his humble opinion, a price of so and so many dollars, and if the next speakers expressed their belief that the main speaker, who incidentally was usually the biggest steel boss, had shown perfect understanding of the situation and that they saw eye to eye with him, the dinner party was likely to be a lasting success (giving indigestion only to the non-invited public)."

F. Machlup, *The Political Economy of Monopoly. Business, Labor and Government Policies* 87-88 (1952) (footnote omitted).

Dr. DePodwin seems, however, to ignore, or at least to blur, the distinction between the role of the economist as historian and his role as social scientist, particularly the most rigorous application of that role, where he acts as an expert witness, duty bound to apply economic analysis to demonstrated facts. We have encountered economists of the caliber of Dr. DePodwin in their academic milieu, and, knowing their fetish for rigorous analysis, cannot conceive of them (or of Dr. DePodwin in his academic role) seriously positing economic conclusions based upon the kind of evidence upon which Dr. DePodwin relied in his report. Although he has now disclaimed reliance on the diaries of Yajima and others,[49] that disclaimer cannot eradicate the pervasive and indelible imprint of those documents upon his report. In short, Dr. DePodwin's adaptation of the

[49] In his post-argument affidavit, DePodwin averred:

> In the preparation of the DePodwin Report the experts did not rely simply on the minutes of meetings, diaries, and other information and documents to which defense counsel object in order to reach conclusions about conspiracy and the occurrence of joint actions which restrained trade and attenuated competition among Japanese manufacturers and exporters of television receivers. As noted above, the report contains a wealth of economic facts and analyses which were used to reach these conclusions.

See also pp. 1341-1342, *supra*.

universe of economic literature, in which generally but loosely stated historical descriptions have an appropriate role, to the kind of analysis required of expert opinion in this case can create only a kind of ersatz economic science which Rule 703 cannot cognize.

Dr. DePodwin also defends his use of the term "cartel" and his conclusion of concerted action by defendants. His utilization of the studies of Professor Ervin Hexner on cartel behavior is the subtlest, and in some ways the most significant, aspect of his report.[50] Throughout the report, DePodwin refers to the export arrangements into which the Japanese manufacturing defendants and others entered under the aegis of MITI, *see* n.38, *supra*, as cartel. He buttresses this usage in his affidavit by a number of references in which commentators and governmental and international agencies have referred to the activities of the Japanese manufacturers, defendants and others, who were signatories to the Manufacturers' Agreements, as a cartel.[51] What DePodwin then does is to interpose the historical notion of a cartel between the evidence and the ultimate conclusion of a violation of section 1 of the Sherman Act. The unstated premise of this argument, unsupported in law, is that anything which can be called a cartel is *ipso facto* violative of the Sherman Act. Building a great scaffolding upon that unstated premise, he also says that we have been studying cartels for years; this is a classical international cartel which fits the historical pattern, ergo there must be an antitrust violation.

This approach is more than subtle. It is clever, but it is also legerdemain. We cannot permit this or any case to be determined by a tyranny of labels. Rather, we must look at actual facts, *i.e.*, at the actual arrangement and its effects. That is what we have done *supra* in determining the admissibility of

[50] We touched on this aspect of the report briefly in our discussion of the outline of DePodwin's analysis, *supra* at 1336-1337.

[51] Those references are themselves inadmissible, but we will assume here that they are within the ambit of Rule 703.

opinions expressed in Dr. DePodwin's report, and what we shall do in terms of the motions for summary judgment and the preliminary determination (under F.R.E. 104(a)) of the sufficiency of conspiracy proof. In short, no talismanic significance attaches to the use of the term "cartel."

On the related question of the use of legal conclusions such as "concerted action" and "conspiratorial," DePodwin responds that he used such terms because he found

> numerous documents which showed that the setting of such things as Check Prices, Bottom Prices, was done not individually, but jointly by companies whose executives met for these purposes. Examples of some of these documents are referenced in Parts IV and V of the DePodwin Report.

But as we have explained *supra*, these are for the most part documents which have been excluded because they are untrustworthy. Moreover, with respect to the "agreements" as to the Japanese home market, DePodwin has either ignored or taken a one-sided view of what transpired at meetings of the various industry groups, parroting the rhetoric of plaintiffs' lawyers.

Apparently aware of the vulnerability of this approach, Dr. DePodwin again invokes the writings of Professor Machlup:

> Sensitive readers may accuse us of attempting to use loaded words, since "collusion" is sometimes used with an undertone of condemnation and with an allusion to deceit, fraud, or trickery. Let us make it absolutely clear that no ethical connotation is here intended and that *the word as used in economic analysis is meant to be neutral as to ethical judgments and unprejudicial as to legal consequences.*

F. Machlup, *The Economics of Sellers' Competition* 433 (1952) (Emphasis added by DePodwin) (footnote omitted).

Adapting this Machlupian passage to his own stewardship, Dr. DePodwin writes:

> The analyses and judgments on which such conclusions were based were economic not legal, as evidenced by the

> report and the documents upon which it is based. Moreover, it is not out of order for economists to characterize business actions as "illegal" or as "violations of law" since key issues in antitrust law are matters of economic judgment. . . . Next, the standard texts in industrial organization, that area of economics which covers restrictive trade practices and other departures from competition, abound in references to antitrust laws. See, for example, F. M. Scherer, *Industrial Market Structure and Economic Performance* (Chicago, Illinois: Rand-McNally, 1980, second edition). Therefore, the economic experts did not see it inappropriate to render economic judgments on the defendants' joint actions and the United States antitrust laws.

It was once observed, whimsically of course, that saying something three times makes it so. But to say three times or nine times, in the present context, that Dr. DePodwin has not made a legal judgment (or, more precisely, to say that he has made a "neutral judgment unprejudicial as to legal consequences") is to belie reality. As we have explained, these judgments made by DePodwin, largely on the basis of expressly excluded evidence, are those not of an economist, but of a conspiracyologist, and are not cognizable in evidence in this court.

E. *The Price of Japanese Television Receivers in the United States and Japan*

1. *Price Comparisons.*

Part VI of the DePodwin Report consists of three alternate sets of calculations which purport to compare the defendants' prices in the Japanese domestic market with their prices in the U.S. market. Appendix B to Part VI consists of a construction offered to show that four of the defendants sold their products in the U.S. at prices which were below their costs. We discuss the Appendix B cost construction *infra*.

The First price analysis in Part VI sets forth a comparison of average prices on (Japanese) domestic sales with average prices on export sales of television receivers, by screen size

categories, for the Japanese manufacturing defendants, Matsushita (MEI), Melco, Sony, Hitachi, Sanyo, Sharp, and Toshiba. The calculations of average prices were made by the firm of Morris R. Cohen & Co., another of plaintiffs' expert witnesses.[32] Average domestic prices in each case are derived by dividing the monetary value of sales to each company's first-line domestic distribution company, less returns, by the total number of units sold, less returns. Average export prices are derived by dividing revenues from sales by each company to its export subsidiary, agent, or customer by the total number of units exported, less returns if any. Although Dr. DePodwin performs separate analyses of color and of black-and-white television receivers, his analysis does not otherwise distinguish among different models in the same screen-size categories. According to DePodwin, this analysis reveals that the domestic price exceeds the export price in all cases, by amounts which range from a few percent to more than 100% of the export price.

The second price analysis, based on the technical comparison of domestic and export television models prepared by plaintiff Zenith Radio Corporation, is a comparision of the prices of domestic models and of export models which Zenith's engineers found technically comparable. *See* Opinion and Order (1916 Antidumping Act), 494 F.Supp. 1190, 1203-04 (E.D.Pa.1980), *appeal pending*, No. 80-2080 (3d Cir.) (explanation of technical model comparisons). The basic sources of price data for sets sold in Japan were defendants' answers to plaintiffs' Interrogatories No. 45 and 46(c) and Supplemental Interrogatory No. 11, and defendants' commodity tax returns as filed with the Japanese Ministry of Finance. The prices of sets exported to the United States were derived primarily from documents produced in discovery by U.S. purchasers of Japanese-made television receivers. Dr. DePodwin performed this second analysis twice: once using domestic prices taken from defendants' answers to interrogatories, and again using

[32] Defendants do not challenge the Cohen report except as utilized by DePodwin. See note 4, *supra*.

domestic prices derived from the Japanese commodity tax returns. He states that the analysis was made with respect to products manufactured by six defendants, but only discusses the results reached for three of them—Sanyo, Toshiba, and MEI. According to DePodwin, the second analysis revealed large disparities between domestic and export prices of these three defendants. As in the first analysis, domestic prices exceeded export prices, in DePodwin's submission, by amounts ranging upward to more than 100% of the export price.

The third analysis is based on the first, but includes adjustments to the prices which are specified in the text of the Antidumping Act of 1916, upon which one count of plaintiffs' complaint was premised. While Dr. DePodwin, in his explanation of the third comparison, discusses the model-by-model comparisons prepared by Walter Lukas, another of plaintiffs' experts, for plaintiff NUE, the third comparison as submitted in his report is not based on those comparisons. Instead, it is based on the figures for average prices by screen size calculated by Morris R. Cohen & Co. which had also been the basis for the first price analysis. According to Dr. DePodwin, making these adjustments "accentuates and increases substantially the dumping margins, already evident in the price differences shown in the preceding portions of this report." DePodwin Report at VI-47.

The defendants' attack on the admissibility of the first and third of these price comparisons is based on the claimed unreliability of the average prices, by screen-size categories, which were calculated by Morris R. Cohen & Co. and used by DePodwin in both those analyses. The Cohen calculations and DePodwin analyses do not even purport to take into account any characteristics of the defendants' television receivers other than screen size and monochrome or color status, thus ignoring both technical differences among models of receivers sold domestically or exported and other differences such as cabinet size and style. Instead, the average price calculations lump together all monochrome and all color receivers of a particular

screen size, even though one model might contain the finest state-of-the-art electronics in an expensive wooden cabinet while another might contain less expensive electronic parts housed in the cheapest of plastic. Most of the defendants have consistently contended that, at pertinent times, their product mix in the United States was predominantly composed of "economy" models, while their product mix in Japan was more heavily weighted toward more expensive models.[53] Dr. DePodwin has made no effort to rebut this contention, nor to make the appropriate allowances for it if it is true.

We think that defendants' objection to DePodwin's use of average prices by screen size is well taken, and accordingly we find his first and third sets of price comparisons inadmissible under both F.R.E. 703 and 702. Under Rule 703, we do not believe an expert economist can reasonably rely upon average prices calculated in such gross terms.[54] Nor, we add, can average prices which are calculated in such gross terms, taking no account of highly significant variations among models, be helpful to the trier of fact. Consequently the first and third set of price comparisons are not admissible.

---

[53] This contention is also supported by the affidavit of Mr. Yamagishi. *See* p. 1359 *infra*. The only defendant that has not made this contention is Sony, which asserts that it sold at "the top of the line" in the United States.

It is also worth noting that the average prices relied upon in DePodwin's first comparison represent, in many or most cases, sales by the manufacturing defendants to their sales subsidiaries. Thus the prices used to compute the averages are, in many cases, intracorporate transfer prices between parent and subsidiary or between subsidiary and subsidiary. The Matsushita defendants urge, in their brief concerning DePodwin's cost construction, *see infra*, that the average export prices used in that construction are deficient because they are based upon intracorporate transfer prices between two MEI subsidiaries. The average prices discussed in that brief are the same as those utilized by DePodwin in his first price comparison. While there may well be some merit to Matsushita's contention, we need not and hence do not reach it, either here or in our discussion of the cost construction.

[54] In terms of the factors set forth at p. 1330, *supra*, there is a problem of trustworthiness and of invalidity of assumptions. Our inadmissibility determination is reinforced when it is noted that actual price data was available to plaintiffs.

The defendants' attacks on the second set of price comparisons, which *are* based on model-by-model comparisons constructed by Zenith's tech[n]ical experts, are premised on the notion that Dr. DePodwin is "comparing apples and oranges" in two respects. First, defendants note that we have ruled that television receivers manufactured for use in Japan, as a group, and those manufactured for use in the United States, as a group, are not comparable for purposes of the Antidumping Act of 1916 since they are not of "like grade and quality" and are not commercially interchangeable. Opinion and Order (1916 Antidumping Act), *supra*. More importantly, the defendants contend that Dr. DePodwin's second analysis is based upon a comparison of list prices as opposed to actual prices, charged at different levels of distribution, without regard to rebates or other adjustments, rendering the prices incomparable. They also challenge DePodwin's use of commodity tax returns in his alternative calculation.

As to the first objection, we do not think that Dr. DePodwin's use of price comparisons of models which are not of "like grade and quality" renders his analysis inadmissible. The comparisons which he uses are based on extensive technical studies undertaken by Zenith personnel in order to pair models of television receivers sold in the U.S. and Japanese markets which, in Zenith's submission, are technically comparable. Although we have ruled that the technical differences between television receivers manufactured for use in Japan, as a class, preclude the plaintiffs from comparing the prices of such receivers to support a claim under the Antidumping Act of 1916, different considerations apply to the comparison of television models for purposes of plaintiffs' remaining claims under the Sherman Act.

The issue of comparability under the 1916 Antidumping Act was whether the television models are sufficiently similar to justify subjecting the defendants to treble-damage liability simply because they allegedly charged different prices in the two markets, assuming that the other requirements of the Act are satisfied. The issue of comparability under the Sherman

Act as presented here, on the other hand, is whether the television models are sufficiently similar that proof of allegedly parallel price differentials between the U.S. and Japanese markets is admissible evidence to support an inference of conspiracy from consciously parallel interdependent conduct. Since the Antidumping Act claims as they related to television receivers have been dismissed, the analysis of price comparisons contained in the DePodwin Report is now offered only to support an inference of conspiracy under the Sherman Act. For this purpose, we think it reasonable for Dr. DePodwin to rely upon the Zenith technical model comparisons, even though the models are not of "like grade and quality." The essential test is whether the models are sufficiently similar to make the comparison of their prices logically probative of parallel pricing by the defendants, which is in turn an intermediate step in the inference of conspiracy which plaintiffs seek to have the trier of fact draw from circumstantial evidence. We do not agree with the defendants that the price comparison is logically probative of parallel pricing only if the articles compared are of like grade and quality. Thus, defendants' objection that the models compared are not of like grade and quality does not prevent the price comparisons from being admissible under rule 703.

The defendants' objection to DePodwin's use of price comparisons which employed prices for the domestic Japanese market that were derived from defendant's answers to interrogatories 45 and 46(c) can be analytically broken down into two sub-objections. First, defendants argue that their interrogatory answers provided only list (as opposed to actual) prices and explicitly gave the plaintiffs notice that there were rebate structures involved which were not included in the 45 and 46(c) interrogatory answers. The use of list prices, without allowing for rebates, tends to overstate the domestic Japanese prices and, in defendant's submission, renders Dr. DePodwin's analysis of the price differentials inadmissible under Rule 703. We agree with the defendants on this point. It is plain from the record that rebates were common at all levels of distribution in

the Japanese market. As a result, price comparisons which are based solely on list prices do not provide a trustworthy picture of the economic realities of the Japanese market. Accordingly, such price comparisons are not a reasonable basis for an economic expert's opinion under Rule 703.

The second prong of defendant's objection relates to prices charged at different levels of distribution. They claim that the domestic prices which Dr. DePodwin derived from their answers to interrogatories are suggested retail prices and are identified as such in the interrogatory answers. Dr. DePodwin, they contend, has made no adjustments to the prices to reflect retailers' margin, wholesalers' margin, rebates, or the 15% Japanese commodity tax. The export prices with which Dr. DePodwin compares these unadjusted domestic suggested retail prices, defendants submit, are actual transactional prices paid by large U.S. importers of their products. Defendants' counsel contended at our evidentiary hearing that if the proper adjustments were applied to the domestic prices which Dr. DePodwin used, the differentials which he found would essentially disappear. PTO 281 at 163-64 (July 16, 1980).

The record is insufficient for us to rule at this juncture on this aspect of defendants' objection, for the record as to price levels utilized is undeveloped. Defense counsel represented at the evidentiary hearing that those price comparisons were based on suggested retail prices, *see* PTO 281 at 163, but no supporting affidavit or other evidence was submitted. The plaintiffs have never responded on this point, either at the hearing or in a written submission. The fundamental inadequacy of the record with respect to the calculation of price differentials based upon the interrogatory answers arises from the fact that the differentials themselves were calculated by Zenith personnel using the Zenith computer system; Dr. DePodwin only undertook a statistical analysis of Zenith's results. There is nothing in the record to indicate the methodology used in preparing the computerized price comparisons. Our independent examination of the Toshiba and Matsushita interrogatory answers neither supports nor undermines the representations of de-

fense counsel: both sets of answers provide list prices at several levels of distribution, only one of which is suggested retail price. It is impossible to tell merely from examination of the answers which of the several alternative list prices at different levels provided therein were used by the plaintiffs in constructing the price comparisons which were provided to Dr. DePodwin. Thus, we are unable to rule at this time on this alternative defendants' objection.[55]

The defendants also object to DePodwin's alternative calculation based upon domestic prices derived from the defendants' Japanese commodity tax returns. They suggest that, once again, the domestic and export prices which DePodwin compares are prices at different levels of distribution, hence incomparable.[56]

According to the opinion of the Japanese law firm of Braun, Moriya, Hoashi and Kubota, one of plaintiffs' experts that is at present unchallenged (*see* note 4 *supra*), the assessment standard upon which the Japanese commodity tax is levied can be calculated in two primary ways: one proceeding forward from

---

[55] We note, that, in view of the fact that it is the plaintiffs' burden to establish the admissibility of the testimony they proffer once an objection is made, it is highly dubious whether the analysis based on 45 and 46(c) interrogatory answers will be admissible unless the record is supplemented. The preclusivity of the FPS would not necessarily bar supplementation of the record on an evidentiary point. Such supplementation would depend upon whether or not the additional matter were fairly within the framework of what is required by PTO 154 to be set forth in the FPS or expert report and whether, if it should have been set forth, good cause has been shown for failure to do so. If DePodwin's testimony is in fact based on a comparison of prices at different levels of distribution, it is not admissible evidence. The comparison of retail prices with wholesale prices cannot be of any economic or legal significance in the circumstances of this case, and thus plaintiff's economic expert could not reasonably have relied upon such a comparison. Thus, Dr. DePodwin's analysis of price differentials based upon the 45 and 46(c) interrogatory answers may well be inadmissible under Rule 703.

[56] The most thorough coverages of this objection are found in Melco's September 22, 1980 response brief at 114-17 and certain defendants' October 24, 1980 response brief at 30-32.

the ex-factory price, and the second calculating backward from the retail price. The first alternative, based on the ex-factory price, results in an assessment base equal to the "sales price . . . at which the manufacturer offers such commodities at such ex-factory point freely for sale to purchasers in the ordinary amount and form of a wholesale transaction after deducting the commodity tax thereon." Braun, Moriya Report at 2, citing Article II, ¶ 1, item 2 of the Commodity Tax Law of Japan. The second alternative, based on the retail price, is calculated by multiplying the retail price by a fixed percentage, set forth in an appendix to the law. That percentage is apparently intended to represent the amount that would result if the retail price were reduced by "the amount equivalent to the usual profit and expense of the seller of such commodity (excluding the manufacturer thereof) in respect of the sale thereof, together with the amount equivalent to the transportation cost usually paid by the manufacturer," Braun, Moriya Report at 3, and by the commodity tax amount itself.

The Braun, Moriya Report further states at ¶ 5 that the "assessment standard of the commodity tax for television receivers has been mainly based on the retail price thereof . . ." What this means is that the simpler calculation, based on an industry-wide formula, is generally used for television receivers. The assessement standard that results is thus a hypothetical price. The commodity tax formula does not purport to be a reliable guide to the actual prices charged in the Japanese market, but is instead intended as an industry-wide construct which avoids the computation of actual prices for countless transactions.[57] Such artificial prices are simply not comparable

[57] The fact that the Treasury Department at one time utilized this formula in calculating 1921 Act antidumping duties does not help plaintiffs, for as we have already noted, the formula has been effectively repudiated by responsible officials. *See* Public Records Opinion, 505 F.Supp. 1125, at 1157-1158. We explained at that time that Commerce Department General Counsel Homer E. Moyer, Jr. had stated that the formula had been adopted because it was "quick and simple," but "less accurate than original data that document actual foreign market prices." Moyer additionally pointed out that it would be unlikely that a showing could be made that the prices derived from the formula are identical to actual prices in Japan.

to the actual transactional prices in the U.S. market with which DePodwin attempts to compare them. The calculation is accordingly inadmissible under F.R.E. 703.

2. *Appendix B Cost Construction*

Appendix B to Part VI of the DePodwin Report is a mathematical construction which is offered to show that between 1967 and 1970 four companies—MEI, Melco, Hitachi, and Sanyo—sold television receivers in the United States at prices below their costs, while earning substantial profits on their sales in Japan. The construction is explicitly based on three assumptions which are contradicted by the sworn affidavit of Kenji Yamagishi, an MEI executive, and which are also inherently implausible. A fourth assumption implicit in the analysis is also contradicted by Yamagishi's affidavit. The analysis uses average prices by screen size categories which, as we have already ruled, could not reasonably be relied upon by an economics expert. For these reasons, discussed in detail below, the cost construction is inadmissible under Rule 703.[58]

The Appendix B analysis is not based on direct evidence of the defendants' costs. Rather, it is a mathematical construction based only on the internal profit and loss statements of the

[58] The Matsushita defendants also note, supported by Yamagishi's averment, that two of the five Matsushita factories discussed by DePodwin—Moriguchi and Utsunomiya—did not produce television receivers for export to the United States during the relevant period. In his August 1980 affidavit, Dr. DePodwin conceded that his inclusion of the Utsunomiya plant was based on an apparent misreading of MEI's interrogatory answers. In his post-argument affidavit, DePodwin conceded that the Moriguchi production records show that it produced television receivers only for the domestic market. MEI's counsel points out that DePodwin's Appendix B construction found that the Moriguchi and Utsunomiya plant incurred massive losses on exports to the U.S., while in fact the plants produced no exports at all, and characterizes the construction as a "fantasy." Dr. DePodwin's concessions vitiate his analysis as respects the Moriguchi and Utsunomiya plants, but do not in themselves undermine his analysis as respects other Matsushita plants and the plants of other defendants. The concessions are relevant, however, to DePodwin's attack on Yamagishi's credibility. *See* n.62, *infra*.

defendants' factories and on company-wide average prices, or "unit values," of television receivers by screen size, calculated separately for monochrome and color sets, again by Morris J. Cohen & Co.[39] Plaintiffs have submitted this construction in

---

[39] DePodwin explains his methodology as follows:

Based on the above assumptions, the methodology for deriving the operating profits on United States exports and domestic sales is illustrated through an example for 12 inch black & white television sold in 1969 by Matsushita's Moriguchi TV Business Division.[8]

[8] The unit values shown are for total company sales of 12 inch black & white television receivers. However, based on assumption (1), these unit values are applicable to the 12 inch black & white television receivers of the Moriguchi TV Business Division.

The following items of data are necessary for the computation:

a. Operating unit profit on sales: 8.8%

b. Unit value, domestic sales: $76.78

c. Unit value, exports to the United States: 43.65

d. Unit value, exports to the United States and domestic sales: 59.95

Computational Steps:

1. Based on assumption 2(a), the operating profit on exports to the United States plus domestic sales for 12 inch black & white television receivers is 8.8%, i.e., the return on sales of the entire operating unit. Since the unit value (average sales per unit) of these television receivers is $59.95, their average oprating profit per unit is:

8.8% of $59.95 = $5.28

2. Their average operating cost per unit is average sales per unit less average operating profit per unit, or

$59.95 - $5.28 = $54.67

3. Based on the assumption 2(b), the average operating cost per unit is the same for exports to the United States as for domestic sales. Thus,

Average operating cost per unit of exports to the United States = $54.67

Average operating cost per unit of domestic sales = $54.67

4. The average operating profit per unit of domestic sales is the average sales per unit (unit value) of domestic sales less the average operating cost per unit of domestic sales, or

$76.78 - $54.67 = $22.11

Similarly, the average operating profit per unit of exports to the United States is the average sales per unit (unit value) of exports to the United States less the average operating cost per unit of exports to the United States, or

$43.65 - $54.67 = -$11.02, or a loss

lieu of an analysis of the actual cost data of defendants, much of which was tendered to them during discovery, and even more of which plainly would have been discoverable under the Federal Rules of Civil Procedure had they sought it. The extent of the cost data which was actually tendered to plaintiffs' counsel was summarized by Matsushita's counsel during argument:

MR. MILLSTEIN: [I]n May and June and October of 1976 apparently I'm told that the plaintiff's representatives went to Japan and MEI representatives tendered to the plaintiff for inspection a host of cost-related documents. Just prior to this argument I asked my colleagues to attempt to ascertain what was tendered to the plaintiffs, what did MEI offer to the plaintiffs to look at and what did they look at? And here is the list with which I have been provided.

THE COURT: Are you reading a list of what was tendered or what they looked at?

MR. MILLSTEIN: Tendered and looked at. That's what my colleagues tell me happened in 1976. Expense ledgers, production records, tooling charge calculation sheets, cash journals, accrued expense ledgers, annual financial statements, asset and liability ledgers, sales slips, financial statements for the export color TV department, head office accounts books, accounts payable notes, deposit account books, balance sheets, profit and loss statements, sales and general administrative expense

---

5. The operating profit on domestic sales is the average operating profit per unit of domestic sales expressed as a percent of average sales per unit (unit value) of domestic sales, or

$22.11 as a percent of $76.78 = 28.8%

Similarly, the operating loss on exports to the United States is the average operating loss per unit of export to the United States expressed as a percent of average sales per unit (unit value) of exports to the United States, or

$11.02 as a percent of $43.73 = -25.3% Owing to the low unit values for exports to the United States *vis a vis* domestic unit values, the overall operating profit on sales of 8.8 percent for 12 inch black and white television receivers translates to a loss of 25.3 percent on exports to the United States, and a profit of 28.8 percent on domestic sales.

DePodwin Report at VI 72 and 73.

sheets, general allocation and direct sales expense sheets, journal books, specifications of tooling charge calculations, work time and estimated cost calculations for models TR-901BR, TR143AK, TR622UK, TR929UW, general vouchers, materials purchase slips and four more pages which I will not read into the record of those types of papers turned over for the plaintiffs to look at.

Now, I am told that the plaintiffs took about 25 percent of what they looked at and never touched the balance of 75 percent.

PTO 167 at 633-34 (April 25, 1979). Plaintiffs did not counter Mr. Millstein's representations, sub silentio conceding them.

Although the principal basis for our exclusion of the Appendix B cost construction is its reliance on average prices and erroneous assumptions, it is also significant that the plaintiffs and their expert eschewed the particularized, actual cost data which was available to them, in favor of a mathematical construction in gross terms of what is obviously at best a rough estimate of defendants' costs. The availabiltity of actual cost data is pertinent to our analysis, for we do not think that Dr. DePodwin acted reasonably under Rule 703, in relying on the data and the methodology of Appendix B, when actual cost data was available. As we have stated, however, the principal reasons for the exclusion of Appendix B is its use of average prices by screen-size categories and its reliance on assumptions which, according to the uncontroverted affidavit of a person with knowledge, are simply wrong.[illegible] We have discussed the infirmity of DePodwin's use of average prices calculated by gross screen size categories *supra* and need not add to that discussion here, incorporating it instead by reference. We turn instead to an analysis of DePodwin's assumptions.

[illegible] The Matsushita defendants also contend that the DePodwin cost construction is inadmissible or irrelevant because it relies on intracorporate transfer prices between two Matsushita subsidiaries, which in their contention are of no legal or economic significance. *See* n. 53, *supra*. They further contend that the only costs which are relevant to a claim of predatory pricing are marginal or average variable costs, which DePodwin does not even purport to consider. We do not reach these objections.

Dr. DePodwin identifies three assumptions upon which the construction is based:

> The operating profits on exports to the United States and domestic sales are derived for television receivers of several screen sizes, both color as well as black and white, for each company, by operating unit. The derivation is based on the following assumptions:
>
> 1. For each company, the unit values (by screen size, monochrome, and color) of exports to the United States, domestic sales, and exports to the United States plus domestic sales were the same for all television manufacturing plants of the same company.
>
> 2. For each operating unit:
>
> a) The operating profits/losses on all major products covered by the profits/losses reported were in close correspondence.
>
> b) The average (operating) cost of exports to the United States of each screen size, monochrome, and color was the same as the average (operating) cost of domestic sales of the same screen size, monochrome, and color.

DePodwin Report at VI-70 & 71 (footnote omitted). In addition to these explicit assumptions, the defendants have correctly identified a fourth assumption which is made implicitly in the course of the analysis: that the factories considered in the analysis did not produce significant numbers of television receivers destined for sale in countries other than the United States and Japan. We discuss the most egregious of these assumptions first.

a. *The Cost Equivalency Assumption*

The most extravagant assumption in Dr. DePodwin's construction is the one which he identifies in the portion of his report which we have just quoted as 2(b): that within each operating unit, for each monochrome and color screen size, the average operating cost of exports to the United States was the same as the average operating cost of products sold in Japan. We agree with the Matsushita defendants that:

> This “cost equivalency” assumption is the very linchpin of the analysis, since it is used by DePodwin as a surrogate for actually measuring defendants’ operating costs for television exports to the United States. Moreover, since the Cohen Report calculates lower unit values (average selling prices) for defendants’ U.S. exports vis-a-vis domestic sales, DePodwin’s “cost equivalency” assumption essentially preordains the conclusion that defendants’ exports will be found to generate lower profits (or, more likely, losses).

In other words, assumption 2(b) is where Dr. DePodwin puts the rabbit into the hat.

According to the affidavit of Kenji Yamagishi, an MEI executive, this assumption is “completely inaccurate.” Yamagishi avers:

> During the 1967-70 period, MEI’s average operating costs were never the same for sales of television models in domestic and export markets. Rather, in each year discussed by DePodwin, there were substantially different cost factors associated with MEI’s production and sale of television sets for these markets which render DePodwin’s assumption of a domestic-export “cost equivalency” totally invalid.
>
> Moreover, the mix of television sets sold by MEI in the United States during the 1967-70 period consisted primarily of lower cost economy models, while the mix of television models sold by MEI in Japan during this period was more heavily weighted towards higher cost models. Consequently, average operating costs were consistently lower for exports to the United States than they were for domestic sales.

Thus Yamagishi’s affidavit squarely contradicts Dr. DePodwin’s cost equivalency assumption.

Dr. DePodwin attempts to support his cost equivalency assumption by an analysis of MEI’s production costs, as reported to the United States Treasury Department in connection with the proceeding under the Antidumping Act of 1921. *See generally* Public Records Opinion, 505 F.Supp. 1125, at 1151-1155 (description of antidumping proceedings). According to Dr. DePodwin “the production costs of almost two-thirds of the export models are within 15 percent of the production costs of their equivalent domestic models.” DePodwin Report at VI-71. His own figures show, however, that the difference between domestic and export production costs exceeds 10% for 56.7% of the models considered, exceeds 15% for 36.7% of the models considered, and exceeds 20% for 25.0% of the models considered. It is plain that in some cases the domestic production costs are greater than export production costs, while in many other cases the opposite relationship exists. These results hardly support his thesis that export and domestic production costs are identical.[61]

DePodwin also announces that the *average* production cost difference was only 0.02%. We find this figure unpersuasive. First, it is obviously the result of averaging a large number of comparisons in which the domestic costs exceeded the export costs with a similarly large number of comparisons in which the export costs exceeded the domestic costs. It therefore does little to establish that the production costs were nearly identical; the result of averaging a large positive figure with an equal negative figure is always zero. Second, DePodwin does not explain how he calculated his “average”—e.g., whether he gave each comparison equal weight, whether he gave each comparison weight according to the number of units produced of each model, whether he gave each comparison weight according to the monetary value of sales of each model, or whether he gave the comparisons varying weights according to some other system.

In any event, even if the data supported Dr. DePodwin’s claims about *production* costs, the equivalency of domestic and

[61] In his August 1980 reply affidavit, DePodwin undertook another, somewhat more extensive analysis of production cost data submitted by MEI to the U.S. Treasury Department. In that analysis, he found that the difference between domestic and export production costs exceeded 10% in only 38.5% of the comparisons considered. We do not find the difference between this analysis of production costs and the one in his original report to be significant in any way.

export production costs would not support his assumption about the equivalency of average *operating* costs. Production costs represent only part of overall operating costs. In his affidavit, Yamagishi avers:

> The "production costs" reported by MEI in the Treasury Department submissions cited by DePodwin [citations omitted] only include manufacturing costs, such as direct material costs, direct labor costs and manufacturing overhead. By contrast, the factor profit and loss statements used by DePodwin to calculate MEI's operating costs included *both* production costs and other operating costs, such as direct selling expenses in Japan, allocation expenses and the Japanese Commodity Tax.

This averment is entirely consistent with the contention of the defendants throughout this litigation, and throughout the 1921 Act antidumping proceeding, that the manufacturing defendants bear substantial expenses for selling, distribution, advertising, promotion, and warranty costs of their products in the domestic Japanese market, as well as the Japanese commodity tax, which they do not bear with respect to models manufactured for export. Because of the difference between operating and production costs, DePodwin's figures for production cost will not support his assumption of the equivalency of average operating costs for domestic and export products.

The failure of the cost equivalency assumption is itself sufficient to vitiate the entire cost construction and render it inadmissible under Rule 703. Since DePodwin also makes three other assumptions which are contradicted by the record, however, we turn to a brief discussion of these.

b. *The Unit Value Equivalency Assumption*

The assumption which Dr. DePodwin identifies as number 1, quoted at 104, *supra*, is that within each screen size, and monochrome or color category, the unit values or average prices of the television receivers made by a particular company were the same in each factory operated by that company. This assumption is made with respect to the average prices of

receivers manufactured for export, of those manufactured for domestic sales, and to the combined average of export and domestic sales. Yamagishi's affidavit flatly contradicts this assumption, averring:

> This is completely inaccurate. In 1972, MEI produced to plaintiff National Union Electric Corporation the production records (MJ4645-4725) for each of the factories studied by the DePodwin Report for the 1967-70 period. These records clearly show that during this period, MEI's factories devoted a diffferent proportion of their production to different priced products in the same screen size and color categories. As a result, the average selling prices (or what DePodwin terms "unit values") were not the same for each of the relevant factories during the 1967-70 period.

In his August 1980 reply affidavit, DePodwin defends this assumption in three ways. First, he asserts that his assumption was not actually that the unit values are *identical*, but only that the unit values are "sufficiently similar" that it is "not unreasonable" to use them in the computation. Of course, DePodwin's own statement of his assumption, quoted *supra* at 1359, belies this assertion. Furthermore, his methodology makes it clear that his assumption is in fact one of identity. *See* n. 59, *supra* (DePodwin's footnote 6). If DePodwin had made a showing that the differences among unit values were so insignificant that they could reasonably be disregarded, that might suffice to justify his assumption of their identity. However, he has made no such showing; nor do the conclusory statements in his report even suffice to put the point in issue.

Second, DePodwin attacks Yamagishi's credibility and claims that there is no evidence to support Yamagishi's averments. His attack on Yamagishi's credibility is based primarily on a factual claim which DePodwin has since withdrawn. It is obvious that Yamagishi's affidavit is itself evidence, and need not be supported by other evidence. Moreover, we find Yamagishi's affidavit highly credible, both because of his high position in MEI, which supports his claim of personal knowledge of the matters covered in his affidavit, and because of the obvious

inherent implausibility of DePodwin's assumptions.[62] It is DePodwin's assumption, and not Yamagishi's averment, that fails for total lack of support in the record.

Finally, DePodwin notes that if he had not made the unit value equivalency assumption, he would have been unable to conduct his analysis on a factory-by-factory basis, but would have been reduced to treating each company as a whole. This contention fails for two reasons. First, the analysis might have been made on the basis of adequate cost data had such been inspected or sought. Second, the fact that his assumption number 1 enabled DePodwin to present his construction with a veneer of precision has no bearing on whether or not the assumption is defensible.

c. *The Operating Profit Equivalency Assumption*

The assumption which Dr. DePodwin identifies as 2(a) (p. 1359, *supra*) is that within each operating unit, the operating profits or losses on all major products were "in close correspondence." Although he does not state the assumption as one of identity among the profits or losses for the various products, using the phrase "in close correspondence," it is clear from his explanation of his methodology that his actual assumption is that the profits or losses for the various products were identical. *See* n.59, *supra* (Computational Step 1). Thus Dr. DePodwin assumes that if a particular factory reports an overall profit rate of 8.8%, it is earning an 8.8% profit on each of the

[62] DePodwin's attack on Yamagishi's credibility in his August 1980 affidavit is based primarily on DePodwin's claim that the Moriguchi plant produced television receivers for export to the United States. As we have mentioned, Yamagishi averred that the Moriguchi plant manufactured only domestic products. Since DePodwin conceded in his September 22, 1980, affidavit that according to production data Moriguchi produced only for domestic consumption, he has in effect withdrawn the basis for his attack on Yamagishi's credibility. *See* n. 58, *supra*. While it is of course true that matters of credibility must at the summary judgment stage be resolved in favor of plaintiffs, that is not the case when the court is assessing admissibility pursuant to F.R.E. 104(a).

products which it manufactures. Again, this assumption is flatly contradicted by Yamagishi:

> During the 1967-70 period, MEI's factories realized different rates of profitability on each of their different television models. There was thus a wide variation between the overall rates of profitability reported for the TV Departments discussed by DePodwin and the individual profitability rates realized for the various television models produced by those factories during the 1967-70 period.

In his August 1980 reply affidavit, DePodwin attempts to justify this assumption by examining the ratio of price to production cost for 89 MEI television models exported to the U.S. and 18 domestic models. His calculations show that the ratio for export models ranges from some unspecified figure below 1.25 to a maximum of 1.54. His calculations for domestic models show a variation from 1.80 to 2.50. Although DePodwin presents only a summary of the distribution of these figures, it appears that with respect to both domestic and export models, the ratios are distributed quite evenly between the extremes we have mentioned. DePodwin claims that these figures demonstrate that the profit or loss rates on various products were "in close correspondence," but this is plainly not so. Apart from the wide variation in DePodwin's ratios themselves, the distinction between production and operating cost vitiates this analysis as well. If, for example, overhead and other non-production costs for export models amount to 25% of production costs, DePodwin's ratios would correspond to a rate of profit which would vary from a loss, in an amount which cannot be discerned from his figures, to a profit of 23%.[63] Thus the

[63] According to DePodwin's figures, the ratio of price to production costs for export models varies from less than 1.25 to a maximum of 1.54. If we assume that non-production costs amount to 25% of production costs, any price below 125% of production costs would represent a loss. The maximum ratio reported by DePodwin, 1.54, would represent a profit of 29% of production costs (154% minus 125%), which is equivalent to 23% of overall costs (29% as a percentage of 125%). While there is no support in the record for our assumption that non-production costs are 25% of production costs, or for any other specific figure, we make the assumption here only for purposes of illustration, *i.e.* to show how DePodwin's analysis is vitiated by his failure to take non-production costs into account.

analysis in DePodwin's reply affidavit is insufficient to support his profit/loss equivalency assumption.

d. *The Assumption That No Products were Manufactured for Export to Third Countries*

An assumption which is implicit in Dr. DePodwin's methodology is that all the television receivers manufactured in the factories which he considers were either sold in Japan or exported to the United States. Yamagishi avers that MEI factories "produced significant numbers of television sets for sale to export markets other than the United States."

According to Dr. DePodwin's August 1980 reply affidavit, Matsushita's sales to third countries amounted to 3.8 percent of its television sales in 1968, 4.2 percent in 1969, and 9.9 percent in 1970. In that affidavit, he recalculates the cost construction to take those third-country sales into account, and avers that the new calculations do not alter his ultimate conclusion that the defendants sold their products at a loss in the United States. However, his own comparison shows that the exclusion of third-country sales resulted in an overstatement of the alleged constructed loss on exports to the U.S. by amounts of up to 10%. Accordingly, it is plain that the exclusion of third-country sales distorted his original calculations to an appreciable extent.

e. *Admissibility With Respect to MEI, Sanyo, Hitachi, and Melco*

We conclude that the Apppendix B cost construction is inadmissible under F.R.E. 703 because of the use of average prices by screen size, because of the erroneous assumptions upon which Dr. DePodwin relied, primarily the assumption of cost equivalency, and because of the availability of more reliable data. The discussion above has focused on MEI because the issues were briefed and argued by MEI's counsel, because only MEI has represented that it actually tendered voluminous cost data to the plaintiffs, because the Yamagishi affidavit refers only to MEI and, balancing out these matters, because

DePodwin made no effort whatever to support any of his assumptions except with respect to MEI.

We think, however, that the Appendix B cost construction is inadmissible with respect to Sanyo, Hitachi, and Melco as well. Although we do not know whether these companies tendered cost data to the plaintiffs, it is plain that such data would have been discoverable under the Federal discovery rules. The construction relies on average prices by screen size in regard to these companies as well as MEI. Furthermore, we have characterized Dr. DePodwin's assumptions as inherently implausible, and all of the defendants have represented that their costs for television receivers manufactured for the domestic market include substantial non-production costs which they do not bear with respect to the television receivers manufactured for export to the United States. In the absence of any support for DePodwin's crucial assumption of cost equivalency, we find that it was unreasonable for him to rely on that assumption in his analysis of any of the four companies which he considered. Nor have DePodwin or the plaintiffs provided adequate support for the other assumptions made with respect to Sanyo, Hitachi, and Melco.[64]

Thus, with respect to all four of the defendants whom DePodwin considers in Appendix B, we find that the cost costruction is pervaded by reliance on untrustworthy sources of information: false or unsupported assumptions, and average prices calculated in gross terms. This pervasive reliance on suspect sources renders the Appendix B cost construction inadmissible in its entirety under Rule 703.

F. *The Japanese Market Background*

Chapter VII of the DePodwin report describes the Japanese domestic market, reaching the conclusion expressed in the

[64] According to DePodwin's figures, Hitachi and Melco did not manufacture television receivers of the same screen size at different plants. Thus DePodwin's assumption number 1—that average prices by screen size were the same at each plant of the same company—is unobjectionable with respect to those two companies.

chapter's title: "The Nature of the Market for Television Receivers in Japan Has Been Conducive to Cartel Agreements." DePodwin discusses the high degree of concentration in the Japanese consumer electronics market, informing us that a high degree of concentration "is conducive to collusion." He goes on to state that "[c]ollusion among domestic manufacturers was aided by barriers to competition from imports." DePodwin Report at VII-1.

After discussing concentration of the market, DePodwin describes other barriers to imports into the Japanese market, concentrating on tariff rates, import quotas, and other governmentally imposed restrictions, such as import deposits, labeling laws, and safety standards. He closes with a short section describing barriers to direct foreign investment in Japan.

We held *supra* that narrative information in the nature of industry background is helpful and admissible under Article VII. Market background is of a similar nature, and is admissible for the same reasons.[65]

One section, however, from pp. VII-7 to VII-12, cannot truly be called background material. That section, which deals specifically with the home electric appliance industry, and which refers specifically to certain of the defendants in this litigation, is based solely on a publication by Komiya *et al.*, which DePodwin quotes verbatim and which he plainly adopts unquestioningly. We discuss a similar section of the Yamamura report based on the same publication *infra* at p. 1368, concluding it is inadmissible. The same result follows here for the same reasons, and we incorporate that discussion here by reference.

---

[65] Defendants object to this background as irrelevant, contending that trade barriers in Japan have nothing whatever to do with an export conspiracy. That issue will be addressed in our forthcoming opinion on the conspiracy questions.

G. *Summary of Conclusions*

We have not addressed those portions of DePodwin's report which go to the issues of damage and injury, for they are not germane to our decision on the summary judgment motions. Of the remainder of the report, we have found that, with certain exceptions, those matters which are primarily background, *i.e.*, methodology and economic principles in Part I, industry background in Parts II and III, and market structure background in Part VII, are admissible under Article VII. Those portions of the report that discuss the "cartel" alleged to exist in this litigation, primarily Parts IV, V, and VI, are not admissible.[66]

IV. *The Yamamura Report*

A. *Introduction*

If the DePodwin report is the most professionally disinterested of plaintiffs' expert reports, Professor Kozo Yamamura's report, "The Pervasive Use of Collusive and Company Group *(Keiretsu)* Activities in Achieving the Rapid Increase in Japanese Exports of Television Receivers to the United States," is the most partisan.[67] Professor Yamamura, an economist specializing in the Japanese economy, described his task as follows:

> The central purpose of this Report is to demonstrate that the rapid increase in exports of Japanese electronic products for home entertainment (especially television sets and radios) to the United States from the mid-1950s to

---

[66] Certain calculations of price differentials in Part V were reserved. *See* p. 1348, *supra*.

[67] Professor Yamamura holds a Ph.D. in economics from Northwestern University. He is a Professor of Economics and Asian Studies at the University of Washington, as well as Adjunct Professor of International Business in the School of Business Administration and Chairman of the Japanese Studies Program in the School of International Studies, both at the University of Washington. His publication list is extensive, covering virtually all aspects of Japanese economic history and development.

the early 1970s was achieved with the substantive and crucial aid of effective collusive activities in which the major Japanese producers of television sets and other electronic products engaged in both domestic and American markets.

Yamamura Report at 1. In contrast to Dr. DePodwin, who sought to examine "whether" collusive behavior among the Japanese was responsible for their success in the United States market, Prof. Yamamura set out to prove "that" collusion was prevalent. We do not say that this is necessarily an impermissible objective, but it does cause us to carefully consider defendants' contention that an expert who begins with the assumption that something is the case is likely to be able to "prove" that the assumption is indeed true.[68]

B. *The Japanese Market Background*

After a brief introduction, the Yamamura report begins with a discussion of the Japanese post-war economy, with emphasis on the importance attached to rapid growth. Part I of the report, entitled "Environment for Rapid Growth of the Economy and Exports," describes two aspects of what Prof. Yamamura describes as close cooperation between industry and government: monetary policy and relaxation and weak enforcement of Japanese antitrust policy. As described by Prof. Yamamura in his summary submitted at the court's request, *see* note 2, *supra:*

> The five critical ingredients of the monetary policy are outlined (on pp. 7-9) and the report states that "the eagerness of the officials of the Ministry of Finance and the Bank of Japan to use their legal and extra-legal powers of persuasion, backed by their powers to allocate loans, the money market was effectively "administered" for the purpose of achieving rapid economic growth" (p. 9). The policy consistently and strongly favored the largest banks and the largest firms, and, in particular, made it difficult for small- and medium-sized firms to obtain loans.

[68] Prof. Yamamura notes that he has long held the views expressed in his report.

> The relaxation and weak enforcement of the domestic antitrust policy also created an environment in which large firms could flourish and cooperate in cartels. Antimonopoly legislation was viewed by industry leaders and pro-growth policymakers as inhibiting economic growth and an increase in exports and a number of important changes were instituted in the 1950s. . . . Not only did the number of exempted cartels increase, but "unauthorized illegal cartels also proliferated, the costs of which included restricted competition at home and the imposition of severe injury to foreign firms in markets abroad." (p. 15). . . . In the words of the report, "Prevailing MITI attitudes and ineffective FTC enforcement have combined to permit widespread violation of Japanese antitrust law." (p. 21). . . . "Cartel capitalism" has had numerous deleterious effects on the Japanese population, including maintaining artificially high domestic prices. Pages 25-32 of the report decument [sic] the increased public criticism and consumer reaction to cartels.

Professor Yamamura follows his general discussion of the Japanese economic environment with a detailed section describing company or industry groups called *keiretsu*, a significant characteristic of Japanese economic life.[69] According to the report, *keiretsu* "collectively dominate the industrial, financial and marketing activities of the [postwar Japanese] economy." As explained by Professor Yamamura at p. 33,

> The central purposes of this section are to: (1) identify the *keiretsu;* (2) present observations and evidence concerning their presidents' clubs, mutual shareholdings, and several other crucial factors which establish their existence and indicate the degrees of their "group solidarity"; (3) discuss the roles of the trading companies as members of company groups; (4) ask why such *keiretsu* exist in Japan; and (5) examine the roles of the *keiretsu* in the effectiveness of domestic cartels and their effect on the conduct of member firms in international markets.

[69] Professor Yamamura concentrates in this section upon company group, or horizontal, *keiretsu*. He touches briefly in a subsequent section upon vertical, or distribution, *keiretsus*, these vertical arrangements are the subject of Professor Haley's report, addressed *infra*.

Professor Yamamura explained in his summary that there are two principal international consequences of *keiretsu:* "(1) they facilitate predatory behavior of firms, and (2) they prevent foreign entry into Japanese markets."

Having described *keiretsu* and their economic effects in detail, Professor Yamamura was able, by way of summary, to conclude the section with a definition:

> A *keiretsu* is a group of companies in various industries which is formed to gain and increase the member companies' collective market power in both domestic and international markets. A *keiretsu* increases the market power of its members because the member companies, as a group, can create a dominant inner circle of the largest companies which effectively limit or minimize the rigor of domestic and international market forces. This inner circle is created because the member companies enjoy a more ready and reliable access to capital, market information, privileged and often exclusive trading relationships, and other advantages than do non-members. To realize these gains, the cohesiveness of the groups is essential and it is solidified by means of the president's clubs, interlocking directorships, cross-shareholdings, and other means.
>
> To the extent that such groups constitute a large segment of the Japanese economy as a whole, and to the extent that the group activities are conducive to increasing the efficiency of the economy by means of shared information, technological expertise and the joint financing of large and riskier ventures, the growth of the Japanese economies are aided by these inner circles—albeit at the cost of having anti-competitive inner circles of large enterprises. For foreign enterprises, however,the *keiretsu* constitute a substantive barrier to trade and an effective source of market power in the Japanese market which increases the efficacy of domestic cartels organized to maximize domestic profits which can be and are used to subsidize the efforts of Japanese cartel members to increase market shares in foreign nations by means of dumping and price fixing.

Yamamura Report at 71-72.

Defendants contest the relevancy of the information provided in these two sections on several grounds,[70] but we do not reach those objections in this opinion. Their Article VII objections are considerably less strenuously pressed. Their 702 argument essentially attacks the relevancy of this discussion: defendants seem to be saying that testimony which is irrelevant is not helpful to the jury. While that may be true, it is more appropriately considered in the relevancy context. We shall restrict our inquiry of helpfulness under F.R.E. 702 to the question whether the expert's specialized knowledge is of assistance to the jury *if* relevant. We hold that these sections of Professor Yamamura's report, which constitute the kind of helpful background we have referred to *supra*, do present significant matters within the purview of an economist otherwise beyond the ken of the jury and pass muster under the "or otherwise" clause of F.R.E. 702.

With respect to F.R.E. 703, defendants challenge occasional individual sentences as being conclusory, without underlying basis. This argument is not vigorously pressed, however, and the contentions have not been explicitly outlined. Nor have the sources upon which Yamamura relies been attacked. We think it is clear from a reading of these sections that the information presented is sufficiently based upon reliable economic sources. We see no problem under F.R.E. 703.[71] Accordingly, Professor

---

[70] They argue, *inter alia*, that a climate or environment conducive to concerted action is in no way probative of actual concerted action among these defendants. They argue further that an opinion that the Japanese have a "propensity to conspire" is inadmissible character evidence under 404(a), in that it can only logically be offered to suggest that these defendants acted in conformity with that trait. Finally, they argue that, even if some minimal probative value were to be discovered, it is vastly oveshadowed by the unfair prejudice such testimony could engender, and hence is inadmissible under F.R.E. 403 as well.

[71] We should point out that Professor Yamamura's report is fraught with conclusory and inflammatory rhetoric. As we discussed *supra*, we shall have no difficulty ignoring such rhetoric in our consideration of the summary judgment motions. Nor do we foresee any danger at trial, for the requisite form of questioning and availability of the motion to strike will preclude any expert witness from testifying in an inappropriate manner.

Yamamura's "Japanese Market Background" segment will be considered on the summary judgment motion and in connection with the F.R.E. 104(a) conspiracy determination and, subject to an appropriate limiting instruction, may be submitted to the trier of fact at trial.

C. *Collusive Activities*

The remainder of the Yamamura report, beginning at page 73, is totally inadmissible for the same reasons discussed with respect to Dr. DePodwin's report. Professor Yamamura, like Dr. DePodwin, read the documents that have been offered in this case and undertook to weave a story from them, narrating their contents and offering his interpretation. He thus runs afoul of both Rules 703 and 702 by relying on the same untrustworthy documents as did Dr. DePodwin, and by providing no "economic value added" which would assist the trier of fact in understanding the evidence.

Professor Yamamura signals in the introduction to Part III that these problems will undoubtedly arise:

> The central aim of this section is to provide, against the background already presented, the abundant and compelling evidence demonstrating the effectiveness of the collusive activities (vertical and horizontal price fixing, predatory dumping, and other illegal conduct) in which the defendant television producers engaged for over two decades, beginning in the mid-1950s, in both the Japanese domestic market and the United States market.
>
> More specifically, the evidence to be presented below will show: (1) that the collusive activities in which the defendant television producers engaged in the domestic Japanese market were elaborately and closely coordinated and monitored by numerous consultative bodies which met regularly, and by various sub-groups and committees organized within the trade association of the industry for the purpose of fixing prices, profits and rebate rates, market shares, joint output, etc.; and (2) that the collusive activities in which the defendant television producers engaged in the United States market were also elaborately and effectively coordinated, monitored, and implemented—including predatory price fixing and other anti-competitive means intended to increase the Japanese producers' market share in the United States—at the cost of grave and permanent injury to the United States producers of television sets.

Yamamura Report at 73.

Directing his attention first to the domestic market, Professor Yamamura begins with a description of the "collusive activities" of the familiar domestic "conspiratorial groups"—the EIAJ, the Market Stabilization Council, and the various sub rosa groups—followed by page after page (approximately forty of them) of what Yamamura terms "supporting evidence." This "supporting evidence" is nothing but direct quotations from documents submitted in conjunction with this litigation.[72] All of the documents quoted by Professor Yamamura were part of the record in the Six Company Case before the JFTC, and all were considered by us in the pretrial evidentiary hearings. Specifically, he quotes protocols, or statements, by various employees of the six companies,[73] testimony by two of those same employees, and the diaries of Yajima, Yamamoto, and Tokizane. The diaries were excluded from evidence in our Japanese Materials Evidentiary Opinion. The testimony, however, we ruled to be admissible, with the exception of certain export references not at issue here, against the six companies involved; the protocols, with the exception of that of Mr. Koishi

---

[72] Professor Yamamura's format is somewhat curious. He begins with a four-page conclusory section about collusive meetings, which he follows with a "summary of selected evidence." This "summary" merely lists the paragraph numbers of the "evidence" which follows which supports the statements in the brief narrative. He follows this summary with his "evidence" in a section which merely quotes directly from documents. There is no narrative interspersed, and no attempt at explanation of the documents. The quotations are merely strung one after the other in no immediately apparent order.

[73] Protocols included are those of Adachi (Hitachi), Yamamoto (Hitachi), Kawahara (Toshiba), Kamuro (Toshiba), Kamakura (Toshiba), Saeki (Hayakawa, now Sharp), Narita (Toshiba), Okuma (Melco), Ito (Melco), Koishi (Fuji), and Yajima (Toshiba).

of Fuji, a non-party, we found also to be admissible as admissions against the individual employer.

We need not determine whether Professor Yamamura's use of the admissible protocols and testimony is so tainted by his equal reliance upon the unreliable diaries as to amount to a lack of reasonable reliance under F.R.E. 703, however, for Professor Yamamura has run afoul of F.R.E. 702 by engaging in the same oath-helping conspiracyologist exercise as did Dr. DePodwin. In fact, Yamamura's presentation is even less helpful than DePodwin's, for he has done nothing but quote the documents directly, after prefacing those quotations with a summary of their contents. But under our system of jurisprudence, we leave to lay jurors the task of sifting through the evidence presented, assessing its probative worth, and aided by the arguments of counsel, the instructions provided by the court, and their own common sense, deciding for themselves the inferences and conclusions to be drawn. We do not delegate that task to expert witnesses. This is fact-finding, not the application of expertise, and is totally inappropriate expert testimony.

Concluding his discussion of the Japanese domestic market, Professor Yamamura notes, as described in his summary:

> Of special importance in terms of collusive activities of the defendant television producers in their domestic markets is the control they exercised over distribution, through employing collusive vertical restraints (Section A-3, pp. 118-125). Instrumental in this respect was (1) "tight grip which each major Japanese manufacturer had on their respective distribution outlets" (the details of which are explained on pp. 118-124), which "constituted a very effective barrier to the entry of foreign sellers, Japanese discount stores, and Japanese as well as foreign producers into the Japanese market for television sets and other electric home entertainment products" (p. 124), (2) weak domestic antitrust enforcement (p. 125), and (3) cooperation between MITI and industry (pp. 125-126).

With regard to the first of these points, manufacturers' control over the distribution channels, Professor Yamamura

rather astonishingly quotes verbatim for five and one-half single spaced pages from a publication which he neglects to identify, except by noting that it was written by "Komiya et al." We assume this is the same publication as that cited in a subsequent section at p. 126 and listed in the bibliography for the report. If so, it is a Japanese language article in a Japanese journal, apparently about the electric home appliance industry, with an unknown translator. The quotation discusses the vertical, or distribution, *keiretsu* in the home electric appliance industry, with specific factual reference to some of the defendants in this litigation.

This segment presents an admissibility problem different from the others we have addressed in this opinion. We can assume, although we may be incorrect, that the journal in question is an economics journal, and that Komiya et al. are economists. We can even assume that the article is of the highest scholarly caliber, and that it would be unquestionably reasonable for an expert witness to rely upon it in forming an opinion. But Professor Yamamura has not merely relied upon it in forming an opinion: he has imported it wholesale, incorporating it into his "dissertation" on the Japanese market structure. He has, in actuality, switched expert witnesses. Instead of Professor Yamamura expounding under the "or otherwise" clause of F.R.E. 702, we now have Komiya et al. providing their views. But those persons have not been qualified as expert witnesses in this proceeding. Nor has there been any attempt to qualify the Komiya publication under Rule 803(18), which permits materials "established as . . . reliable authority" and relied upon by an expert witness to be read into evidence as an exception to the hearsay rule. Indeed it would be extremely difficult to so qualify this article, for it presents such detail with respect to individual defendants as to demand a particularly firm foundation. Moreover, the publication is intrinsically tentative on factual matters and does not appear to espouse an opinion. It is replete with phrases such as "it is said that," "there are some manufacturers who," "it is esti-

mated that," and "from a clue provided. . . ." For these reasons, the quoted section is inadmissible.[74]

The other points referred to above—barriers to foreign sellers, weak domestic antitrust enforcement, and cooperation between MITI and industry—are passed over briefly by Professor Yamamura in a page and a half. Essentially, what he has done is to recall earlier sections of the report dealing with market structure, relating them to the television industry. We discussed this technique with reference to the DePodwin report, ruling that such testimony could be admissible only if the underlying factual basis were present in the record. *See* pp. 1346-1347, *supra*. As with the DePodwin report, because we have ruled Prof. Yamamura's discussion of conspiratorial activities inadmissible, there is nothing to inform his application of background materials to his analysis of collusive activities, hence this segment is inadmissible to support Yamamura's conclusions with respect thereto.

Turning from the domestic market to the export market, the report, again as described in the summary,

> explains the collusive activites engaged in by the defendant companies to increase exports of television receivers to the United States market. As is stated in the report, "The elaborate, effective, and nearly two-decade long collusive activities of the defendants in the Japanese domestic market provided them with (1) large profits . . . which were used to finance the expansion of their productive capacities and to absorb the cost of dumping their products in the U.S. market; and (2) an established, on-going, and effective collusive apparatus which was well-tested in the dumping of radios in the United States and was also readily used in the dumping of television receivers in the U.S. market." (p. 126)

Once again the Yamamura report echoes the DePodwin report as it sifts through familiar documents, drawing therefrom conclusions regarding the JMEA rules and manufactur-

[74] As noted *supra*, the same reasoning excludes a corresponding section of the DePodwin report.

ers' agreements, customer registration, the Five-Company Rule, reference prices, kickbacks, and rebates. Yamamura relies for his information primarily upon the Manufacturers' Agreements and JMEA rules, which we have assumed *supra* to be reliable bases for expert testimony in terms of F.R.E. 703. He also, however, quotes heavily from such dubious documents as: the Komiya publication discussed above; a publication cited as Kazuki Daimon, *Kuroi Bukka* (Black Prices), a translation of which, titled "The Fangs of Monopoly," he has attached as Appendix B; *Yomiuri Shimbun*, Japan's major daily newspaper; the Initial decision in the Six Company Case; and the Yajima diaries.

We need not balance Professor Yamamura's reliance on materials of questionable reliability against his use of materials assumed to be reliable, however, for we can easily dispose of this section of the Yamamura Report on F.R.E. 702 grounds. Yamamura has done nothing more than what Dr. DePodwin did. He has provided factual conclusions of conspiratorial activities based upon narration taken directly from documents proffered in this litigation. He has not performed any economic analysis; instead he has engaged in the practice of "conspiracyology." This section of his report is accordingly inadmissible.

Part IV of Prof. Yamamura's report is a brief conclusion which highlights the principal findings. To the extent that the section summarizes materials, such as those dealing with the structure of the market, which we have found admissible under Article VII, the summary is of course admissible as well. To the extent, however, that conclusions are repeated from those portions of the report which we have deemed inadmissible—*i.e.*, the findings of conspiratorial behavior among these defendants—the summary is likewise plainly inadmissible.

To summarize, we have found pages six through seventy-two of Professor Yamamura's report, purged of its conclusory and inflammatory rhetoric, to be admissible, but the balance must be excluded from evidence for the reasons stated.

V. *The Nehmer Report*

The Nehmer Report,[75] "Economic Analysis of Evidence Relating to Japanese Electronic Products Antitrust Litigation," submitted by Economic Consulting Services, Inc., shares the problems of the DePodwin and Yamamura reports. As will be seen, the opinions it expresses are inadmissible essentially to the same extent as those reports.

The report proclaims itself an economic analysis, but it is much more akin to a highly-skilled research report prepared for some policy-making body, such as an executive branch agency or congressional committee. As such, it is essentially a collation of the factual materials we have discussed before, with a smattering of economic jargon sprinkled on top, but without the specialized knowledge of the Japanese economy and history provided by Professor Yamamura or the thoroughness of Dr. DePodwin. The report is noteworthy for the paucity of its citations. Nehmer has appended a lengthy bibliography, which includes vast numbers of documents we have held to be inadmissible in our previous evidentiary opinions, but he only occasionally informs the reader which of those many sources he is relying upon for particular information. In actuality Nehmer is plaintiffs' counsel's theoretician. He has supplied the jargon and the theory which has informed plaintiffs' case. As such he has served his purpose, but his opinions do not pass Article VII muster.

[75] Stanley Nehmer holds an M.A. from Columbia University. He is president of Economic Consulting Services, Inc. and Director of Economic Consulting Services, Wolf & Company. He has held a variety of economics-related positions, primarily in government, including Deputy Assistant Secretary for Resources and Trade Assistance, U.S. Department of Commerce, 1965-1973; Deputy Director and then Director, Office of International Resources, U.S. Department of State, 1961-1965; Senior Economist, International Bank for Reconstruction and Development (World Bank), 1957-1961; Economist, Department of State, 1945-1957; Office of Strategic Services (assigned by U.S. Army), 1942-1945; Fellow, City College of New York, 1941-1942; U.S. Representative, Commodities Committee, United Nations Conference on Trade and Development, Geneva (1965); Adjunct Professor, American Business History, American University (1948-1963); Chairman and U.S. Representative, OECD Textiles Committee (1971-1973); Member, Oil Import Appeals Board (1965-1973); Chairman, Committee for the Implementation of Textile Agreements (1972-1973); Alternative Member, Oil Policy Committee (1970-1973); Director, Export Trade Mission to Japan and Hong Kong (1971); and, Director, Export Trade Mission to Eastern Europe (1973).

Mr. Nehmer's publications are primarily historical. In addition, he has frequently testified before the International Trade Commission with regard to various industries.

As with the other reports discussed, we are reminded from the outset that Mr. Nehmer began with a particular goal in mind:

> The basic purpose of the report is to present an economic analysis demonstrating that the Defendants in said litigation ("Defendants") conspired and otherwise engaged in anti-competitive activities contrary to U.S. law in restraint of U.S. trade. The report also addresses the calculation of damages sustained by Zenith as a result of these unlawful acts.
>
> . . . . .
>
> The body of this report is organized in furtherance of four, principal objectives. These objectives can be briefly described, as follows:
>
> (1) demonstrate that the Defendants have conspired to restrain U.S. trade in consumer electronic products and reduce competition in the U.S. market;
>
> (2) demonstrate that the strategy pursued by the Defendants toward this end was anti-competitive in its intent and effects;
>
> (3) demonstrate that the result of Defendants' strategy was the elimination of most U.S. manufacturing of consumer electronic products, and the consequent loss of thousands of U.S. employment opportunities; and
>
> (4) calculate damages sustained by Zenith.

Nehmer Report at I-1 to 2.

Following a brief introduction, the report begins with a chapter entitled "Key Elements of Defendants' Anti-Comptetitive Strategy: Basic Theoretical Concepts." This

chapter is somewhat analogous to DePodwin's "Outline of Economic Analysis," *see* pp. 1336-1337 *supra*, in that it describes a number of basic economic concepts which it then relates in summary fashion to the "evidence" in this case as it is subsequently developed in the report. This chapter is accordingly admissible to the same degree as the correlative DePodwin chapter—that is, to the extent that it explains methodology, economic principles, or analytical framework, it is admissible; to the extent, however, that it applies such principles to the case at bar in conclusory fashion, it is not. Rather, the opinions expressed must be considered in their subsequent factual context.

Chapter III, "Structure of the Japanese Consumer Electronics Industry: A System of Total Control" is analogous in part to sections of the DePodwin and Yamamura reports which we found to be admissible. Nehmer's version, however, we must exclude.

The chapter describes the consumer electronic products industry in Japan "as a system subject to virtually total control by the major manufacturers acting in concert with respect to production, distribution, exports and pricing." Nehmer Report at III-1. The chapter begins with a brief description of the Japanese distribution system of affiliated dealers, and moves quickly into a lengthy discussion of the activities of the Market Stabilization Council. Nehmer briefly describes various of the other industry groups, returns to discourse again on the distribution system, mentions trade barriers,[76] and ends with descriptions of each of the Japanese defendants in this litigation.

Nehmer relies for his description of the industry upon three primary sources: the consent agreement in the Market Stabilization Council case before the JFTC, discussed *supra* at 1340; the Komiya publication discussed *supra* at 1368-1369,

[76] Thus those portions of the chapter addressing the market structure—the distribution system, trade barriers, etc.—are similar to DePodwin's Chapter VII and Yamamura's Chapters 1 and 2.

and a report by Techno International Inc. Nehmer not only relies on the Market Stabilization Council document, he quotes it verbatim for 5½ pages. But as we have discussed, both *supra* and in our Public Records Opinion, that document is not admissible because it is not reliable as proof of the matters set out therein. The Komiya article we discussed extensively in our consideration of the Yamamura report. Although Nehmer does not quote Komiya verbatim, as did Professor Yamamura and Dr. DePodwin, it is plain from his citation style, *see* pp. II-1 to 2; III-17 to 20, that he has merely narrated for a new audience the essence of the Komiya article. Thus the situation is the same as in the Yamamura report: Nehmer has not based an opinion upon a number of sources, but has merely adopted wholesale what someone else has said about the activities of these defendants. The Techno International article is used in precisely the same manner. The only other documents cited in the course of Nehmer's description of the market are: (1) defendants' answers to plaintiffs' interrogatories relating to group membership, which is undisputed; (2) the draft decision in the Six Company Case, cited to support a single paragraph describing the six companies' price agreements but which, as we have already explained, is inadmissible; and (3) a statement by Konosuke Matsushita, discussed *supra*. Reliance on these documents further undermines plaintiffs' position.

For reasons discussed with respect to the DePodwin and Yamamura reports, the opinions expressed in Chapter III of the Nehmer report must be excluded. Nehmer has adopted the sources discussed above, virtually all of which were either ruled inadmissible on trustworthiness grounds, or are otherwise untrustworthy (or not qualified under F.R.E. 803(18) as discussed at 129, *supra*). Opinions based thereupon are accordingly not reasonably based in terms of F.R.E. 703.[77] Moreover,

[77] The closing section of Chapter III, which gives basic background about the individual defendants, is drawn entirely from two sources: *Fortune* magazine, and Judge Higginbotham's opinion on jurisdiction and venue, 402 F.Supp. 262 (E.D.Pa. 1975). The *Fortune* article is plainly inadmissible hearsay. Judge Higginbotham's findings we ruled inadmissible in our Public Records opinion, however we do not reach the F.R.E. 703 issue with regard to reliance upon those findings.

Nehmer has taken these documents and merely described them for his audience, often quoting at length. He has engaged in the same oath-helping factual analysis as have the other experts, hence his narration is inadmissible under F.R.E. 702.

Chapter IV of Nehmer's report, entitled "Japan as a Market 'Closed' to Foreign Competition in the Area of Consumer Electronics," describes the barriers which, in Nehmer's submission, effectively closed the Japanese market to imports. This chapter is similar to Chapter VII of the DePodwin report, discussed *supra* at 1363, and the major portion of it is admissible under Article VII for the same reasons.

The first fourteen pages of the chapter describe the financial and non-financial barriers which allegedly discourage the importation of foreign products into Japan, as well as barriers to direct foreign investment in Japan. While the section is for the most part citationless, we do not see that as a bar to its admissibility as expert testimony, for the bases of the testimony can plainly be elicited at trial under F.R.E. 705. This discussion appears to us to be the type of information which an economist could draw upon his own background and experience to provide, particularly one with as extensive experience in the U.S. Commerce Department as Mr. Nehmer. We have no reason to suspect that Nehmer has primarily relied upon anything other than reliable sources. Moreover, the testimony is helpful in providing background for the trier of fact. Thus, purged of their occasional references to such things as "Defendants' scheme," the first fourteen pages of Chapter IV are appropriate expert testimony.[78]

Beginning on page IV-14, however, Mr. Nehmer takes a different tack, rendering the remainder of the Chapter inadmissible. The section describes unsuccessful efforts by individual U.S. manufacturers to enter the Japanese market, focusing on Zenith, Motorola, and Sears, all parties to this litigation. Nehmer relies solely on documents tendered in this

[78] We intimate no view here on the relevance of the matters contained in this section to the alleged export conspiracy.

case, primarily letters of various company executives.[79] We need not determine the independent admissibility of these documents, nor their reliability for purposes of F.R.E. 703, for the narrative is plainly inadmissible under F.R.E. 702. Nehmer has presented no economic analysis whatsoever, and this is not the type of economics-oriented background information which we found helpful with respect to trade barriers. Instead it is a factual narration with doses of pure speculation tossed in at random,[80] drawn from and quoting liberally documents potentially before the court. Nehmer has merely strung together documents which the jury is perfectly capable of understanding, to describe attempts by American firms to

[79] *Inter alia*, Nehmer cites a letter from I. Kobayashi of C. Itoh & Co., Ltd. of Japan to Y. Tamiya of C. Itoh & Co. (America) Inc., a trading company through which Zenith attempted to sell its products in Japan, purportedly explaining why such marketing efforts must fail; a letter from D. Andre of Nichimen, Inc., another trading company, to J. Miguel, Zenith's Vice President for export, again explaining marketing difficulties; a letter from Charles A. Tausche, a Sears representative, to John Borst, Jr. of Zenith, explaining Sears' exclusion from the Japanese market; a letter from W. Frick of Zenith International to S. Inaba of C. Itoh & Co. (America) terminating Zenith's effort to enter the market; Japanese press reports of Motorola's proposed entry into the market; and a market analysis prepared for Zenith by C. Itoh & Co.

[80] An example of such speculation appears at p. IV-19. In the context of a discussion of Sears' exclusion from the Japanese consumer electronic products market, Nehmer quoted at length from a letter from a representative of the law department at Sears to house counsel for Zenith, written apparently to explain Sears' non-participation in the Japanese market, which included a comment to the effect that exporting such products to Japan was "rather like bringing coals to Newcastle." Nehmer continued:

> The references to coals and Newcastle are hardly appropriate in this context, since if Sears were permitted to sell consumer electronic products in the Japanese market it would make little sense to import these from the United States, given the fact that Sears' principal suppliers were Japanese manufacturers located in Japan. Indeed, it would appear that the true reason for Sears' exclusion from the Japanese market is much more pointed. Sanyo and Toshiba simply would not want their low-priced television receivers produced for delivery to Sears in the U.S. to be sold in the higher-priced Japanese market and thus destroy the price-fixing arrangements of the domestic cartel operating in Japan.

enter the Japanese market. This is the same oath-helping we have held inadmissible before.

Nehmer turns in Chapter V to "Major Features of the Defendants' Anti-Competitive Export Strategy." That chapter outlines the economic structure of defendants' alleged successful penetration of the U.S. CEP market. It is followed by three chapters which detail plaintiffs' conception of the "cartel" with reference to specific product lines: Chapter VI addresses radio receivers; Chapter VII, television receivers, and Chapter VIII, tape recorders, phonographs, and other consumer electronic products. Because of its centrality to Nehmer's exposition, we describe the anatomy of Chapter V in detail before drawing our conclusions.

Chapter V is the most analytic of Nehmer's chapters, explaining in economic terms how and why particular corporate behavior patterns yield particular anti-competitive results. He begins by discussing the alleged system of discriminatory pricing:

> Japanese consumer electronics manufacturers could not export television sets to the United States at the same price at which they were sold in Japan because the cartel maintained artificially high prices in Japan. Japanese products would simply not be marketable in the United States at the high monopoly prices charged in Japan.
>
> But, given a willingness to violate U.S. law, there was no need to charge the same prices in the United States as in Japan. Japan and the United States represented two perfectly segmented markets as far as the Japanese cartel members were concerned: there was a possibility that U.S. buyers could re-export products from the United States to Japan, competition in the Japanese market was restricted, and foreign competition simply was not permitted to exist in Japan.
>
> The ability to charge different prices in the cartelized Japanese market and in the competitive U.S. market also implied that the cartel members could charge a *lower* price in the United States market that would have been possible otherwise, with little consideration for aggregate supply and demand and for the disciplines of cost and capital formation which normally govern a competitive environment.

Nehmer Report at V-1. He then analyzes the effect on the vulnerable U.S. market of the low prices of the Japanese manufacturers, and ends the section with the following summary of his important points:

> 1. Due to the existence of the domestic cartel, cartel members have a capability for discriminatory pricing. This consists of charging artificially high, monopoly prices in Japan and exporting products to the United States at much lower prices.
>
> 2. The prices charged by cartel members in the U.S. market can be set at whatever level is needed to penetrate this market.
>
> 3. The ability to establish a discriminatory pricing scheme stems from the existence of the cartel operating within a Japanese market protected from foreign competition.

Nehmer Report at V-3 & 4.

Turning next to collusion in the export market, Nehmer merely reiterates that:

> [c]ollusion in the export market was an integral part of the operation of the cartel, and analytically it is impossible to divorce a discussion of the Defendants' anti-competitive activities in the U.S. market from their anti-competitive activities in the Japanese market. Such collusion both allowed cartel members to target their sales efforts against U.S. firms rather than each other and provided them with a forum for agreeing upon ways to coordinate and conceal their activities.

Nehmer Report at V-4. He then discusses the Manufacturers', or check-price, Agreements and JMEA rules which we have already described, including a description of the customer registration and allocation procedures, and analyzes their economic basis and effect. The core of plaintiffs' theory as to the check prices is explained thus:

First, "check" prices provided the cartel members with an essential defense against dumping charges. Such check prices could be, and were, presented as transaction prices even when large volumes of products in practice were continually sold at prices that were far below the established check price level, often surreptitiously through the vehicle of secret rebates.

Second, check prices of course served as common reference prices. Such reference prices both provided a convenient point of departure for cartel members in making their pricing decisions and established good lines of communication among the cartel members. Sales at prices above or below these reference prices were made, of course, whenever this was expedient.

Finally, it is important to note that to the extent that the check prices did indeed represent the lowest possible price that could be charged without disrupting the U.S. market and/or without dumping, the frequent and deliberate sales made by the Defendants at prices which were substantially below the established check prices provide clear evidence of anti-competitive intent, as well as large volume of precise examples of illegally concealed dumping margins by individual cartel members.

Nehmer Report at V-6.

Nehmer next spends a few pages describing the Japanese manufacturers' phased entry into the U.S. market, by which they concentrated their sales in a given product category, beginning with those at the bottom end of the price spectrum. He explains that such a strategy increased the impact on the U.S. market by having a more pronounced impact in the targeted category than they would have had a similar sales volume been dispersed throughout the market.

Turning to alternatives to discriminatory pricing, Nehmer informs us that, although the "cartel members apparently preferred to use dumping to penetrate the U.S. market whenever this strategy was possible, . . . this preference did not prevent cartel members from using other methods either to maintain or to increase their share of the U.S. market." These other strategies included development of offshore facili-

ties to take advantage of lower foreign labor costs and a program of anti-competitive acquisitions. The chapter closes with a brief description of the "Historical Evolution of the Japanese Consumer Electronics Cartel." Nehmer then summarizes the "evidence indicating that the Defendants both formed an effective cartel and used a systematic anticompetitive strategy to penetrate the U.S. market":

1. Clear indications of collusion in the Japanese domestic market including: price-fixing agreements, controls on production levels, refusal to allow imports from the U.S., and attempts to prevent entry of new firms into the market.

2. Price discrimination, or the charging of lower prices for exports to the United States than for shipments to the domestic Japanese market, for a *wide range of products over a large number of years.*

3. Massive over-investment, as the cartel members developed production capacity for most consumer electronic products far in excess of that needed to supply the domestic market alone.

4. The establishment of check prices that served both as reference prices and to conceal the dumping activities of the cartel members. These check prices were violated when this served the purposes of the cartel members, often by means of secret rebates paid to U.S. customers.

5. Written restrictions that limited the ability of cartel members to acquire or change customers without the approval of other cartel members, and which limited the ability of two or more cartel members to sell to the same U.S. customer.

6. The acquisition of U.S. firms by cartel members for the apparent purpose of (1) eliminating independent competitors and (2) increasing the market share and consequent market power of the cartel members.

Nehmer Report at V-13.

We have quoted at some length from the Nehmer report in part to illustrate his methodology and style. The entire chapter

is without citation,[81] and its is therefore unclear precisely what information Nehmer is using. At best, he is in essence doing what Dr. DePodwin did in his Outline of Economic Analysis, *supra*, *i.e.*, summarizing the "evidence" discovered in his review of the case (presented in Chapters VI-VIII) and using that information as a basis for analysis. At all events, what Mr. Nehmer has done in Chapter V is to act as plaintiffs' theoretician—or summation orator—drawing conclusions from all the evidence and wrapping it up in a neat package. There is no economist's "value added" and the wrap-up does not bespeak the "ways" of Mr. Nehmer's work. This is the work of a conspiracyologist, not helpful to the trier of fact and inadmissible under Rule 702.

We make a number of additional observations germane to rule 703 analysis. Nehmer has explained many facets of market pricing behavior that could appropriately be the subject of expert testimony. Unfortunately, however, the assumptions from which he extrapolates—that is, the alleged behavior patterns of the defendants which he analyzes—are not supported by the record. We would be inclined to rule that such testimony would be permissible, as an analogy to the hypothetical question, if it were plain there was sufficient evidence in the record to support the assumptions upon which the analysis proceeds.[81a] Indeed, at trial, Mr. Nehmer could join Dr. DePodwin and Professor Yamamura in analyzing economically

[81] It could possibly be argued that an expert's naked, unsupported opinion defeats a summary judgment motion, and that the basis for that opinion need not be revealed until trial under F.R.E. 705, which states:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

In this case, however, the court has "require[d] otherwise," for Pretrial Order 154 requires that the bases for expert opinions be included in the parties' preclusive FPS's.

[81a] We note again that plaintiffs were duty bound to have placed it in the record by this time, given the precepts of F.R.Civ.P. 56 and PTO 154.

the evidence presented. However, as the report is presented, the permissible analytical material is so embedded in a context replete with such startling assumptions as defendants' "willingness to violate U.S. law" that it is inseparable from the impermissible conclusions. Moreover, the conclusions that flow from the analysis are so thoroughly intertwined with the conclusory assumptions about defendants' activities that we are totally unable to separate them. The best that can be said for the segment of the report is that it is difficult to discern the basis for Nehmer's opinion in order to determine the reasonableness of his reliance thereupon.

In sum, we find that Chapter V of the Nehmer Report does not comport with the standards outlines under F.R.E. 703 as well as 702. The opinions expressed in Chapter V are therefore inadmissible.

Chapters VI, VII, and VIII describe in detail plaintiffs' (or Nehmer's) conception of the Japanese electronic products cartel. Chapter VI "traces in detail the course of the penetration of the U.S. market for radios by the Japanese consumer electronics industry." Chapter VII does the same for television receivers, and Chapter VIII for tape recorders, phonographs, and other consumer electronic products.

In the radio chapter Nehmer places heavy reliance upon the 1957 consent agreement in the Market Stabilization Council case before the JFTC, the rationales supporting the JMEA rules, the JMEA rules themselves, *Japan Economic Year Book*, JMEA and EIAJ newsletters, *Television Digest*, and the transcript of the record of a case before the Customs Court, *U.S.* v. *Continental Forwarding Co.*, Customs Appeal 5415 (1970). The television chapter relies upon the same 1957 Market Stabilization Council documents, the 1966 Six-Company Case draft decision, the previously-discussed Komiya article, the Manufacturers' Agreements and JMEA rules, various answers to interrogatories, the U.S. Tariff Commission injury determination in the 1921 Act anti-dumping proceeding, and a number of miscellaneous internal memoranda. The tape recor-

der, phonograph, and other products chapter relies almost exclusively upon the JMEA rules and their rationales.

Despite the fact that Chapters VI and VIII present virtually plaintiffs' entire case with respect to non-television products, we content ourselves with this outline, rather than discussing these chapters in any depth, for they are in essential part and flavor indistinguishable from the DePodwin and Yamamura reports. We would prolong this already lengthy opinion unduly if we were to repeat the analysis employed in connection with these reports even though it is equally applicable here. Even positing that some of these materials (*e.g.*, interrogatory answers, the Manufacturers' Agreements and the JMEA Rules) are trustworthy and admissible, the balance of materials on which Nehmer relies tip heavily to the side of untrustworthiness. Many, if not most, of the materails were excluded or are excludable; others are inadmissible or of no significance for reasons discussed from time to time herein. We incorporate by reference what we have said above in connection with the DePodwin and Yamamura reports.

However, even were we to wave a magic wand, declare all of these sources trustworthy, and rule that expert testimony based thereupon meets the requirements of F.R.E. 703, we would still be met by the insurmountable barrier of F.R.E. 702. Nehmer has done in these three chapters exactly what DePodwin and Yamamura did in their reports. He has taken documents otherwise potentially before the court and has analyzed them factually, building the edifice upon which the economic analysis of Chapter V, discussed *supra*, could proceed. He has not in these chapters aided the trier of fact in understanding anything other than factual matters already within its province. He has engaged in precisely the oath-helping the defendants' condemn, telling the trier of fact what defendants have done. His factual analysis is inadmissible under F.R.E. 702.

The balance of the Nehmer Report—Chapters IX and X—addresses injury and damage issues, which we need not reach at this summary judgment stage.

Accordingly, we find the opinions described above expressed in the Nehmer Report inadmissible, with the exception of the portions of Chapter II which deal with methodology and the first fourteen pages of Chapter IV.

VI. *The Saxonhouse Report*

"The Impact of Japanese Financial and Employment Practices on Japanese Production, Marketing and Price Behavior," by Gary R. Saxonhouse,[82] is best summarized by Professor Saxonhouse himself:

> This paper shows that Japanese firms, in general, and Japanese electrical equipment manufacturing including radio and television manufacturers, in particular, had higher fixed costs than did their American counterparts. These exceptionally high fixed costs were the result of the special labor market and financing practices common to Japanese firms. These high Japanese fixed costs had three consequences which are pertinent to the present litigation.
>
> First, given their high fixed costs, Japanese radio and television manufacturers had a strong desire to avoid the risks of financially injurious, vigorous price competition. This, in turn created a very strong desire to collude among Japanese manufacturers.
>
> Second, the very high fixed costs meant, in a Japanese institutional context, that Japanese radio and television manufacturers would dump more output abroad with larger differences between home market price and domestic price than would otherwise be the case.
>
> Third, it is shown that collusive price increasing behavior by Japanese manufacturers in their home market enabled and sustained lower prices in Japan's export markets. There is an initimate connection between pricing behavior in Japan's home market and pricing behavior overseas. Higher prices at home subsidized lower prices overseas.

Saxonhouse Report at 1-2.

---

[82] Dr. Saxonhouse is a Professor of Economics at the University of Michigan.

Defendants' primary objections to the Saxonhouse report are relevancy-based. They argue, first, that it is simply not a permissible inference to say that high fixed costs imply a wish to avoid risk, which in turn implies a motivation to collude. Second, they argue that, even if the assumptions about Japanese corporations in general were warranted, there is no basis for an inference that these particular defendants had any motivation to collude. And finally, they argue that propensity to collude is impermissible character evidence under F.R.E. 404(a). These are all potentially valid objections which we shall consider in conjunction with the conspiracy opinion. But the report is fundamentally flawed under Article VII as well.

The first portion of Professor Saxonhouse's report reviews statistics comparing (1) the debt-equity ratios of Japanese and American companies, as well as those of Zenith, NUE and various defendants; (2) the rates of corporate bankruptcy in Japan and the United States; (3) the rates of worker separation in the Japanese and American electrical equipment industries; and (4) expenditures for research and development by Japanese and American companies. Based upon these comparisons, he concludes that Japanese companies have higher fixed costs than American companies.

The figures which Saxonhouse uses are not seriously challenged as unreliable. However, we note that they do represent unweighted arithmetic averages, rather than providing information about individual companies. The single table, Appendix Table 4, that does break down the debt equity ratio averages on a company-by-company basis shows that, while for most years the Japanese manufacturing companies had higher debt-equity ratios than the plaintiff companies, that was not consistently the case.[83]

Having concluded that Japanese companies have higher fixed costs than do American companies, Saxonhouse states

[83] Analyzed in the table are MEI, Sanyo, Sharp, Sony, Hitachi, Toshiba, Melco, Zenith, and NUE.

that "[t]his, in itself, makes predictable the necessity for collusive activity to minimize the risks entailed as a result of high fixed obligations." Saxonhouse Report at 5. This highly dubious inference is followed by the breathtaking statement that "[t]he following analysis will proceed *on the premise documented elsewhere that a calculated collusive decision had been made by Japanese radio and television manufacturers to take a continually increasing share of the American market,*" citing the DePowdwin and Yamamura reports. Saxonhouse Report at 5-6 (emphasis added). What Saxonhouse has done is to assume the very proposition which he then proceeds to "prove," and to base that assumption upon opinions which we have since found to be inadmissible, based in part upon their reliance upon untrustworthy information.

The ensuing pages of this brief report (14 pages of text, plus additional tables) are highly speculative, despite being adorned by impressive-appearing graphs charting the relationship between total costs and output and profit-loss curves. The following statement is illustrative:

> Studies of industries in the United States suggest that heavy fixed charges increase the desire and motivation of firms to collude. With fixed charges almost universally higher in Japan, the desire and motivation to collude in the home market and to carry that collusion to export markets must also have been stronger.

Saxonhouse report at 7-8 (footnote omitted).[84]

Not only is the report speculative, but it repeatedly restates the fact that a collusive decision by the defendants has been explicitly assumed. Neither Rule 703, which excludes opinions based upon unreliable assumptions, nor Rule 702, which ex-

[84] Defendants attack the two U.S.-industry studies cited by Saxonhouse, suggesting that studies of U.S. industry imply nothing about Japanese industry, and pointing out that one of those studies is based upon a classroom game rather than actual corporate behavior. When an economist uses scholarly economic literature, however, rather than the types of materials found untrustworthy in this case, we are loath to unnecessarily impugn the bases for his opinion.

cludes opinion testimony not helpful to the trier of fact, condones the admission of such circular expert testimony. The opinions expressed in the Saxonhouse report are inadmissible.

VII. *The Haley Report*

Defendants' primary objection to "Vertical Restraints by Japanese Television Manufacturers: Anticompetitive Effects" by John O. Haley[85] is that it is irrelevant or, if minimally probative, nonetheless excludable under F.R.E. 403. However, they also interpose objections based upon F.R.E. 702 and 703.

As defined in his recently submitted summary, the conclusions reached by Professor Haley are:

> 1. From 1966 through the mid 1970s the defendant Japanese television manufacturers had the capacity effectively to enforce a price-fixing agreement (or cartel) related to sale of television receivers in Japan as a result of the following factors:
>
> (1) There were governmentally-imposed barriers to entry by foreign television manufacturers under the Foreign Investment Law and the Foreign Exchange and Foreign Trade Control Law.
>
> (2) The Japanese television industry, and in particular such major firms as Matsushita Electric Industrial Co. Ltd., Hitachi Co. Ltd., Sony and Tokyo Shibaura Electric Co. Ltd., had established by 1966 a network of manufacturer-controlled wholesale and retail outlets that permitted manufacturer supervision and control over resale prices.

[85] Professor Haley holds an LL.B. from Yale University and an LL.M. from the University of Washington. He is Associate Professor of Law at the University of Washington, Executive Secretary of the Japanese American Society for Legal Studies, and Managing Editor of *Law in Japan: An Annual*, the principal English-language periodical on Japanese law. He studied in Japan as a Fulbright-Hays Scholar and earlier as a Princeton-in-Asia Teaching Fellow, and held legal clerkships with Japanese law firms from 1971-74. He has published extensively on various facets of Japanese law.

> 2. The defendant Japanese television manufacturers, particularly major manufacturers such as Sony and Matsushita Electric Industrial Co. Ltd., used their control over distribution to fix and maintain resale prices.

Defendants do not attack Professor Haley's discussion of Japanese barriers to foreign competition beyond arguing that it, like similar discussions in the other reports, is irrelevant. Thus, for Article VII purposes the discussion summarized by subparagraph (1) above, when stripped of its occasional resort to conclusory terminology, is admissible. Similarly, the Japanese defendants do not dispute that they had a large number of affiliated dealers. They argue, however that the conclusion at the end of subparagraph (2), that the practice of using affiliated dealers "permitted manufacturer supervision and control over resale prices" and the related conclusion of paragraph 1 that this control amounted to a "capacity effectively to enforce a price-fixing agreement" are economic conclusions and hence beyond Haley's expertise as a law professor specializing in Japanese antitrust law.

While that suggestion is superficially attractive, we decline to rule on that basis. The line between antitrust law and antitrust economics is of necessity indistinct, and it is not clear to us that these statements are beyond Haley's sphere of expertise, especially since he will be subject to cross-examination. Accordingly, those portions of Haley's report which express the opinion that because of their distribution systems defendants had the capacity to fix resale prices are not excludable under Article VII for the same reasons that Professor Yamamura's discussion regarding motivation to collude is unobjectionable.[86] As an expert on Japanese law, Professor Haley is also capable of explaining that these distribution networks have been subject to increasing concern by the Japanese Fair Trade Commission.

Notwithstanding the foregoing, Haley's leap to the conclusion that Japanese television manufacturers actually used

[86] We express no view at this time with regard to the relevance of such a conclusion.

the capacity which he has posited in support of an actual price-fixing conspiracy (paragraph 2 above) is not admissible.[87] Haley's support for this conclusion apparently stems entirely from JFTC documents in three cases. None of these documents pass trustworthiness muster. He refers to the Initial Decision in the Six-Company Case, discussed *supra*, as showing that a price-fixing agreement among the Japanese manufacturing defendants "required manufacturer-imposed resale price maintenance as a means of effecting the horizontal agreement." Haley Report at 7. As we have already noted, the document was withdrawn by plaintiffs and is in any event untrustworthy. To show resale price maintenance he refers to the Draft of Decision and Consent Decision in the resale price maintenance case against Matsushita, but both of these were excluded in the Public Records Opinion. Haley also cites a Recommendation Decision in a similar case against Sony. While the Sony document was not deemed important enough by plaintiffs to be proffered at the pretrial evidentiary hearings, it would clearly be inadmissible for the same reasons as the Recomendation Decision in the Market Stabilization Council case—because it is a preliminary, advocatory document in the nature of a complaint, which is not probative of the matters asserted. *See* Public Records Opinion, 505 F.Supp. 1125, at 1176-1184. As we explained *supra*, an opinion based pervasively upon such materials cannot be admissible under F.R.E. 703.

Moreover, the conclusion does not follow from those documents. The Six Company Case, which was terminated by the Commission for lack of evidence, alleged a horizontal agreement to fix prices. The resale price maintenance case against

---

[87] One peculiarity of Haley's report deserves particular mention. In his summary of conclusions, quoted *supra*, he states that defendants "used their control over distribution to fix and maintain resale prices." In the actual report, Haley also suggested that distribution control was a "necessary feature of the 1964 cartel since the horizontal and vertical price-fixing cover could not be effective without such control." Haley Report at 9. If by this he means to suggest that vertical control is a necessary predicate to horizontal price-fixing, he is contradicted by a vast body of antitrust law and practice over the past century.

Matsushita which ended in a consent agreement, while concededly addressing a vertical arrangement, implicates only Matsushita. We observed with respect to F.R.E. 702, at 1134, *supra*, that opinions including inferences which cannot logically be drawn are inadmissible because they are not helpful to the trier of fact. To suggest, as Haley does, that because (under his assumption) the six companies were all involved in a horizontal conspiracy; because Matsushita and Sony were involved in vertical arrangements; and because such vertical arrangements are necessary to effectuate the horizontal agreement *(see* note 87 *supra)* all six companies were therefore guilty of vertical price-fixing is not a drawable inference. We cannot permit such faulty inferences to be presented to the trier of fact, hence the opinion is inadmissible on this alternate ground.

VIII. *Conclusion*

We have found the major, critical opinions presented in plaintiffs' expert reports—those dealing with defendants' alleged conspiratorial activities—to be inadmissible under Article VII of the Federal Rules of Evidence. When we address the issue of conspiracy in our forthcoming summary judgment opinion, we will be left primarily with those portions of the expert reports that can be fairly described as "background" materials. We have also reserved our ruling with respect to certain of the price comparisons presented in Part V of the DePodwin report. We emphasize that we have not said that an economist may never express an opinion on conspiratorial activities of a defendant based upon certain market behaviors. Rather, we have said that the experts in this case have created their assumptions—the market behavior in question—in ways that invade the province of the fact-finder and, moreover, that their assumptions are based almost exclusively upon faulty underlying data. Under those circumstances, the experts opinions are inadmissible.[88]

---

[88] Minutes before the intended filing of this opinion, we received a letter from plaintiffs' counsel, Edwin P. Rome, Esq., dated December 8, 1980, addressing issues related to the cost constructions presented in Appendix B

Because our rulings are all subsumed within the foregoing opinion, a separate Pretrial Order is unnecessary.

---

to Part VI of the DePodwin Report, which we ruled upon at pp. 1356-1363, *supra*. We delayed filing our opinion for a day in order to consider this additional correspondence. Upon review, we find that the letter adds no new information which would affect the analysis presented *supra*.

ZENITH RADIO CORPORATION,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

NATIONAL UNION ELECTRIC CORPORATION,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

In re JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION.

Civ. A. Nos. 74-2451, 74-3247.
MDL 189.

United States District Court,
E. D. Pennsylvania.

April 14, 1980.

As Amended April 23 and April 25, 1980.

Blank, Rome, Comisky & McCauley, by Edwin P. Rome, William H. Roberts, John Hardin Young, Arnold I. Kalman, Kathleen H. Larkin, Norman E. Greenspan, Lawrence S. Bauman, Philadelphia, Pa., for Zenith Radio Corporation and National Union Electric Corporation, plaintiffs.

Morton P. Rome, Wyncote, Pa., for National Union Electric Corporation, plaintiff.

Philip J. Curtis, John Borst, Jr., Glenview, Ill., for Zenith Radio Corporation, plaintiff.

Mudge, Rose, Guthrie & Alexander by Donald J. Zoeller, John P. Hederman, Thomas P. Lynch, Howard C. Crystal, Robert A. Jaffe, Shelly B. O'Neill, Mark K. Neville, Jr., New York City, Drinker, Biddle & Reath by Patrick T. Ryan, Philadelphia, Pa., for Tokyo Shibaura Elec. Co., Ltd. and Toshiba America, Inc., defendants; defense coordinating counsel.

Duane, Morris & Heckscher by Henry T. Reath, Terry R. Broderick, Philadelphia, Pa., Crummy, Del Deo, Dolan & Purcell by John T. Dolan, Newark, N.J., Baker & McKenzie by Hoken S. Seki, Thomas E. Johnson, Chicago, Ill., for Mitsubishi Electric Corporation.

Reid & Priest by Charles F. Schirmeister, Robert J. Lynch, New York City, L. Peter Farkas, Washington, D.C., for Mitsubishi Corporation and Mitsubishi International Corporation, defendants.

Weil, Gotshal & Manges by Ira M. Millstein, A. Paul Victor, John F. Carney, Joel B. Harris, Kevin P. Hughes, Robert K. Hood, H. Adam Prussin, Jeffrey L. Kessler, Stuart Peim, Lenore Liberman, Gayle E. Hanlon, Alan Rothstein, Makoto Matsuo, New York City, Morgan, Lewis & Bockius by Raymond T. Cullen, Philadephia, Pa., for Matsushita Elec. Indus. Co., Inc., Matsushita Elec. Corp. of America, Matsushita Electronics Corp., Matsushita Elec. Trading Co., and Quasar Electronics Corp., defendants.

Metzger, Shadyac & Schwarz by Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Stephen P. Murphy, William B. T. Mock, Jr.; Tanaka, Walders & Ritger by Lawrence R. Walders, B. Jenkins Middleton, Washington, D.C., Pepper, Hamilton & Scheetz, Philadelphia, Pa., for Hitachi, Ltd., Hitachi Sales Corporation of America, and Hitachi Kaden Hanbai Kabushiki Kaisha, defendants.

Wender, Murase & White by Peter J. Gartland, Gene Yukio Matsuo, Peter A. Dankin, Lance Gotthoffer, New York City, for Sharp Corporation and Sharp Electronics Corporation, defendants.

Whitman & Ransom by Patrick H. Sullivan, Dugald C. Brown, Kevin R. Keating, Michael S. Press, New York City, Pepper, Hamilton & Scheetz by Charles J. Bloom, Philadelphia, Pa., for Sanyo Elec., Inc., Sanyo Elec. Co., Ltd., and Sanyo Elec. Trading Co., Ltd., defendants.

Arnstein, Gluck, Weitzenfeld & Minow by Louis A. Lehr, Jr., Stanley M. Lipnick, John L. Ropiequet, Chicago, Ill., for Sears, Roebuck & Co., defendant.

Rosenman, Colin, Freund, Lewis & Cohen by Asa D. Sokolow, Renee J. Roberts, Marc Rowin, Kaye, Scholer, Fierman, Hays & Handler by Joshua F. Greenberg, New York City, Wolf, Block, Schorr & Solis-Cohen by Franklin Poul, Philadelphia, Pa., for Sony Corp. and Sony Corp. of America, defendants.

Kirkland & Ellis by Thomas P. Coffey, E. Houston Harsha, Karl F. Nygren, Chicago, Ill., for Motorola, Inc., defendant.

OPINION AND ORDER

(1916 Antidumping Ac)

EDWARD R. BECKER, District Judge.

TABLE OF CONTENTS

TABLE OF CONTENTS

I. *Preliminary Statement*

Dumping is a phenomenon in international trade which has been defined as "price discrimination between purchasers in different national markets."[1] Generically, dumping is the sale of commodities in a foreign market at a price which is lower than the price or value of comparable commodities in the country of their origin. The issue before us arises in the context of the alleged dumping in the United States of television receivers, radios, phonographs and tape and cassette recorders manufactured in Japan. Plaintiffs Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE") have alleged in their complaints that the Japanese defendants[2] and their co-conspirators[3] are and have been participants in a conspiracy which, by artificially lowering export prices, has for more than 20 years sought the methodical destruction of the United States domestic consumer electronic products industry. This litigation is described generally at pp. 1195-1198 of our opinion on subject matter jursidiction, filed this day. Instead of rescribing that description here, we simply incorporate those pages by reference. Suffice it here to say that this is one of the most massive cases ever heard by the United States Courts, and that in addition to numerous claims under the antitrust laws, plaintiffs seek treble damages for alleged violations of the Antidumping Act of 1916,[4] one of several dumping statutes enacted by the Congress.

[1] J. Viner, Dumping: A Problem in International Trade 4 (1923, reprinted 1966).

[2] The ten principal defendants are Mitsubishi Corporation, a Japanese trading company; Matsushita Electric Industrial Co., Ltd., Toshiba Corporation, Hitachi, Ltd., Sharp Corporation, Mitsubishi Electric Corporation ("MELCO"), Sanyo Electric Co., Ltd., and Sony Corporation, all Japanese manufacturers of consumer electric products; and two American companies, Motorola, Inc. and Sears, Roebuck & Co. Fourteen other defendants are subsidiaries of the principal Japanese defendants. Of the twenty-four defendants, fifteen are defendants in both suits, seven in the Zenith action only, and two in the NUE action only.

[3] In addition to the twenty-four named defendants, the plaintiffs have identified dozens of alleged coconspirators whose business operations span the globe, ranging from small Japanese companies to such world industrial giants as N. V. Phillips Gloeilampenfabrieken and General Electric.

[4] The Antidumping Act of 1916, hereinafter variously "the 1916 Antidumping Act," "the 1916 Act," or, where appropriate, "the Act," is here reproduced in full:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systemically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale

This opinion addresses the separate motions of several groups of defendants for summary judgment on the plaintiffs' 1916 Antidumping Act claims. The motions addressed to the 1916 Act claims have been advanced as part of wider motions seeking summary judgment on other discrete portions of the litigation as well. Motions which deal with the 1916 Act claims have been filed by Mitsubishi Electric Corporation and Melco Sales, Inc.; by Sears, Roebuck and Co.; by Matsushita Electric Industrial Co., Ltd., and affiliated defendants; and by Hitachi, Ltd., Toshiba Corporation, Sanyo Electric Co. and their affili-

price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction on actions for damages thereunder.

15 U.S.C. § 72. The plaintiff's claims under the 1916 Act are stated in Count I of the Complaint of plaintiff NUE, in Count VII of the Complaint of plaintiff Zenith, and in Count VI of Zenith's Counterclaim. NUE's claims involve only television receivers, while Zenith's claims encompass other consumer electronic products as well.

ated defendants.[5] The numerous summary judgment motions concerning this and other issues are catalogued in our opinion on subject matter jurisdiction. As is explained there, we intend to decide the pending motions issue by issue, writing separate opinions on each issue if necessary. Accordingly, this opinion disposes of the arguments based on the 1916 Antidumping Act made in all of the motions listed above, and does not reach the other issues which are comprehended in these motions.

In order to decide the defendants' motions for summary judgment on plaintiffs' dumping claims, we are required to interpret the 1916 Act and to apply it to the undisputed facts before us. Although television sets and other consumer electronic products manufactured for sale and use in the United States, as a class, and consumer electronic products manufactured for sale and use in Japan, as a class, look essentially the same and serve precisely the same functions for the listener or viewer, U.S. and Japanese consumer electronic products[6] are adapted to the technical conventions of television and FM broadcasting and of the electrical power systems which are

[5] The Hitachi-Toshiba-Sanyo motion was joined by Sharp Corporation, Mitsubishi Corporation, and their subsidiaries. Sony Corporation and its subsidiary have moved separately for summary judgment on factual grounds particular to Sony, but have also asserted the legal theory which is addressed in this opinion. Three of the four motions listed in the text are addressed to other matters as well as the 1916 Act claims. Sears Roebuck's motion is concerned only with Zenith's dumping claims as stated in Count VI of the Zenith Counterclaim.

These motions and others raise additional questions concerning the construction of the 1916 Act, apart from the comparability issue which is addressed in this opinion. In particular, a number of arguments have been made concerning the predatory intent proviso of the Act. We do not reach these arguments here.

[6] Throughout this opinion, we refer on occasion to "U.S." products and "Japanese" products, as a shorthand for products manufactured for sale and use in the United States and in Japan, respectively. In deciding the instant motions, we are only concerned with products manufactured in Japan; we are deciding whether products manufactured in Japan for the Japanese domestic

different in the two countries. While the standards for encoding visual and aural information on a radio wave are identical in the television and FM systems of the U.S. and Japan, the frequencies allocated to TV and FM broadcasts are different. As a result, television and FM receivers manufactured for use in Japan cannot receive many broadcasts in the U.S. and vice versa. In addition, the Japanese electrical power system uses 100 volts and frequencies of either 50 or 60 Hertz ("Hz"), while the U.S. system is at 120 volts and only 60 Hz. Because of this difference, Japanese television receivers used in the U.S. would be in serious danger of failing because of overheating, Japanese phonographs and tape recorders of a certain design would run at the wrong speed, and the audio output of radios, phonographs, and tape recorders would include an objectionable hum.

These facts, which are undisputed, form the background for the task before us in this opinion—*i.e.*, the first construction in the 64 years since the enactment of the 1916 Act of its core provisions. More specifically, we must decide what standards the Act imposes for the comparability of the United States and foreign products required in order for an import transaction to be subject to the prohibition of the 1916 Act.

While the contentions of the parties will be set forth in detail *infra*, suffice it to say for purposes of this preliminary statement that the defendants, arguing from the text of the 1916 Act which uses the referent "such articles," contend that goods do not meet the comparability standards of the Act unless they are identical which concededly the goods in question are not. Alternatively, defendants argue that the "like grade and quality" standard of § 2 of the Clayton Act, which preceded the 1916 Act, is applicable, a standard which defendants assert, plaintiffs have not met. Plaintiffs, on the other hand, vigorously protest over-literal constructions and assert that television sets manufactured for use in the United States and those manufactured for use in Japan are both television sets serving precisely the same function, and that with the exception of adaptation to the technical conventions of the two countries, they are essentially the same. Just as the defendants contend that the 1916 Act does not apply, the plaintiffs vigorously assert that it does.

home market are comparable with products manufactured in Japan for exportation to the United States. The products made by American manufacturers and their characteristics are not discussed anywhere in this opinion. Consequently, the appellation "U.S.," whenever used in this opinion, refers to the place of intended use of electronic products, and never to their place of manufacture.

The precise question before us is whether TV sets and other consumer electronic products manufactured for sale and use in the United States, as a class, and consumer electronic products manufactured for sale and use in Japan, as a class, are sufficiently similar to be comparable for purposes of the 1916 Act even though: (1) the two classes of products are adapted to the different technical conventions of the two countries; (2) accordingly, the products have different tuners, power transformers, and electric motors; and (3) as a result, the products differ in consumer use and marketability and are not commercially interchangeable. As will be seen during the course of our lengthy discussion, we answer this question in the negative, holding that the two classes of products are not comparable under the 1916 Act.

Although the Antidumping Act of 1916 has been in force for nearly 64 years, it has rarely been used and therefore has rarely been construed. In order to resolve the issue before us we find it necessary to examine the legislative history of the Act, and its background in contemporary law and politics, in far greater depth than has heretofore been recorded. Our detailed analysis of the 1916 Act is contained in Part IV of this opinion. We also have occasion to compare the 1916 Act, which creates a private right of action for treble damages and provides criminal penalties for dumping, with the Antidumping Act of 1921 ("the 1921 Act" or "the 1921 Antidumping Act"), which established an administrative system for the assessment of special customs duties for dumping. The 1921 Antidumping Act has very recently been repealed but the system of dumping

duties which it created remains essentially intact in its successor legislation. The 1921 Antidumping Act is involved in this litigation because the plaintiffs seek to introduce into evidence the fact that the Treasury Department, which formerly administered the 1921 Act, has assessed dumping duties against many of the defendants for importing television receivers from Japan at prices lower than those at which comparable models have been sold in Japan. As is set forth more fully in a subsequent part of this opinion, we hold that the administrative findings of dumping under the 1921 Act are not pertinent to the instant claims of privately actionable dumping under the 1916 Act because the 1921 Act and its successor legislation grant the administering authority broad discretion to determine whether products sold in the two countries are comparable, whereas litigants under the 1916 Act are not clothed with the same discretion.

As will be seen, our examination of the legislative history of the 1916 Act reveals that it was intended to complement the antitrust laws by imposing on importers substantially the same legal strictures relating to price discrimination as those which had already been imposed on domestic businesses by the Clayton Antitrust Act of 1914. Conforming to the will of Congress, we will hold that the 1916 Act cannot be applied to articles which are not sufficiently similar to be comparable for purposes of domestic price discrimination law. Hence, to give rise to a violation of the 1916 Act, the products sold in the United States and the products sold in the foreign country must be of "like grade and quality" as that phrase is used in § 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13. Case law under the Robinson-Patman Act makes it clear that physically different articles are not of "like grade and quality" if the differences affect consumer use and preference or marketability.

Although the 1916 Act was intended as a companion to the antitrust laws, Congress borrowed language from contemporary customs appraisement law to refer to the price of goods in the foreign country. As we shall explain, by using the

term "actual market value or wholesale price," Congress incorporated by reference the valuation provisions of the Tariff Act of 1913 ("the 1913 Act" or "the 1913 Tariff Act"). Under that statute, and under both earlier and subsequent practice, the value of imported merchandise could be determined by reference to sales of "similar" merchandise in the country of origin. The standard employed to decide whether merchandise was sufficiently "similar" was strict, however: "similar" merchandise had to be commercially interchangeable with the articles under appraisement. Because of the use of language taken from the 1913 Tariff Act in the 1916 Antidumping Act, we will hold that there is no violation of the 1916 Act unless the standards of similarity of customs appraisement law are met.

Both of the legal standards which we find applicable speak in terms of consumer use, consumer preference, and marketability. The standard derived from customs appraisement law is the more rigorous of the two: it requires commercial interchangeability. While we recognize that that the relevant differences between consumer electronic products manufactured for use in the U.S., as a class, and those manufactured for use in Japan, as a class, are only adaptations to the differing technical conventions of the two countries, their impact on consumer use, consumer preference, and marketability is clear: a product manufactured for sale in one nation is of no practical use to a consumer in the other nation. Consequently, the products do not meet the standards which are applicable to product comparisons under the 1916 Antidumping Act, and summary judgment on the 1916 Act claims must be granted.[7]

The foregoing is a capsule summary of the ultimate conclusions of this opinion. In the course of its development we

---

[7] In conjunction with granting summary judgment, we dismiss Count I of NUE's Complaint, which states NUE's claims under the 1916 Act and is limited to television receivers. Zenith's claims under the 1916 Act encompass non-television products as well as television receivers, and, as will appear in due course, a small category of non-television products escapes the effects of our summary judgment order. Accordingly, we do not dismiss the Zenith 1916 Act claims *in toto*.

have many tasks. Our first task is to state the parties' contentions, both legal and factual. Next we will make "findings" of the facts as to which no genuine issue exists. In the next following portion of the opinion, we review the 1916 Antidumping Act in general terms, analyzing its language, its legislative history, and its background in the law and politics of the first administration of Woodrow Wilson. After this review, we address our attention to the particular legal issues raised by the instant motions. In the penultimate part of this opinion, we discuss the standards controlling the grant of summary judgment and demonstrate that summary judgment is required here. Finally, we explain our reasons for certifying our order for immediate interlocutory appeal under 28 U.S.C. § 1292(b).

II. *Contentions Of The Parties*

A. *The Defendants*

The principal argument which defendants have advanced in support of their motions for summary judgment on plaintiffs' dumping claims hinges on the meaning of the word "such."[8] The 1916 Act mandates that the price at which imported articles are sold within the United States be compared with "the actual market value or wholesale price of *such* articles" in a foreign country, after certain expenses are added to the foreign value. 15 U.S.C. § 72 (emphasis added). From this juxtaposition alone, the defendants contend that the 1916 Act contemplates a

[8] Some of the arguments stated in this part of our opinion have been made by all the moving defendants: some arguments have been made only by one defendant or one group of defendants. We make no attempt here to ascribe particular arguments to the particular defendants who made them. We do not consider in this opinion the contention of defendants Sharp Corporation and Sharp Electronics Corporation that any claim under the 1916 Antidumping Act is barred by the 1953 Treaty of Friendship, Commerce and Navigation with Japan, 4 U.S.T. 2063, T.I.A.S. 2863. While that contention is properly before us, the plaintiffs have not had the opportunity to respond to it. We have scheduled argument on the Sharp defendants' contentions based on the 1953 Treaty for June 18, 1980.

comparison of the price of *identical* articles sold in the U.S. and in the relevant foreign market. This simplistic argument is, however, not strongly pressed; rather, the defendants rely upon a line of cases in the customs courts, which interpret the word "such" in a related context.

Unlike the 1916 Act, which uses the lone term "such" in the phrase we have just quoted, many other customs appraisement statutes use the language "such or similar" to specify which articles may be considered by the customs appraiser in his determination of value. In construing the phrase "such or similar," the customs courts have held as follows: (1) the word "such" means identical; (2) when applying an appraisement statute which includes that phrase, an appraiser should look first to sales of identical merchandise, and should only look to sales of similar merchandise if identical merchandise is not sold in the relevant market; and (3) whether or not merchandise is "similar" within the meaning of customs appraisement statutes is to be determined by the application of several criteria, including commercial interchangeability of the putatively "similar" articles. *E.g.*, *United States* v. *Irving Massin & Bros.*, 16 Ct.Cust.App. 19 (1928); *United States* v. *Johnson Co.*, 9 Ct.Cust.App. 258 (1919).

Relying on this line of customs decisions, defendants argue that the word "such," standing alone in the context quoted in the 1916 Antidumping Act, should be interpreted to mean "identical." They contend that by using the single word "such" in the 1916 Act, where it might have used the disjunction "such or similar," Congress must have intended to limit the application of the Act to situations in which identical merchandise is sold in the United States and in the relevant foreign market. Accordingly, they argue that the 1916 Act is inapplicable in this litigation unless the consumer electronic products sold in the United States and in Japan are identical.[9]

[9] Some of the defendants have also argued that plaintiffs' 1916 Act claims should be dismissed because U.S. consumer electronic products do not have an "actual market value or wholesale price" in Japan. They rely on *Outboard Marine Corp.* v. *Pezetel*, 461 F.Supp. 384, 408-09 (D.Del.1978), in which

To establish the factual predicate for their summary judgment motions, defendants have submitted numerous affidavits and have taken the depositions of several of plaintiffs' expert witnesses. In a subsequent part of this opinion, we state the material facts as to which there is no genuine issue, and there is no reason to duplicate that exposition here. For our present purposes, it is sufficient to note that defendants' affidavits are advanced to show that there are specific physical differences between consumer electronic products manufactured for use in the United States, as a class, and those manufactured for use in Japan, as a class.[10] These differences arise from the different technical conventions of television and FM radio broadcasting, and of the transmission of electrical power, in the two coun-

Judge Schwartz dismissed a claim under the 1916 Antidumping Act for the alleged dumping of golf carts manufactured in Poland. It was undisputed in *Pezetel* that the defendants' golf carts were not sold in Poland and were not commonly exported to third countries, but were sold only in the U.S. Judge Schwartz ruled that the 1916 Act does not provide a private right of action to challenge activity in a single market, *i.e.*, the United States, and accordingly dismissed the dumping claims.

The defendants in the instant case try to assimilate this litigation to *Pezetel* by arguing that there are no relevant sales in Japan because products made for sale in the U.S. are not sold in Japan. This argument, however, "puts the rabbit in the hat" by assuming that the consumer electronic products which defendants concede *are* sold in Japan are not comparable with those sold in the U.S., either because they are not identical or because they are not sufficiently similar. In *Pezetel*, in contrast, there were *no* sales of golf carts of any type in Poland or in relevant third countries. Because defendants' argument relying on *Pezetel* assumes what is to be proved, *i.e.*, that the standard for comparability of products under the 1916 Act is not met here, we consider it to be merely an alternate verbal formulation of defendants' main arguments on comparability.

[10] While the differences with which we are concerned in this opinion are those between U.S. products, as a class, and Japanese products, as a class, there are also, in some instances, individual differences between the particular products which plaintiffs have sought to pair for their dumping comparisons. Such individual differences are revealed in the model-by-model matchups to which we will refer in our discussion of the factual record. *See* pp. 1202-1203, *infra*. The defendants have not based their arguments on these individual differences; neither however have they conceded that the class-by-class differences are the only pertinent ones.

tries. Since the evidence produced by the defendants tends to show specific differences between U.S. and Japanese products, it tends to demonstrate, *a fortiori*, that in defendants' contention those products are not identical.

The defendants have also advanced several other arguments concerning the comparability of U.S. and Japanese consumer electronic products under the 1916 Antidumping Act. Noting that the 1916 Act had an underlying antitrust purpose, they posit that the Clayton Antitrust Act of 1914, which banned price discrimination but applied only to domestic transactions, exempted from its proscription any price discrimination made "on account of differences in the grade [or] quality" of the articles sold. They submit that because of this language the Clayton Act, like the 1916 Antidumping Act, required physical identity of the products sought to be compared on a charge of domestic price discrimination. They note also that Section 2 of the Clayton Act, as amended by the Robinson-Patman Act of 1936, which currently governs domestic price discrimination, applies only to sales of commodities which are of "like grade and quality." 15 U.S.C. § 13(a). They accordingly argue that the 1916 Act must be interpreted in light of § 2 of the Clayton Act, and that because of the undisputed physical differences between U.S. and Japanese consumer electronic products, which affect their marketability, they are not of "like grade and quality." The defendants' argument based on the Robinson-Patman Act was originally set forth in no more than two pages of their memoranda supporting their motions, but the argument has assumed increased prominence in their latest submission dated March 7, 1980.

Alternatively, the defendants contend that U.S. and Japanese consumer electronic products are not even "similar," as that term is construed in post-1916 customs appraisement law. As we have noted, the customs courts have held that "similar" articles must be, *inter alia*, commercially interchangeable. Defendants point in particular to two decisions. In *United States* v. *Eggen*, 55 C.C.P.A. 95 (1968), the Court of Customs and Patent Appeals held that ball bearings in metric

sizes were not "similar" to ball bearings in inch sizes, because the two were not commercially interchangeable. In *United States* v. *Ford Motor Company*, 46 Cust.Ct. 735 (1961), the Customs Court held that right-hand-drive automobiles manufactured for use in Ireland were not "similar" to left-hand-drive automobiles manufactured for use in the United States, again because the two types of automobiles were not commercially interchangeable. The argument based on construction of the word "similar" in customs appraisement law was originally set forth in a brief footnote in a Sears Roebuck memorandum, but like the Robinson-Patman argument it has assumed increased prominence in defendants' latest submission.

In response to our request, the parties submitted supplemental memoranda on the legislative, political, and social history of the 1916 Antiduimping Act.[11] In their joint memorandum, the defendants argue that "the 1916 Act was firmly rooted in antitrust principles and was passed by a Congress whose majority was fervently anti-protectionist." They contend that the Act should therefore be construed in harmony with the antitrust laws to foster, and not to inhibit, vigorous price competition in United States markets.

The defendants have also argued that the 1916 Act includes criminal penalties, and was viewed by Congress primarily as a criminal provision. Although the criminal penalties created by the Act are not involved in this civil litigation, defendants point out that whatever construction we give the statute might be applied in future criminal cases, and therefore argue that we should construe the statute strictly against those who seek to invoke its provisions. *See FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954). While we do not address this argument specifically in our discussion, we are mindful that the 1916 Act is a criminal as well as a civil statute.

[11] All told, the various defendants submitted a total of 13 briefs which deal, in whole or in part, with issues discussed in this opinion. The plaintiffs submitted 8 briefs. In addition, we heard extensive oral argument on the motions.

The criminal side of the statute does not affect our reasoning, however, for we are convinced that we would interpret the Act as we do in this opinion even if this were a criminal prosecution under the 1916 Antidumping Act.

The defendants have also advanced several arguments concerning the interpretation of the 1916 Act with respect to issues besides the comparability of U.S. and Japanese products. These other arguments concern the interpretation of two other key phrases in the statute: the predatory intent clause, and the language making the statutory prohibition applicable to "any person importing or assisting in importing." *See* n. 4, *supra* (quoting the Act in full). For example, some defendants have argued that in order to show predatory intent, plaintiffs must show that each defendant sold its products at a price below its marginal cost, citing, *e.g.*, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975), or that the defendant has a sizable share of the market. Some defendants have argued that they have neither imported nor assisted in importing products from Japan to the United States because their sales are made only in Japan. In addition, several defendants have argued that the Act is inapplicable to them because they sell consumer electronic products only in the United States, and the Act should be applied only to companies which themselves sell products in both markets.[11A] With a single

[11A] Sears Roebuck has recently filed a motion arguing that Zenith's dumping claims against it, which were made in Zenith's Counterclaim filed March 17, 1977, are barred by the statute of limitations. Sears, which is not a defendant in the NUE action, contends that the relevant statute of limitations is the Pennsylvania six-year statute, 12 P.S. § 31.

In addition, Motorola contends in a recent motion that the dumping claim against it must be dismissed because Zenith has failed to set forth in the FPS any facts supporting a dumping claim against Motorola. Motorola is not a defendant in the NUE action.

exception, we need not, hence we do not reach any of these arguments.[12]

B. *The Plaintiffs*

The plaintiffs argue that defendants' proposed construction of the 1916 Antidumping Act "is nothing more than an evisceration of the Act and a vehicle for frustrating the clear purposes of Congress." They point out that the customs decisions construing the phrase "such or similar" are all interpretations of other statutes, not of the 1916 Antidumping Act. They argue that the narrow construction of the term "such" in those decisions was necessary there to avoid rendering that word redundant, but is not necessary in the interpretation of the 1916 Act. They argue that a restrictive reading of the Act would be at odds with its remedial purpose, and that Congress intended to broadly proscribe unfair methods of competition in international trade. Noting, as do defendants, that the Act was primarily intended to complement the antitrust laws, plaintiffs contend that private antitrust plaintiffs should be favored and not hindered in their efforts to enforce the antitrust laws, and that this principle should apply equally to plaintiffs seeking damages under the 1916 Antidumping Act. They characterize defendants' reading of the Act as "hypertechnical," and contend that the Act should be read to permit the comparison of

---

[12] We reject the contention of defendants Mitsubishi Corporation and Mitsubishi International Corporation that plaintiffs cannot establish predatory intent with respect to defendants whose market share in sales of consumer electronic products in the United States is small. The 1916 Antidumping Act, unlike *e.g.* section 2 of the Sherman Act, does not require plaintiffs to show that any defendant's predatory intent was accompanied by a dangerous probability of success. Thus the plaintiff is entitled to attempt to establish a defendant's predatory intent by inference, even if the defendant's small market share makes it unlikely that it will succeed in injuring American industry. Moreover, plaintiffs claim that all the Japanese defendants and their coconspirators joined a conspiracy which had the requisite predatory intent: if the plaintiffs can produce evidence *aliunde* of the conspiracy and of particular defendants' membership in it, the defendants who joined the conspiracy will be chargeable with its intent.

products in broad, common-sense generic categories. Plaintiffs here focus, needless to say, on the obvious functional similarity between Japanese TV sets and other products, as used by consumers in Japan, and U.S. TV sets and other products, as used by consumers in the U.S.

Plaintiffs also observed that the ordinary meaning of the word "such" is not so narrow as the construction for which defendants contend, and produce many pages of dictionary definitions to support their argument. They next argue that the expression "actual market value or wholesale price of such articles" means the actual market value or wholesale price of the very articles imported into the United States, and that those articles can have an actual market value in Japan even though identical articles are not sold in Japan. This contention is supported by an extensive review of customs appraisement law, including in particular ¶ R of the Tariff Act of 1913, which defined "actual market value or wholesale price" and was in force when the 1916 Antidumping Act was passed. Plaintiffs point out that ¶ R permitted customs appraisers to refer to sales of similar but not identical merchandise to determine the value of goods undergoing appraisement, and argue that the same rule should be applied in the interpretation of the 1916 Antidumping Act. Plaintiffs have not responded to defendants' arguments based on the Robinson-Patman Act and on the post-1916 customs interpretations of the term "similar."

With respect to the facts, plaintiffs admit that most of the specific differences between U.S. and Japanese consumer electronic products which defendants have identified do exist. Plaintiffs' affiant and expert witnesses aver, however, that these differences are insignificant technically and do not substantially affect the cost of manufacturing U.S. and Japanese products. Plaintiffs argue that because the differences are insignificant from a technical or cost standpoint, the differences do not affect the comparability of U.S. and Japanese products.

In their memorandum on the legislative, political, and social history of the 1916 Act, plaintiffs characterize the Act as an

"economic statute" which has both protectionist and antitrust aspects. They argue that the Act was the product of a political compromise between the Democratic majority in Congress, which opposed tariff protectionism, and the Republican minority, which was avowedly protectionist. Any protectionist facet of the statute would, of course, help plaintiffs' cause.

Having completed our review of the parties' contentions, we turn next to an examination of the factual record before us on the motions for summary judgment.

III. *The Factual Record On Summary Judgment*

A. *Introduction*

In deciding the instant motions addressed to plaintiffs' 1916 Act claims, we have consulted all pertinent evidentiary sources.[13] These include the numerous affidavits filed in support of and opposition to the motions, testimony taken in depositons, plaintiffs' expert witness reports on product comparisons, the model-by-model matchups submitted by the plaintiffs, and the relevant portions of the plaintiffs' Final Pretrial Statement. As will be seen, these sources reveal that the facts which are material to the instant motions are not in dispute, although of course the parties disagree vigorously on the significance of the undisputed facts. The facts which we relate in the following pages are, without exception, admitted by the plaintiffs, and there is accordingly not even the slightest doubt as to their veracity. Before relating these facts it is important that we discuss their evidentiary foundation.

The various defendants have submitted the affidavits of six persons to support their motions on the 1916 Act claims: Masami Itoga (Mitsubishi Electric Corp.), Harry E. Ruther, Jr.

[13] We reject the contention of defendant MELCO that the record for summary judgment closed at some date prior to the filing of plaintiffs' Expert Witness Reports and Final Pretrial Statement. *See* discussion in our opinion on subject matter jurisdiction filed this day, 494 F.Supp. 1161, 1168-1170.

(Sears, Roebuck & Co.), Gordon Reichard (Sears, Roebuck & Co.) (two affidavits), Nobuyuki Yamataka (Matsushita Electrical Industrial Co.), M. Yoshida (Sharp Electronics Corp.), and Akio Morita (Sony Corp.) (¶ 64). Defendants have also referred to the deposition testimony of Zenith executives Vito Brugliera and Karl H. Horn.[14]

Plaintiffs' principal affiant with respect to product comparisons under the 1916 Antidumping Act is Vito Brugliera, Manager of Value Engineering for Zenith. He has submitted six affidavits responding to defendants' affiants, and one affidavit in response to our request. Plaintiffs have also submitted the affidavits of George A. Schupp and Rocco F. Mainiero, two other Zenith officials.[15]

Plaintiffs have also submitted two expert witness reports on the technical comparability of consumer electronic products manufactured for the Japanese market with products manufactured for the U.S. market. The report of Walter Lukas on behalf of plaintiff National Union Electric Corporation concerns only television receivers, which are the only products involved in NUE's claim. The report of Karl Horn and Vito Brugliera, on behalf of Zenith addresses the comparability of television receivers, radios, phonographs, and tape recorder/players. Both reports are based on voluminous and detailed

[14] In addition, defendants have referred to the deposition testimony of Walter C. Fisher, a Zenith executive, and to a letter of William G. Frick, Executive Vice President of Zenith International Sales Corp., dated February 7, 1974, produced as Zenith Document Nos. 30519-20. The Fisher testimony and Frick letter are primarily relevant to cost issues which we do not consider. *See* n. 23, *infra*.

[15] Plaintiffs have also referred to statements in Toshiba Document No. TJ 4629 (Zenith Document No. 4863). According to plaintiffs' translation of that document, S. Yajima, a Toshiba employee, wrote "[t]he same thing exported is to be sold domestically." In context, the statement appears to refer to the cabinet for a television receiver. In light of the undisputed physical differences between U.S. and Japanese television receivers, *see* text *infra*, and although we are mindful of our duty to make all inferences favorable to the plaintiffs, we cannot infer from this lone statement that there is a genuine issue of fact as to the specific differences detailed *infra*.

model-by-model matchups, which were made independently by the authors of each report.[16] The reports include exposition of the technological basis for matchups and the method of their construction, and express opinions, based on the matchups, as to the technological comparability of the products sold in the U.S. and in Japan.

The matchups constructed by the plaintiffs' expert witnesses do not take into account the categorical differences between products manufactured for the Japanese market, as a class, and those manufactured for the U.S. market, as a class, which are detailed *infra*. Lukas states explicitly that these differences are "general considerations" which "do not materially impact upon technological comparability." *See* n.22, *infra*. The method of selecting comparable models which Lukas describes in his report makes no allowances for differences in tuners and power supply components to accommodate the differences we describe below. Although the Horn/Brugliera report does not include an explicit disclaimer of the sort made by Lukas, the detailed explanation in that report of the method of their construction of the model-by-model matchups makes it clear that the differences we describe were not factors in their analysis either. Plainly, the model-by-model matchups are based on the assumption that those differences are not *legally* significant. Since the matchups constructed by

[16] We required plaintiffs to prepare and file these model-by-model matchups during the discovery phase of this case in order to inform the defendants of plaintiffs' contentions concerning their dumping claims and the manner in which plaintiffs intend to prove their dumping case at trial, so that defendants would be able to prepare their defenses. The requirement for specific model-by-model matchups was necessary because there were literally thousands of television models made by the defendants during the relevant time period, and many models of non-television products. As a result there was a virtually limitless number of possible pairings of models upon which plaintiffs might base their dumping claims. We required plaintiffs to select a limited number of home market and export models to pair for comparison. Because of the great technical detail involved in the selection of models for comparison, and more particularly because of the technical differences which were *not* considered by plaintiffs' experts in preparing model-by-model matchups, the matchups shed considerable light on the instant motions.

plaintiffs' experts do not address but do not contravene the differences described herein, the validity of the matchups as essential support for plaintiffs' claims under the 1916 Antidumping Act is wholly dependent on whether or not we agree with the assumption upon which the matchups are based: that the undisputed physical differences between products used in Japan and those used in the U.S. are legally insignificant.

The plaintiffs' Final Pretrial Statement ("FPS") was filed pursuant to Pretrial Order No. 154, a case management order which we entered on March 20, 1979, to govern the final pretrial phases of this gargantuan litigation. Pretrial Order No. 154 has been published as an appendix to our opinion certifying for interlocutory appeal our prior opinion and order concerning plaintiffs' Seventh Amendment right to civil trial by jury, 478 F.Supp. 889, 946-60 (E.D.Pa.1979), *appeal pending*, No. 79-2540 (3d Cir. filed Sept. 20, 1979). The requirements governing the FPS are set forth in Part III of Pretrial Order No. 154, 478 F.Supp. at 949-50. Plaintiffs were required to set forth in narrative form each fact which they intend to prove at trial. *Id.* Part III-C, 478 F.Supp. at 949. The FPS has preclusionary effect: except for good cause shown, the plaintiffs are precluded from offering at trial any facts or evidence to prove such facts which have not been disclosed to the defendants and the court in plaintiffs' FPS. *Id.* Part III-D, 478 F.Supp. at 949-50. The FPS which plaintiffs have filed, including appendices, errata, and addenda, contains more than 17,000 pages.

The plaintiffs' dumping claims as set forth in the FPS, vol. 17 at 8049-8273, are based on massive model-by-model price comparisons which they have submitted with the FPS as Appendices C, D, and J. The price comparisons are based on the matchups of models sold in the U.S. with models sold in Japan which were constructed by plaintiffs' experts Lukas and Horn/Brugliera. FPS vol. 17 at 8052 (television receivers); *id.* at 8151-64 (non-television consumer electronic products). As a result, the validity of the plaintiffs' dumping claims as set forth with preclusive effect in the FPS is dependent on the validity of the model-by-model matchups which were constructed accord-

ing to the methods described in the reports of plaintiffs' expert witnesses. As we have noted, the validity of the matchups depends in turn on whether or not U.S. and Japanese consumer electronic products are comparable for purposes of the 1916 Antidumping Act despite the undisputed differences between them. Except insofar as it reveals plaintiffs' reliance on the model-by-model matchups to support their dumping claims, plaintiffs' FPS does not otherwise address the issues of product comparability which are involved in the instant motions.

We turn now to an exposition of the technical differences between consumer electronic products made for use in Japan and in the U.S., and the effects of those differences on consumer use and marketability of those products. We begin with television receivers, and then consider the same factual matters with respect to non-television products.

B. *Physical Similarities and Differences Between U.S. and Japanese Television Receivers*

Apart from variations between and among particular models of television receivers, which do not concern us here, there are technological differences between television receivers sold for use in the United States, as a class, and television receivers sold for use in Japan, as ~~a~~ class. There are also extensive similarities in the technology employed in the two classes of products. We address the similarities first, and then turn to the differences.

The function of any television receiver is to create sound and pictures by decoding information which has been encoded upon a radio signal of a particular frequency. There are three major systems in use for encoding audio and video information by altering the electrical characteristics of a radio signal:

PAL (Phase Alternating Line);

SECAM (Sequential Color and Memory); and

NTSC (National Television Standards Committee).

PAL is used in Germany; SECAM is used in France and the Soviet Union. NTSC is used in the United States and in Japan, and in many other countries. Because both Japan and the U.S. employ the NTSC standards, the electrical characteristics by which visual and auditory information are encoded on a radio frequency to convey sound and pictures to the consumer's home are identical in the two countries.[17] Because the standards are identical, the signal processing technology within television receivers used in the two countries is the same.

Television receivers designed for use in Japan could be operated in the United States, and receivers designed for use in the United States could be operated in Japan, if the following components were altered or replaced:

1. Very High Frequency (VHF) Tuner
2. Ultra High Frequency (UHF) Tuner
3. Power Transformer.

The functions of these components, and the reasons why identical ones cannot be used in the U.S. and in Japan, are ex-

[17] The following technical characteristics are common to both the U.S. and the Japanese television systems:

Number of lines	525
Video bandwidth	4 Mhz
Channel width	6 Mhz
Sound carrier relative to picture carrier	+4.5 Mhz
Line frequency	15750 Hz
Field frequency	60 Hz
Picture frequency	30Hz
Picture modulation	AM
Picture modulation sense	Negative
Sound modulation	FM ±25 Khz
Sync waveform	+25%
Interlace	Two-to-one
Picture scan	Left-to-right and Top-to bottom

plained *infra*. Television receivers which are physically identical except for these three components[18] could be operated in both countries.[19]

The material differences between U.S. and Japanese television receivers arise from two sources: the differing frequencies upon which television broadcasts are made, and differences in the available alternating current power supply. The U.S. and Japanese television systems differ in the allocation of radio frequencies for television broadcasts. In Japan, TV broadcasts are made on frequencies ranging from 90 to 108 megahertz ("Mhz") and from 170 to 222 Mhz for VHF broadcasts, and from 470 to 770 Mhz for UHF broadcasts. In the United States, VHF broadcasts are made on frequencies ranging from 54 to 88 Mhz and from 174 to 216 Mhz, and UHF broadcasts are made on frequencies ranging from 470 to 890 Mhz. It should be

[18] The defendants' affiant Gordon A. Reichard avers that a fourth component, the Video Intermediate Frequency System, would have to be altered or replaced. The VHF and UHF tuners in a television receiver convert the broadcast frequencies which they receive to a lower frequency known as the intermediate frequency ("IF") for transmission to the Video Intermediate Frequency System. The IF still has encoded upon it the audio and video information which will eventually be used to produce sound and pictures, after being processed by the Video Intermediate Frequency System and other components of the television receiver. The intermediate frequencies in use in the United States and in Japan are different. In the United States, the IF is 45.75 Mhz for video and 41.25 Mhz for audio; in Japan, the IF is 58.75 Mhz for video and 54.25 Mhz for audio. Although Reichard states that a TV receiver designed for use in one market could not be used in the other market without changes in the Video Intermediate Frequency System, presumably to accommodiate the admitted difference in IF values, plaintiffs' affiant Vito Brugliera avers that physically and electronically identical components of this type could be used in the U.S. and in Japan. There is thus a genuine issue of fact on this point, but the issue is not material since the other differences between U.S. and Japanese products are sufficient for summary judgment under the legal standard formulated in Part V of this opinion.

[19] Although receivers with only these differences would be physically capable of operation in both countries, receivers which are operable in Japan might not be *legally* operable in the United States because of federal standards governing the emission of radiation. *See* 21 C.F.R. Part 1020 (1979).

apparent from these figures alone that, although there is some overlap in both the VHF and the UHF bands, much of the frequency spectrum which is allotted to television broadcasts in each country is not so used in the other country. More importantly, the allocation of specific frequencies to particular television channels differs as between the U.S. and Japan.[20]

The VHF and UHF tuners within a television receiver receive transmitted radio signals of desired frequencies, upon which audio and video information has been encoded. The tuners convert the received signal to specific lower frequencies, *see* n.18, *supra*, and transmit the converted signal to

[20] The following table sets forth the channel frequencies of the VHF band in the United States and Japan.

CHANNEL	*U.S.A.*	*JAPAN*
1 - Picture	None	91.25 Mhz
1 - Sound	None	[illegible]5.75 Mhz
2 - Picture	55.25 Mhz	97.25 Mhz
2 - Sound	59.75 Mhz	101.75 Mhz
3 - Picture	61.25 Mhz	103.25 Mhz
3 - Sound	65.75 Mhz	107.75 Mhz
4 - Picture	67.25 Mhz	171.25 Mhz
4 - Sound	71.75 Mhz	175.75 Mhz
5 - Picture	77.25 Mhz	177.25 Mhz
5 - Sound	81.75 Mhz	181.75 Mhz
6 - Picture	83.25 Mhz	183.25 Mhz
6 - Sound	87.75 Mhz	186.75 Mhz
7 - Picture	175.25 Mhz	189.25 Mhz
7 - Sound	179.75 Mhz	193.75 Mhz
8 - Picture	181.25 Mhz	19 .25 Mhz
8 - Sound	185.75 Mhz	197.75 Mhz
9 - Picture	187.25 Mhz	199.25 Mhz
9 - Sound	191.75 Mhz	203.75 Mhz
10 - Picture	193.25 Mhz	205.25 Mhz
10 - Sound	197.75 Mhz	209.75 Mhz
11 - Picture	199.25 Mhz	211.25 Mhz
11 - Sound	203.75 Mhz	215.75 Mhz
12 - Picture	205.25 Mhz	217.25 Mhz
12 - Sound	209.75 Mhz	221.75 Mhz
13 - Picture	211.25 Mhz	UHF BAND STARTS
13 - Sound	215.75 Mhz	UHF BAND STARTS

other components of the TV receiver for processing. The VHF and UHF tuners employed in the U.S. and in Japan must be physically different to accommodate the different frequencies upon which television picture and sound are broadcast in the two countries.

As a result of the foregoing, Japanese television receivers could not receive most VHF television broadcasts in the United States, and *vice versa*, even if the sets were otherwise operable. The Japanese channels 8, 9, 10, and 11 correspond to the U.S. channels 10, 11, 12, and 13, respectively. A Japanese set operated in the U.S. could receive U.S. channels 10-13 and no others; a U.S. set operated in Japan could receive Japanese channels 8-11 and no others. The Japanese UHF band is wholly included in the U.S. UHF band; a U.S. set operated in Japan could receive all UHF broadcasts, but a Japanese set operated in the U.S. could not receive all U.S. UHF broadcasts.[21]

The U.S. and Japanese systems for the transmission of electrical energy in the form of alternating current also differ. Thus the power sources available for the operation of television receivers and other appliances are not the same in the two countries. In the United States, electric power is supplied at 120 volts, with a power frequency of 60 Hz; in Japan, power is supplied at 100 volts, with frequencies of either 50 Hz or 60 Hz in use in different parts of the country. The power transformers in television receivers convert incoming alternating current to direct current at a voltage appropriate to the electronic design of the receiver. Because television receivers used in the U.S. and in Japan are designed to operate on the available power supply, the power transformers in use in the two countries are different. However, receivers which are powered only by batteries could be used interchangeably in the two countries, if they were altered to receive the appropriate frequencies.

---

[21] UHF channel allocations of the U.S. and Japan are listed in the 1966 World Radio TV Handbook (20th ed.) at 249 (attached to Report of Walter Lukas).

C. *Effect of the Physical Differences on Consumer Use and Marketability*

The plaintiffs' affiants and expert witnesses emphasize that the physical differences which we have outlined between television receivers sold in the U.S., as a class, and television receivers sold in Japan, as a class, are technically insignificant.[22] In deciding these summary judgment motions, we must credit these averments, as they clearly suffice to raise a genuine issue of fact. Even if we were not so bound, we have no doubt that the differences described above have little more significance technically, and are of little more professional interest to an electronic engineer, than the prices at which the receivers are sold or the nationality of their producers. Plainly, the undisputed physical differences between television receiv-

---

[22] For example, Vito Brugliera has stated in more than one affidavit that "television receiver sets manufactured for sale in Japan do not differ in any significant respect, either from a technical or cost standpoint, from television receivers manufactured by Japanese manufacturers or others for sale in the United States." In another affidavit, Brugliera avers, "Monochrome and color television receivers in each market are electronically identical, function by function by virtue of the NTSC standard. That components may differ between domestic and export receivers is of little consequence from a design viewpoint." And Brugliera and Karl Horn, in their expert witness report, state:

> It is our opinion that such products are comparable at the functional, technological and manufacturing level. Any purported differences, once one understands the technical issues, are not significant.

Walter Lukas, the plaintiffs' other expert witness on technical issues, explaining the model-by-model matchups which he constructed, wrote:

> In this comparison of television receivers, the following general considerations do not materially impact upon technological comparability:
>
> (1) Minor modifications of VHF and UHF tuners and video intermediate frequency amplifiers reflect a slight variance in channel allocations for the markets in Japan and the U.S. . . .
>
> (2) Power sources available for television receiver operation in Japan are 100 Volts, 50/60 Hz; in the U.S., 120 Volts, 60 Hz. (These voltage characteristics constitute the prevalent standard used for television receivers in those markets.)

Lukas concludes, "My opinion . . . is that such television receivers are practically identical in substantially all material technological respects."

ers used in the U.S. and in Japan are merely adaptations to the technical conventions of broadcasting and of electrical power transmission in the two countries.[22A] They are closely analogous to the differences necessitated by the use of the metric system in many countries, and of the traditional units in the United States, or by the use of right-hand-drive automobiles in some countries and of left-hand-drive vehicles in the United States.

Our task, however, is to determine the *legal* significance of the undisputed physical differences. We are not concerned with the technological significance of the differences unless the legal standard which we must apply is formulated in terms of their technological significance. The legal standards which are controlling here, for reasons which are stated at great length in the remainder of this opinion, do not require us to evaluate the significance of the differences as a technical matter, or to assess the extent to which they would affect an engineer designing a television receiver. Nor do the controlling legal standards require us to evaluate the differences in cost of production which result from adaptation to the differing technical conventions of the U.S. and of Japan.[23] Instead, the pertinent legal standards require us to assess the impact of the

[22A] In addition to the physical differences we have discussed, TV receivers are constructed differently to comply with legal safety standards applicable in the U.S., *see* n. 18, *supra*, and in Japan. The nature of the Japanese standards, and the physical differences which the two sets of standards necessitate, have not been developed in the record before us. Since the different safety standards render TV receivers manufactured for one market legally unmarketable in the other, this difference also supports the grant of summary judgment on the plaintiffs' 1916 Act claims with respect to television receivers.

[23] As a result, we need not consider the record which the parties have made on the relative cost of production of television receivers for the U.S. and for Japan. Specifically, we do not consider the 1974 letter of William G. Frick and the deposition testimony of Walter C. Fisher, *see* n. 14, *supra*, concerning Zenith's plans to market U.S.-made television receivers in Japan, the investment that Zenith determined would be necessary to modify its product for the Japanese market, and the ultimate abandonment of Zenith's plans.

Defendants contend, on the basis of the Frick letter, the Fisher testimony, and Gordon Reichard's affidavit of April 16, 1979, that there are no genuine issues of fact as to differences in the relative cost of manufacturing television receivers for the Japanese and American markets and as to the investment required to switch production facilities from one type of receiver to the other.

Reichard avers that in order to convert a color television model manufactured for the United States market so that it could be used in the Japanese market, it would be necessary to set up special production facilities, to obtain new test equipment, and to invest a minimum of $100,000 in new capital equipment. Defendants interpret the Fisher testimony and Frick letter as support for this position, since Frick concluded that "it is not economically feasible for Zenith to enter the Japanese market with Television products," and Fisher explained the reasons for that decision in his deposition testimony. Plaintiffs' affiants Brugliera, Schupp, and Mainiero state, however, that the steps which Reichard says are necessary to change from production of U.S. to production of Japanese TV receivers may or may not be necessary, depending on other economic factors, such as production volume, and technological factors. As we have previously noted, Brugliera avers in other affidavits that the differences in the cost of manufacturing products for the U.S. market or for the Japanese market are insignificant. In light of the averments of plaintiffs' affiants, we could not conclude that there are no genuine issues of fact either with respect to the relative cost of production of U.S. and Japanese products, or with respect to the investment necessary to change over production facilities from one product to the other. For the reasons stated in the text, however, we do not view these issues as material to the disposition of the summary judgment motions.

undisputed physical differences on consumer use and marketability. To these matters we now turn; again, the facts related are admitted by the plaintiffs and there is not the slightest doubt as to their veracity.

Zenith's Executive Vice President, Karl H. Horn, one of its highest officers and a member of its Board of Directors as well as an expert witness in this litigation, discussed the utility in Japan of TV sets designed for United States use, and *vice versa*, at his deposition. He admitted that a set designed for use here might be incapable of receiving any picture at all in Japan, let alone a satisfactory one, and conceded that sets designed for

use in Japan cannot receive two of the three major U.S. television networks in Chicago, the situs of the deposition. Mr. Horn testified, *inter alia:*

> Q. Do you know whether I could walk into a Sears Roebuck store here in Chicago and buy a Sears color television set and take it over to Tokyo and plug it in and operate it?
>
> A. You could plug it in and you could operate it. Whether you would receive any picture at all or whether you would receive a satisfactory picture is a big question mark.
>
> Q. Would you in good conscience suggest to anyone that he take a Sears television set as they are sold in the United States and sell it to somebody for use in Japan?
>
> A. No. . . .
>
> Q. Could I, assuming I were to go to Tokyo or Osaka, or any large city in Japan, and walk into the department store and purchase a television set, could I bring that set as I purchased it in Japan to this country and operate it satisfactorily?
>
> A. . . . You do not receive the U.S. low channels, 2 through 6, but you can receive without any adjustment 9 [sic] through 13 and with adjustment 7 through 9. . . .
>
> Q. So that without modification that set in Japan would be incapable at least of receiving two of the three major television networks in the United States in Chicago?
>
> A. Yes.

Vito Brugliera, plaintiffs' affiant and expert witness, testified at his deposition that a TV receiver manufactured for use in Japan, if used in the United States, probably would run hot and might "overheat and go" as a result of the voltage differences.[24] He testified that it would be "ridiculous" to try to use in the U.S. a receiver manufactured for use in Japan:

---

[24] Mr. Brugliera testified as follows:

> Q. Just a simple question. If you plugged the Japanese set in the wall, do you know what would happen here in the United States?
>
> A. If you plugged it into the wall, it would probably operate, depending on how good their power supply circuit was. It would probably run hot.

> Q. Would you consider it ridiculous to try to use a Japanese set in the United States?
>
> A. Well, in that context I would say yes, because—
>
> Q. You consider that ridiculous apart from the question of cost?
>
> A. Yes, because from a cost viewpoint, there is not the kind of difference.
>
> Q. Apart from any question of cost or price of the Japanese set, would you consider it to be ridiculous to try to use that set in the United States?
>
> A. In terms of, let's say, usable frequency allocations, I would have to agree with you.
>
> Q. Because it wouldn't get all the U.S. channels, would it?
>
> A. But that doesn't say the sets are different from a technological or cost viewpoint. That is a point I want to make very clear.

> You would probably receive at least four or five channels here.
>
> Q. How long could you operate it that way?
>
> A. As I said, depending on how good their power supply design was.
>
> Q. Suppose they had a poor power supply design.
>
> A. Well, it would get hot.
>
> Q. What would happen then?
>
> A. You are talking about the AC line differences. In Japan it is 100 volts, 50 or 60 cycles. Here it is 120 volts, and from an engineering point of view, that is nothing.
>
> Q. But what would happen to the set, anything?
>
> A. As I said, depending on the power supply. Some of them might last indefinitely. Some of them might overheat and go. It is a function of individual design, but it is a minor engineering difference.

While Brugliera testified that certain Japanese TV sets might *not* "overheat and go" in the U.S., we do not require the moving defendants to demonstrate that there is no genuine issue of material fact with respect to overheating of particular specified models because the frequency difference, which applies to all TV receivers without exception, would by itself be sufficient to justify the grant of summary judgment.

Brugliera also testified that attempted use in the United States would be a "misapplication" of the Japanese domestic TV receiver.[25] He admitted that the alterations necessary to make a TV set manufactured for one country capable of receiving all television broadcasts in the other country are beyond the capacity of the average consumer.[26]

---

[25] Brugliera testified:

A. There are two things. One is misapplication of something designed for one market versus the technology and cost associated with designing for each of those specific markets.

If you want to stretch the analogy, I will grant you would be misapplying a Japanese domestic TV model by plugging it into U.S. wall outlet, but I am saying that it is not very difficult to design for either market, knowing the environment you are going to face, and that the cost differentials are miniscule. I am saying you could build the same set and just have a different module for the power supply and substitute A or B and have a different tuner package and substitute A or B, depending upon which market you were designing for.

Q. But going really to the set as it was designed for use in Japan as opposed to this set as it was designed for use in the United States, would you state that it would be a misapplication to attempt to use the one or the other in the foreign market?

A. Yes, but that is saying, for instance, do you drive a British car in the U.S.? You normally wouldn't. You could if you wanted to.

I could take a Japanese set and use what is called a variable transformer and operate it all the time.

[26] Brugliera testified:

Q. But it is a different component or tuner in each set, is that right?

A. The tuners are different—well, if the tuners are click stop, you know, individual channels, they would be different; but, for instance, if you were using what we call a strip tuner, which is a mechanical tuner that has plastic strips in it that have resistors and capacitors and coils on them, you could use the mechanical housing in the electronic circuits and just interchange the strips . . .

Q. When you are talking about interchanging the strips, would that be from a lab or technical end? In other words, if you were a consumer—

A. A consumer could conceivably do it.

Q. Let's say the average consumer—

A. It would usually be a technician at a technical level because you normally don't want a customer getting inside the set.

Although Brugliera's statement that "you normally don't want a customer getting inside the set" was made during a discussion of strip tuners, we view it as of wider import. Brugliera admitted that modification of a set designed for use in Japan to make it operable in the U.S. requires at least the substitution of different tuner and power supply components. n. 25, *supra*. The record reveals no instances of television receivers which are designed so that the necessary substitution can be made without "getting inside the set." It follows from these facts and from Brugliera's statement quoted above that the necessary substitution would normally be made by a technician, and not by the consumer. We note that although we must, on these summary judgment motions, make all inferences in favor of the plaintiffs, we are not required to ignore the rules of logic. *See First National Bank of Arizona v. Cities Service, Co.*, 391 U.S. 253, 287-89, 88 S.Ct. 1575, 1591-92, 20 L.Ed.2d 569 (1968).

[27] *See also* n. 22A, *supra*.

To recapitulate: (1) a receiver designed for use in Japan would not receive most U.S. broadcasts and would be in serious danger of fatal overheating; (2) the changes necessary to make the Japanese domestic set operable in the United States could not be made by the average consumer. It is clear from the admissions of plaintiffs' witnesses that any rational consumer in the United States would prefer a television receiver manufactured for use in this country to one manufactured for use in Japan, and that he would not purchase a set manufactured for use in Japan. Similarly, any rational Japanese consumer would prefer a TV set made for use in Japan to one designed for use in the United States.[27] We conclude that television receivers manufactured for use in Japan are unusable by consumers in the United States, that they are unmarketable in the U.S., and *a fortiori*, that the receivers are not commercially interchangeable.

D. *Physical Differences Between U.S. and Japanese Non-Television Consumer Electronic Products; Effects Thereof on Consumer Use and Marketability*

In addition to its claims with respect to television receivers, plaintiff Zenith Radio Corporation also complains of actionable dumping of radios, phonographs, and tape and cassette recorder/players. National Union Electric Corporation, the other plaintiff in this litigation, has limited its complaint to television receivers. Although the record with respect to simi-

larities and differences between non-television consumer electronic products sold in the U.S. and in Japan is far less voluminous than the corresponding record with respect to TV receivers,[28] two differences are undisputed. As before, all the facts we relate are admitted by the plaintiff.

All consumer electronic products which are not solely battery-operated must be designed to accommodate the differ-

---

[28] The only affidavit submitted by defendants in support of the summary judgment motions on Zenith's 1916 Act claims with respect to non-television products is that of Harry E. Ruther, Jr., an electrical engineer employed by Sears, Roebuck and Co. An affidavit of Vito Brugliera responds to Ruther on behalf of Zenith. The expert witness report of Brugliera and Karl Horn addresses itself to the comparability of non-television products, and explains the construction of Zenith's model-by-model matchups of allegedly comparable products. The plaintiffs' FPS sets forth Zenith's dumping claims for non-television products, vol. 17 at 8149-64, and includes voluminous price comparison reports submitted as Appendix J. The price comparisons are based on model-by-model matchups listed in the FPS at 8151-64. According to the FPS, those matchups are to be authenticated by the testimony of Horn and Brugliera, and consequently we assume that the matchups were constructed according to the methods stated in the Horn/Brugliera expert witness report. As a result, the validity of Zenith's non-television dumping claims as set forth with preclusive effect in the FPS is dependent on the validity of the model-by-model matchups constructed by Horn and Brugliera, which in turn depends on whether or not we share their assumption that the physical differences recounted in the text are legally significant. *See* pp. 1203-1204, *supra*.

The Ruther and Brugliera affidavits, the Horn/Brugliera report, and the model-by-model matchups in the FPS are all concerned solely with radios, phonographs, and tape and cassette recorders. None of these sources include stereo and audio instruments or electronic components, even though these two categories of electronic products were included in Zenith's complaint and counterclaim. We have previously ruled that Zenith has abandoned its dumping claim with respect to electronic components by failing to include them in its previous submission of model-by-model comparisons. See Pretrial Orders No. 146 at p. 233 (Feb. 27, 1979); No. 165 at pp. 76 & 97-98 (Apr. 23, 1979); No. 222 at 153-57 (Jan. 16, 1980). Since stereo and audio instruments are not mentioned in any of the evidentiary sources which we have consulted in deciding the instant motions, we do not deal with them here. At a subsequent pretrial conference we will take up the question whether or not stereo and audio instruments remain in this case. *See* n. 63, *infra*.

ences in the available power supply in Japan and the U.S. As we have explained, the voltage and frequency of alternating current differs in the electrical power systems of the two countries. Like television receivers, other consumer electronic products which operate on alternating current include a power supply component which transforms the available external electrical power into direct current at a voltage appropriate for the internal workings of the product. The electric motors in some consumer electronic products, particularly phonographs and tape recorders, may be driven by the internal power supply or may be driven directly by alternating current from the external power source. Adaptation of a product designed for use in the United States for use in Japan, or *vice versa*, requires the alteration of the power supply component and of the electric motor if it is driven directly by the external power source.

If radios, phonographs, and tape and cassette recorders designed for use in the United States were operated from the external power sources available in Japan, the audio output of all such products would include an objectionable hum. Moreover, the motors of phonographs and tape and cassette recorders which are powered by external alternating current would operate at a slower speed in Japan, causing pronounced sound distortion. Consumer electronic products which are operated by batteries do not encounter these problems of satisfactory operation.

Another difference between products used in the U.S. and those used in Japan is specifically relevant to radios which receive FM transmissions. The standards for encoding audio information on a radio frequency for FM broadcast are identical in both countries. As a result, the electronic circuits used for processing FM signals in a radio receiver may be identical in both countries. The radio frequency bands assigned to FM radio transmission are different, however. In the United States, FM broadcasts are made on a frequency band of 88 to 108 Mhz. In Japan such broadcasts are made on a frequency band of 80 to 90 Mhz. Radios which receive FM transmissions

which are designed for use in one country cannot be operated satisfactorily in the other country in that they can only receive broadcasts on the narrow part of the band, 88 to 90 Mhz, on which transmissions are made in both countries.

The plaintiff's affiant and witness aver that these differences are of no technical significance and do not affect manufacturers costs.[29] For the reasons stated at p. 1207, *supra* and at great length *infra*, we do not view the technical signficance of the differences as a decisive factor in the disposition of these summary judgment motions. Instead, the relevant factor is the effect of the undisputed differences on consumer use and marketability. It is clear that any rational consumer would prefer products which do not produce an objectionable hum or other sound distortion, and would prefer radios which can receive all broadcasts in his country on the FM band. Therefore we conclude that all consumer electronic products which are not solely battery-operated, and all radios which receive FM transmissions whether or not battery-operated, which are designed for use in the United States, are unusable to consumers in Japan, are unmarketable in Japan, and, *a fortiori*, are not commercially interchangeable with products designed for use in Japan.[30]

---

[29] Vito Brugliera states that "radios, phonographs and open reel and cassette tape recorders manufactured for sale in Japan do not differ in any significant respect either from a technical or cost standpoint from similar items manufactured by Japanese manufacturers or others for sale in the United States." He avers that to prevent objectionable hum "only minor technical modifications are necessary," that the problem of motor speed may be solved by a "simple mechanical modification" and that the differences in the FM band are "of no technical significance." The Horn/Brugliera report observes, *e.g.*, that the differing voltage and power frequency of alternating current in the U.S. and Japan is "easily accommodated" in tape recorders "by interchanging to components: the electric drive motor and power transformer," and concludes that the products are "technically comparable."

[30] The factual record with respect to non-television products does not include averments as to the effects of the operation in the *U.S.* of products designed for use in *Japan*. Thus we cannot add here, as we did in our discussion of TV receivers, the words "and *vice versa*." This difference is immaterial, however, for the fact that the differences stated in the text affect consumer use and marketability in Japan is sufficient by itself to preclude comparison of the products for purposes of the 1916 Act.

Having stated the undisputed physical differences between consumer electronic products manufactured for sale in the U.S. and those manufactured for sale in Japan, and having evaluated the impact of those differences on consumer use and marketability, we now turn to our analysis of the Antidumping Act of 1916.

IV. *Analysis Of The Antidumping Act Of 1916*

A. *Introduction*

The observation that the Antidumping Act of 1916 has not played a prominent role in the American jurisprudence is an egregious understatement. In fact, until the 1970's the Act was mentioned in only one reported decision, and that addressed a dispute over the availability of pretrial discovery and did not reach the merits. *H. Wagner & Adler Co.* v. *Mali*, 74 F.2d 666 (2d Cir. 1935). Apparently there have been four attempts to enforce the criminal provisions of the Act, but none of them has been successful and none has given rise to a reported judicial decision. Marks, *United States Antidumping Laws—A Government Overview* 43 Antitrust L.J. 580, 581 (1974). It may well be that, other than the *Mali* case cited above, there was, prior to the 1970's, nary an action brought by civil plaintiffs invoking the 1916 Antidumping Act.

Nor has the Act occasioned much scholarly commentary. With the single exception noted, we have searched the antitrust treatises in vain for reference to it. That exception is a recent treatise on the application of antitrust law to foreign trade, which dispatches the Act in the following paragraph:

> The present Antidumping Act of 1921 superseded the Antidumping Act of 1916 which provided criminal penalties and a treble damage action for dumping with intent to restrain or monopolize trade or to destroy, substantially injure, or prevent the establishment of a U.S. industry. The earlier law, while still intact, has been of no significance. Not only has the 1921 Act taken its place, but the specific intent required posed a very difficult enforcement problem. However, a private treble damage case brought under the 1916 Act in 1971 is pending as of this writing.

W. Fugate, Foreign Commerce and the Antitrust Laws 412 (1973) (footnotes omitted). The "private treble damage case" mentioned in the above quotation is the instant litigation.

The Act has been construed in an earlier decision in this litigation, in which Judge A. Leon Higginbotham, Jr., our predecessor in the case, upheld the validity of the Act against constitutional attack on grounds of vagueness. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 251 (E.D.Pa.1975). Judge Higginbotham there analyzed the language of the statute and determined that the challenged terms have a clear and ascertainable meaning. *Id.* at 255-58. Besides the instant litigation, the Act has also been interpreted in three other reported cases. In *Bywater* v. *Matsushita Electric Co.*, 1971 Trade Cas. ¶ 73,759 (S.D.N.Y.1971), and in *Schwimmer* v. *Sony Corp. of America*, 1979-1 Trade Cas. ¶ 62,632 (E.D.N.Y.1979), the courts granted summary judgment for the defendants on the issue of standing. The courts observed that the language of the provision of the 1916 Act which authorizes private treble damage actions is substantially the same as the language of 15 U.S.C. § 15, which authorizes treble damage actions for violations of the antitrust laws, and held that the rules of standing applicable under § 15 should also apply in suits brought under the 1916 Act. Thus neither opinion tells us anything about the meaning of the act itself. And in *Outboard Marine Corp.* v. *Pezetel*, 461 F.Supp. 384, 408-09 (D.Del.1978), Judge Murray M. Schwartz decided only that the Act has no application to goods which are manufactured exclusively for importation to the United States, and are not commonly sold either in the country of their manufacturer or in third countries. Accordingly, he dismissed the plaintiff's claim that electric golf carts were imported from Poland at prices which violated the Act, since the carts were sold only in the United States.

While we find the analysis in these decisions useful, and will refer to it in our discussion, determination of the summary judgment motions which are presently before us requires a more extensive inquiry into the legislative and social history of

the Antidumping Act of 1916 than has heretofore been undertaken. This will aid in our threshold task, which is to ascertain whether the Act was intended to be part of the corpus of antitrust law, or whether the Act was intended to be "protectionist" legislation, as that term is used in discussion of tariff barriers to free trade. This is a most important endeavor, for the character of the statute is of salient concern in its construction. We also seek guidance, of course, on the narrower issues before us.

Our *modus procedendi* will be as follows. We will first examine the language of the statute itself. Next we will sketch the relevant political and legal history of the era, before the United States entered World War I, in which the Act was passed. As the Supreme Court recently observed, "courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 669, 99 S.Ct. 1403, 1405, 59 L.Ed.2d 677 (1979), quoting *United States* v. *Union Pacific Railroad Co.*, 91 U.S. 72, 79, 23 L.Ed. 224 (1875). In review of the 64 years which have passed since enactment of the statute, we will "recur to the history of the times" in somewhat more detail than is customary in the construction of more recent statutes which arise from a more familiar social and political background. After the background is sketched, we will examine the legislative history immediately pertinent to the enactment of the Antidumping Act. Finally, we will examine the essential differences between the Antidumping Act of 1916 and the Antidumping Act of 1921.

B. *The Statutory Text*

The term "dumping" has been defined as "price discrimination between purchasers in different national markets." J. Viner, Dumping: A Problem in International Trade 4 (1966 ed.). *See Zenith, supra*, 402 F.Supp. at 259. Thus, to restate the obvious, the Antidumping Act of 1916 is a prohibition of

international price discrimination. The Act mandates a comparison of the price at which articles are imported or sold within the United States with the "actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production."[31] The Act is violated if the price in the United States is "substantially less" than the foreign "actual market value or wholesale price," after freight, duty, and incidental expenses are added thereto, and if the proscribed price discrimination is undertaken with the intent of injuring domestic industry.

1. *Similarities to Antitrust Statutes*

As a price discrimination statute, the Antidumping Act of 1916 is functionally similar to the price discrimination statutes which are applicable to domestic business. Section 2 of the Clayton Act makes it unlawful "to discriminate in price between different purchasers of commodities." 38 Stat. 730 (1914).[32] This provision was in force at the time of the passage of

[31] 15 U.S.C. § 72 (quoted in full at n. 4, *supra*). The Act also permits "actual market value or wholesale price" to be calculated with respect to the principal markets "of other foreign countries to which [the articles] are commonly exported." *Id.* However, this provision is of no significance in the instant litigation since the plaintiffs have not sought to compare U.S. prices with values derived from sales of consumer electronic products in any nation other than the country of their production, Japan. In our discussion, we will frequently abbreviate the statutory language quoted in the text by referring to the "actual market value."

[32] Section 2 of the Clayton Act, as enacted in 1914, provides in full as follows:

> Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes

the 1916 Antidumping Act and, as amended by the Robinson-Patman Act of 1936, is still in force. 15 U.S.C. § 13.[33] The Supreme Court has held that the phrase "discriminate in price" embraces all differences in prices charged to different purchasers. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549, 80 S.Ct. 1267, 1274, 4 L.Ed.2d 1385 (1960). However, Section 2 of the Clayton Act, both before and after the Robinson-Patman amendments, is applicable only if both "legs" of the alleged price discrimination involve commodities which are "sold for use, consumption, or resale within the United States." *See Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402

> only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

38 Stat. 730 (1914).

[33] Section 1 of the Robinson-Patman Act, 49 Stat. 1526 (1936), made extensive amendments in section 2 of the Clayton Act; the amended section is often referred to simply as "the Robinson-Patman Act," since the original version of section 2 of the Clayton Act is no longer operative. In our discussion, we refer to the "Robinson-Patman amendments" and the "Robinson-Patman Act" interchangeably, depending on the context. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which is the only portion of the amended section 2 which we consider in this opinion, reads in full as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission

F.Supp. 244 (E.D.Pa.1975).[34] Hence the Clayton Act and the Robinson-Patman Act do not apply to international dumping, which involves price discrimination between commodities sold for use in the United States and commodities sold for use in foreign countries. *See id.* at 249.

In addition to its functional similarity with Section 2 of the Clayton Act and the Robinson-Patman Act, the Antidumping Act of 1916 bears other significant resemblances to the antitrust statutes. As the courts noted in *Bywater, supra*, and *Schwimmer, supra*, the standing and damage provisions of the 1916 Act are essentially the same as those applicable to the antitrust laws under section 4 of the Clayton Act, 15 U.S.C. § 15. The clause of the 1916 Act which creates criminal penalties is virtually identical to, and specifies the same penalties as, the corresponding clauses of the Sherman Antitrust Act as then in force, 26 Stat. 209 (1890). And the intent clause of the

may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

15 U.S.C. § 13(a).

[34] Concomitantly, in his opinion dealing with the constitutionality of the 1916 Act as against an attack for vagueness, Judge Higginbotham observed:

> As I read the Act, it forbids regular, continued price discrimination between purchasers in *different national markets* whenever the discrimination is motivated by a desire to destroy competition. . . .

402 F.Supp. at 259 (emphasis added).

1916 Act speaks in antitrust terms, limiting the scope of the statutory ban to price discrimination practiced "with the intent of destroying or injuring industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."[35] We conclude then, on the basis of the statutory text, that the 1916 Act is an antitrust, not a protectionist statute. That conclusion is strongly corroborated by the political and legal history of the relevant era, and the legislative history of the 1916 Act, both of which are discussed *infra*.

2. *Incorporation of Customs Appraisement Terminology*

On the other hand, in one important respect, the language of the 1916 Act follows contemporary customs terminology. At the time of enactment of the 1916 Antidumping Act, the phrase "actual market value or wholesale price" had a specialized meaning in the customs law of the United States, as both Judge Higginbotham and Judge Schwartz have recognized. *See Zenith, supra*, 402 F.Supp. at 257; *Pezetel, supra*, 461 F.Supp. at 409. In the Tariff Act of 1913, § III, ¶ R, 38 Stat. 189, Congress directed that customs duties based on the value of imported merchandise should be assessed upon "the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported."[36] The Antidumping Act of

[35] It is also of some significance that the Act was introduced and passed under the heading "Title VIII—Unfair Competition." *See* pp. 1220-1221, *infra*.

[36] Whenever in our discussion we refer to "¶ R" of the Tariff Act of 1913, we mean ¶ R of Section III of that Act, which is here reproduced in full:

> "R. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported; that such actual market value shall be held to be the price at which such merchandise is freely offered for sale to all purchasers in said markets, in the usual wholesale quantities, and the price which the seller, shipper, or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade

1916 incorporates this entire phrase, with only one substantive change, which is irrelevant for our present purposes. The 1916 Act provides that the United States price of imported articles should be compared with "the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production."[37] The language of the 1913 Act and the 1916 Act in this respect are essentially identical.

The phrase "actual market value or wholesale price" had a long history in customs law prior to 1916. The phrase had been employed in customs appraisement statutes since the Tariff Act of 1842, § 16, 5 Stat. 563. *See generally* R. Smith, Customs Valuation in the United States 86-138 (1948). The definition of that phrase which was stated in ¶ R of the 1913 Tariff Act was essentially the same as the definition provided in § 19 of the Customs Administrative Act of 1890, 26 Stat. 139. That section of the 1890 Act was left untouched by the Tariff Act of 1897, § 32, 30 Stat. 211, which amended other sections of the 1890 Act. It was reenacted with minor changes and renumbered as § 18 in the Tariff Act of 1909, 36 Stat. 101. While the 1909 Tariff Act made several modifications in the language of § 19 of the Customs Administrative Act of 1890, only one change is perti-

in the usual wholesale quantities, including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subjected if separately imported. That the words "value," or "actual market value," or "wholesale price," whenever used in this Act, or in any law relating to the appraisement of imported merchandise, shall be construed to be the actual market value or wholesale price of such, or similar merchandise comparable in value therewith, as defined in this Act.

38 Stat. 189 (1913).

[37] *See* n. 31, *supra*.

nent here. The 1909 Act stated explicitly for the first time what was implicit in prior customs practice, i.e., that actual market value could be determined on the basis of "similar merchandise comparable in value" with the goods under appraisement, thereby codifying prior practice. *See* pp. 1229-1230, *infra*.

What is important to note for our present purposes is that the meaning of "actual market value or wholesale price," a function of statutory definition and customs practice, remained essentially unchanged in customs appraisement law from 1890 until after the enactment of the Antidumping Act of 1916. In our discussion we refer to the 1913 Tariff Act because that was the customs statute which was in force when the 1916 Act was passed.

Paragraph R of the 1913 Tariff Act specifically prescribes the definition of "actual market value" stated therein apply "in any law relating to the appraisement of imported merchandise." *See* n.36, *supra*. Insofar as the 1916 Antidumping Act requires a determination of the value of imported merchandise, it is such a law. Moreover, Congress expressed in 1921 its understanding that the 1916 Antidumping Act was a "law relating to the appraisement of imported merchandise." In § 303(a) of the Emergency Tariff Act of 1921, Congress made a new customs appraisement provision, *see* n.59, *infra*, applicable "in any law of the United States in existence at the time of the enactment of this Act *relative to the appraisement of imported merchandise (except . . . section 801 of the Revenue Act of 1916)*." 42 Stat. 16 (1921) (emphasis added). Section 801 of the Revenue Act of 1916 is the Antidumping Act of 1916, *see* pp. 1220-1221, *infra*. The inclusion of the 1916 Act among the exceptions enumerated in § 303(a) of the Emergency Tariff Act of 1921 demonstrates that Congress considered the 1916 Act a law "relative to the appraisement of imported merchandise" to which the section would otherwise have applied.

We note, however, that even if ¶ R of the 1913 Tariff Act were not explicitly made applicable to all laws "relating to the appraisement of imported merchandise," we would still construe the language "actual market value" in the 1916

Antidumping Act as a reference to ¶ R and an incorporation thereof. For, by incorporating in the 1916 Act a phrase from contemporary customs law, Congress must have intended to direct that the appraisement of imported merchandise under the 1916 Act follow the principles set forth in the Tariff Act of 1913. "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard* v. *Pons*, 434 U.S. 575, 583, 98 S.Ct. 866, 871, 55 L.Ed.2d 40 (1978) (citations omitted).

We will explain in detail below, *see* pp. 1229-1230 & 1234-1239, *infra*, how and why the appraisement principles of the 1913 Tariff Act permitted recourse to sales in a foreign country of merchandise which was "similar" but not identical to the merchandise under appraisement. It is our view that this rule was incorporated into the 1916 Antidumping Act by the use therein of customs phraseology drawn from the 1913 Tariff Act. However, the permissible degree of similarity was not unlimited. *See* discussion *infra*. Although the limits of the concept of similarity of goods for customs appraisement purposes were not clear in 1916, the legal standard was clarified in a line of customs decisions beginning in 1928 and continuing to the present. For the reasons to be stated in due course, we find the subsequent customs decisions applicable in the interpretation of the 1916 Act. As applied to the uncontested facts before us, and for the reasons set forth below, the standard of similarity set forth in those decisions compels us to grant summary judgment for the defendant on plaintiff's 1916 Act claims.

Although, in our view, the pending summary judgment motions might be disposed of solely because of the consequences which flow from the incorporation in the 1916 Act of the appraisement standards of the 1913 Tariff Act, we also seek guidance from the legislative history of the Antidumping Act of 1916. Before turning to the legislative history, however, we must first review the background of the statute in the law and politics of the era when it was enacted.

C. *Antitrust and Tariff Law and Politics in the First Wilson Administration*

The Antidumping Act was approved on September 8, 1916, during the last months of the first administration of President Woodrow Wilson. The Democratic Party had a majority in both houses of Congress during the Sixty-Third Congress of 1913-15 and the Sixty-Fourth Congress of 1915-17.[38] The Democratic Congresses, consonant with Party tradition in that era, were vigorously opposed to anticompetitive and monopolistic practices. The Democratic Party platform of 1912 stated the party's position on monopoly as follows:[39]

> A private monopoly is indefensible and intolerable. We therefore favor the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials, and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States.
>
> We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menance to competitive conditions . . .
>
> We regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficiency and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation.

The Sixty-Third Congress translated its antimonopoly fervor into law with the enactment in 1914 of the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., and the Clayton Act, 15 U.S.C. § 12 et seq. As we have already noted, section 2 of the Clayton Act prohibited price discrimination, a practice which was then viewed as an important contributor to the growth of monopoly. *See* H.R.Rep.No.627, Pt. 1, 63d Cong.,

[38] Congressional Quarterly, Inc., Guide to Congress 182-A (2d ed. 1976). The Democrats lost control of both houses of Congress to the Republicans in the election of 1918, and lost the Presidency as well in the election of 1920.

[39] National Party Platforms, 1840-1956, at 169 (K. Parker & D. Johnson, eds.) (1956) [hereinafter cited as "Platforms"].

2d Sess. 8-9 (1914). The section was not intended to apply to international commerce. *Id.* at 7. *See Zenith, supra,* 402 F.Supp. at 248-49.

The Democratic Party's opposition to monopoly was matched by its strong support for international free trade. Adhering to their long-established position, the Democrats demanded "a tariff for revenue only." On this issue, the Democratic Platform of 1912 stated:[40]

> We declare to be a fundamental principle of the Democratic party that the Federal government, under the Constitution, has no right or power to impose or collect tariff duties, except for the purpose of revenue, and we demand that the collection of such taxes shall be limited to the necessities of government honestly and economically administered.
>
> The high Republican tariff is the principal cause of the unequal distribution of wealth; it is a system of taxation which makes the rich richer and the poor poorer; under its operations the American farmer and laboring man are the chief sufferers; it raises the cost of the necessaries of life to them, but does not protect their product or wages. . . .
>
> We favor the immediate downward revision of the existing high and in many cases prohibitive tariff duties, insisting that material reductions be speedily made upon the necessaries of life. Articles entering into competition with trust-controlled products and articles of American manufacture which are sold abroad more cheaply than at home should be put upon the free list. . . .
>
> . . . We appeal to the American people to support us in our demand for a tariff for revenue only.

The Democrats viewed the protective tariff issue as closely related to their efforts to limit the power of perceived monopolies. For example, their 1912 platform proposed that "[a]rticles entering into competition with trust-controlled products" be put on the free list, *i.e.* admitted without the payment of any

[40] *Id.* at 168-59.

tariff duties. More broadly, the Democrats believed that the protective tariffs then in force insulated domestic trusts from legitimate foreign competition. Woodrow Wilson stated their position in a 1912 campaign speech:

> The men who created the monopoly . . . are the men who have taken advantage of the protective tariff to get together to make great combinations of industry to shut out competition and to make sure that the prices are in their own control.

W. Wilson, *A Crossroads of Freedom: 1912 Campaign Speeches of Woodrow Wilson* 156 (J. Davidson, ed.) (1956). *See* F. Taussig, *The Tariff History of the United States*, 362 (1931, reprinted 1967).

The Tariff Act of 1913, known as the Underwood Tariff Act, was adopted a few months after President Wilson and the new Congress were inaugurated. It brought substantial reductions in tariff rates, as well as the reenactment in ¶ R of the appraisement provisions which we have already quoted, which were derived from existing legislation. As stated in the House Report, a principal purpose of the Tariff bill was:

> [T]o introduce in every line of industry a competitive tariff basis providing for a substantial amount of importation, to the end that no concern shall be able to feel that it has a monopoly of the home market gained other than through the fact that it is able to furnish better goods at lower prices than others.

H.R.Rep. No. 5, 63rd Cong., 1st Sess. at XVII (1913).

The Underwood tariff bill as passed in the House of Representatives included an antidumping clause which authorized the assessment of antidumping duties, but not a private cause of action, and included no injury or intent requirement. *Id.* App. at 454. The Senate Finance Committee struck out this antidumping provision, expressing its fear that the provision might be used by "an unfriendly administration" to increase tariff rates. S.Rep. No. 80, 63rd Cong., 1st Sess. at 31 (1913). *See also* 53 Cong.Rec. 10619 (1916) (Statement of Rep. Swit-

zer). The House concurred in this Senate amendment. H.R.Rep. No. 86, 63rd Cong., 1st Sess. at 28 (1913) (Conference Report).

The Republican minority of this era supported the principle of protective tariffs and resisted the Democrats' efforts to promote free trade. In its 1912 platform, the Republican Party stated:[41]

> We reaffirm our belief in a protective tariff. The Republican tariff policy has been of the greatest benefit to the country, developing our resources, diversifying our industries, and protecting our workmen against competition with cheaper labor abroad, thus establishing for our wage-earners the American standard of living. The protective tariff is so woven into the fabric of our industrial and agricultural life that to substitute for it a tariff for revenue only would destroy many industries and throw millions of our people out of employment.

However, the Republicans were unable to defend their tariff policy from Democratic attack until the adoption of the Emergency Tariff Act of 1921 and the Tariff Act of 1922, when they raised tariff rates sharply.

On June 28, 1914, the assassination in Sarajevo of Archduke Franz Ferdinand of Austria-Hungary set off a chain of events that within a few months embroiled all Europe in World War I. Since European industries were incapacitated, the war "served as protection more effective than any tariff legislation could possibly be." F. Taussig, *supra*, at 448. Not only was importation of competing European products impossible, but American goods which had previously been made only under the shelter of high duties were exported heavily to neutral markets abroad.[42]

---

[41] *Id.* at 184-85.

[42] F. Taussig, *supra*, at 448-49. By the end of 1915, there was practically no unemployment except among the chronic indigent. H. Siebert & Co., The Business and Financial Record of World War Years 44-45 (1939, reprinted 1975). By 1916, "both the country's internal and its external trade reached proportions never previously witnessed." G. Fite & J. Reese, An Economic History of the United States 101 (1973). *See also*, Culbertson, Commercial

Despite the wartime prosperity of American industry, government officials and legislators of both parties feared ruinous foreign competition after the war ended. They anticipated that the European industries, in an effort to revive themselves, would resort to unfair and predatory methods of competition. The prevailing fear of unscrupulous postwar competition from European industry was expressed by Secretary of Commerce William Redfield in his 1915 annual report:

> "Unfair competition" is forbidden by law in domestic trade, and the Federal Trade Commission exists to determine the facts and takes steps to abate the evil wherever found. The door, however, is still open to "unfair competition" from abroad which may seriously affect American industries for the worse. It is not normal competition of which I speak, but abnormal. It is a destructive type of the industrial struggle, intended to put out of being the forces opposed to it that the victor may exploit the field at will. The methods used are not those of legitimate commerce, but those of commerical offense. They aim not at development, but at conquest. When the war shall close, the public control of railways in foreign lands, the semiofficial chambers of commerce, the publicly fostered organizations which control great industries in some countries, will all exist and will all be used in an effort to recover lost commerce. The growth in the United States of industries which may menace large markets heretofore controlled from abroad will not be permitted if public and semipublic forces acting together in foreign countries can prevent it. The outreach of American industries, nay their very existence in our own land in some cases, will be resisted to the full and every stratagem of industrial war will be exerted against them. Expecting this, we must prepare for it. If it shall pass beyond fair competition and exert or

---

Policy in War Time and After, 21-2 (1919). Total exports nearly doubled between 1915 and 1916. *Historical Statistics of the United States, Colonial Times to 1970*, H.R.Doc. No. 93-78, 93rd Cong., 1st Sess. 884 (1973). The surplus balance of trade in 1916 rose 182.4% over the level of the 1915 surplus trade balance. J. Williamson, American Growth and the Balance of Payments, 1820-1913, 257 (Appendix B, Table B-1) (1964).

> seek to exert a monopolistic power over any part of our commerce, we ought to prevent it.

Annual Report of the Secretary of Commerce 43 (1915). Secretary Redfield continued by proposing legislative remedies for the problem, pointing out, however, that the proposed remedies should not restrain normal international competition:

> [T]he question may be said not to be whether we shall prevent such attacks but how they shall be prevented, while welcoming, indeed promoting, that normal ebb and flow of legitimate commerce between our land and all others which will provide for our people the security against exaction which is insured by reasonable competition. . . .
>
> I should prefer . . . to deal with [the problem] by a method other than tariffs, classing it rather as an offense similar to the unfair domestic competition we now forbid.

Among the Secretary's proposals was the enactment of an antidumping law:

> I also recommend that legislation supplemental to the Clayton Antitrust Act be enacted which shall make it unlawful to sell or purchase articles of foreign origin or manufacture where the prices to be paid are materially below the current rates for such articles in the country of production or from which shipment is made, in case such prices substantially lessen competition on the part of the American producers or tend to create a monopoly in American markets in favor of the foreign producer. . . .

This proposal was apparently the precursor of the Antidumping Act of 1916.

Although we have discovered no historical evidence *directly* linking Secretary Redfield's proposals to the drafting of the 1916 Antidumping Act, the circumstantial evidence is strong. In addition to an antidumping provision "supplemental to the Clayton Antitrust Act," Secretary Redfield also recommended legislation outlawing the sale of imported articles "conditioned upon the purchaser thereof not using or dealing in wares produced or sold by the competitors of the manufacturer or seller." Annual Report of the Secretary of Commerce 43

(1915). An antidumping provision and a provision following Redfield's second recommendation were introduced by the Chairman of the House Ways and Means Committee on July 1, 1916, 53 Cong.Rec. 10372, as part of the bill for the Revenue Act of 1916. *See* pp. 1220-1221, *infra*. As introduced, the bill included only those two provisions under the heading "Unfair Competition." *See* H.R.Rep. No. 922, 64th Cong., 1st Sess. 9-10 (1916). As enacted, the two provisions are codified at 15 U.S.C. § 72 and § 73 respectively. The antidumping provision at 15 U.S.C. § 72 is the Antidumping Act of 1916.

In addition to the preceding analysis of the bill as introduced, there is other circumstantial evidence linking the 1916 Antidumping Act to Secretary Redfield's proposal. A member of the Republican opposition stated during the debate on the Revenue Act of 1916 that the Democratic majority supported the antidumping provision to counteract "the ruinous effect of the Underwood tariff law, which Secretary Redfield warns the majority is sure to come about as soon as the war in Europe is over." 53 Cong.Rec.App. 1415 (1916) (statement of Nelson E. Matthews, R-Ohio). Furthermore, Professor Jacob Viner, an eminent contemporary authority on international trade, viewed Secretary Redfield's report as the precursor of the 1916 Antidumping Act. Explaining the origins of the Act, he wrote:

> The Wilson administration, while showing itself wholly sympathetic with the desire for adequate protection against unfair foreign competition, was determined that it should not be employed to build up sentiment for an upward revision of the existing tariff act. It therefore recommended that any measure adopted to meet the problem should be divorced from customs legislation and should take the form of a further extension to those engaged in the import trade of the restraints against unfair competition which had been imposed on domestic commerce.[1]
>
> [1]Cf. the recommendations of Mr. Redfield, Secretary of Commerce in Report of the Department of Commerce, 1915, p. 43; . . .
>
> Congress followed the recommendations of the administration. . . .

J. Viner, *Dumping: A Problem in International Trade* 242-43 (1923, reprinted 1966).

We thus have seen that the political and legal history of the era supports our conclusion from the statutory text that the 1916 Act was an antitrust based unfair competition law, not a protectionist one.

D. *Legislative History of the Antidumping Act of 1916*

The Antidumping Act of 1916 was enacted as section 801 of the Revenue Act of 1916, 39 Stat. 756. The Revenue Act was primarily intended to defray the cost of military preparedness related to the European war and skirmishes on the Mexican border, and to finance a projected federal deficit of more than $200 million for the fiscal year ending June 30, 1917. H.R.Rep. No. 922, 64th Cong., 1st Sess. 1-2 (1916); S.Rep. No. 793, 64th Cong., 1st Sess. 1-2 (1916). The Revenue Act contained provisions addressing a wide variety of subjects, including:

1. A revision of the income tax law, first enacted in 1913, and an increase in the income tax rates;
2. The imposition of the first federal estate tax;
3. The levy of a special tax on the manufacturers of munitions;
4. The imposition of miscellaneous and special excise taxes on alcoholic beverages, tobacco, and other products and activities;
5. The adoption of temporary protective tariff rates favoring domestic dye manufacturers;
6. A revision in the tariff rates for printing paper;
7. The creation of the United States Tariff Commission to study the operation of the custom laws; and
8. Prohibitions against "unfair competition" by importers, including the provision now known as the Antidumping Act of 1916.

One member of the House of Representatives commented, "Since I have been in Congress I do not remember any bill

which has dealt with such a variety of subjects." 53 Cong.Rec. 10528 (1916) (statement of Mr. Longworth).

The Revenue Act was introduced on July 1, 1916, *id.* 10372, and was presented to and approved by President Wilson little more than two months later on September 8, 1916, *id.* 14157. The antidumping clause, § 801, was one of five substantive provisions enacted in the Revenue Act under "Title VIII—Unfair Competition." The antidumping provision was passed in essentially the same form in which it was introduced by Representative Claude Kitchin (D-North Carolina), the Chairman of the House Ways and Means Committee. The discussion of the antidumping clause in the House Report reads in full as follows:

> In order that persons, partnerships, corporations, and associations in foreign countries, whose goods are sold in this country, may be placed in the same position as our manufacturers with reference to unfair competition, your committee recommends:
>
> (1) The adoption of a provision making it unlawful for a person, partnership, corporation, or association to import and systematically sell any article at a price substantially less than the actual market value or wholesale price of such article at the time of exportation, with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States; . . .

H.R.Rep. No. 922, *supra*, at 9-10. The Senate Report made no mention of the antidumping clause.

Congressional debate on the Revenue Act was dominated by Republican cries for high protective tariffs and Democratic rejoinders lauding the benefits of low tariffs and direct taxation as exemplified by the pending income and estate taxes. *See, e.g.*, 53 Cong.Rec. 10579-82 (1916) (Statement of Rep. Moore, R-Pa.). There was very little debate on the antidumping clause, and there were no references to the specific issue presently before us: the comparability of articles sold in the United States with articles sold in foreign countries.

The floor debates on the antidumping clause reveal that the motivation for the clause was the widespread fear of unfair competition from European manufacturers after the end of hostilities. The remarks of Representative Saunders (D-Virginia) were typical:

> Another feature of interest in this bill is the clause containing the antidumping provisions, designed to restrict undesirable foreign importations. . . . This country is likely to be confronted with a flood of cheap foreign manufactured products on the restoration of peace. In the effort to take over the trade which the wise legislation of the past four years has enabled our manufacturers to secure in every portion of the globe, our competitors in Europe will be likely to resort to cut throat competition under the urge of imperious necessity. Every ounce of energy in those countries is now directed toward keeping the machinery of war in motion, and all their business is related to the output of the munition factories. But when the wheels of these factories cease to turn, and the inevitable time of adjustment arrives, the foreign manufacturers of commercial wares must have business, profitable business if possible, but if not profitable, then business on any terms that will bring subsistence to the families of thousands of laborers who will turn from the forging of cannon, and the making of high explosives, the conversion of swords and spears into the implements of prosaic toil.

53 Cong.Rec.App. 1911 (1916). These sentiments were widely shared among legislators of both parties. *See, e.g.* 53 Cong.Rec. 10531 (1916) (statement of Representative Longworth, R-Ohio); *Id.* App. 1398 (statement of Representative Keating, D-Colorado). Senator Penrose (R-Pennsylvania), an opponent of the Revenue Act, spoke nonetheless of the need to prepare for "the invasion of importations which everyone confidently looks for as the war in Europe draws to a close." *Id.* 13061. The legislators' fears in this respect echoed those of the Secretary of Commerce in his 1915 Annual Report. *See* pp. 1219-1220, *supra*. *See also* 53 Cong.Rec.App. 1415 (1916) (statement of Representative Matthews, R-Ohio) (referring to the Secretary's report).

However, the 1916 Congress did not intend to retreat from the basic principle of free trade embodied in the Underwood Tariff Act of 1913 and the Democratic Party platform of 1912. The Democratic Party platform in the reelection campaign of 1916 stated:[43]

> We reaffirm our belief in the doctrine of a tariff for the purpose of providing sufficient revenue for the operation of the government economically administered, and unreservedly endorse the Underwood tariff law as truly exemplifying that doctrine.

During the debate on the Revenue Act, speakers from the Democratic majority uniformly congratulated themselves for the lowered tariffs, and attacked the Republicans for continuing to advocate protectionism. *E.g.*, 53 Cong.Rec. 10525 (statement of Representative McGillicuddy, D-Maine); *id.* 10596 (statement of Representative Dixon, D-Indiana); *id.* 13045 (statement of Senator Underwood, D-Alabama).

The House Committee on Ways and Means and the sponsor of the Revenue Act, Representative Kitchin, stated in unambiguous terms that the antidumping clause was intended to do no more than to impose on importers the same pricing restrictions which had already been imposed on domestic businesses. The committee report recommended adoption of the legislation in order that importers "may be placed in the *same* position as our manufacturers with reference to unfair competition." H.Rep. No. 922, *supra*, at 9 (emphasis added) (relevant portion quoted in full at p. 1221, *supra*). Representative Kitchin, explaining his bill at the outset of its consideration by the full House of Representatives, explained:

> We believe that the *same* unfair competition law which now applies to the domestic trader should apply to the foreign import trader.

---

[43] Platforms, *supra* n.39, at 195.

53 Cong.Rec.App. 1938 (1916) (emphasis added).[44] As Congress apparently was aware, section 2 of the Clayton Act did not apply to international "dumping" transactions. *See Zenith, supra*, 402 F.Supp. at 248-49.

Our objective in construing the Antidumping Act of 1916 is to give effect to the intent of Congress. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975). Statements in a congressional committee report recommending adoption of legislation are highly authoritative in determining the purpose of that legislation. "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber* v. *Allen*, 396 U.S. 168, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). *Accord*, *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *United States* v. *Auto Workers*, 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957). The statements of the sponsor of legislation are also highly probative in its interpretation. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S.Ct. 2295, 49 L.Ed.2d 49 (1976). "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 640, 87 S.Ct. 1250, 1266, 18 L.Ed.2d 357 (1967).

---

[44] The Wilson administration took the same position. The antidumping provision recommended by Secretary of Commerce Redfield was conceived as "supplemental to the Clayton Antitrust Act" and was not intended to retard "that normal ebb and flow of legitimate commerce between our land and all others which will provide for our people the security against exaction which is insured by reasonable competition: *See* pp. 1219-1220, *supra*. In a letter to the *New York Times* published on July 4, 1916, Assistant Attorney General Samuel J. Graham stated the administration's position on the pending antidumping provision:

> Any anti-dumping provision is not a matter of taxation, or, strictly speaking, tariff. It is a power exercised under the commerce clause of the constitution and not under the taxing clause. Its purpose should be to prevent unfair competition. *Just as we have said to our own people by the Clayton Act that they should not indulge in unfair competition, so we propose to say the same to the foreigner.*

Quoted in J. Viner, *supra* n. 1, at 243 n. 1.

The principal lesson which we draw from the legislative history of the 1916 Act, viewed against the historical background of the first Wilson administration, is that the statute should be interpreted whenever possible to parallel the "unfair competition" law applicable to domestic commerce. Since the 1916 Antidumping Act is price discrimination law, it should be read in tandem with the domestic price discrimination law, section 2 of the Clayton Act, which was amended by the Robinson-Patman Act in 1936.[44A] And, in order to be faithful to the intention of Congress to subject importers to "the same unfair competition law," we should not interpret the 1916 Act to impose on importers legal strictures which are more rigorous than those applied to domestic enterprises. We will be guided by these principles when we address the issues raised by the instant motions for summary judgment.

Before we turn to those issues, however, we must discuss the relationship between the Antidumping Act of 1916 and the Antidumping Act of 1921. Because the 1921 Act, as we have explained above, also plays an important role in this case, analysis of the 1916 Act and derivation of its meaning would not be complete without that discussion.

E. *Relationship Between the Antidumping Act of 1916 and the Antidumping Act of 1921*

[44A] The references in the legislative history to "the same unfair competition law" do not specify the Clayton Act, and could be read to refer to the Sherman Act instead. However, the Sherman Act is not concerned primarily with price discrimination, although pricing behavior may be relevant to its prohibitions of combinations in restraint of trade and of attempted or actual monopolization. Since the 1916 Act is a price discrimination law, it makes more sense to infer that Representative Kitchin and the House Ways and Means Committee were referring to § 2 of the Clayton Act, another price discriminaton law, passed less than two years before, which is expressly limited in its scope to domestic transactions. Moreover, both Secretary of Commerce Redfield and Assistant Attorney General Graham viewed the proposed antidumping legislation as supplemental to the Clayton Act, not the Sherman Act. *See* pp. 1219-1220 & n. 44, *supra*.

In 1921, Congress enacted a law providing for the assessment of special antidumping duties on imported goods which are sold in the United States at a price lower than their fair market value. The United States Treasury Department has made a finding of dumping under the 1921 Act with respect to television receivers imported from Japan, T.D. 71-76, 36 Fed.Reg. 4597, 5 Cust.Bull. 151 (1971), and has assessed antidumping duties against many of the companies which are defendants here, as well as other importers of television receivers. The plaintiffs seek to introduce evidence of these assessments at trial.

The Antidumping Act of 1921 was recently repealed as part of the Trade Agreements Act of 1979, Pub.L. No. 96-39, § 106, 93 Stat. 193 (effective Jan. 1, 1980). However, the 1979 Act includes a new antidumping law, 19 U.S.C.A. §§ 1673-1673i (1980), which is built on the 1921 Act, S.Rep. No. 96-249, 96th Cong., 1st Sess. 15-16 (1979), U.S.Code Cong. & Admin. News 1979, p. 381, and in large measure retains the substantive law of the 1921 Act, 45 Fed.Reg.8182 (Feb. 6, 1980) (preamble to regulations implementing 1979 Act). Findings of dumping made under the 1921 Act remain in effect under the 1979 Act, § 106, 93 Stat. 193. Although the 1921 Antidumping Act is no longer in effect, we shall describe it and its legislative history briefly here in order to clarify the distinction between the instant litigation under the 1916 Antidumping Act and the administrative proceedings under the 1921 Act, and to complete the historical background of the 1916 Antidumping Act.

The Antidumping Act of 1921, 19 U.S.C. §§ 160-171 (repealed), does not include criminal penalties for dumping, nor does it create a private right of action for treble damages. It provides only for the assessment of a special dumping duty on merchandise as to which a finding of dumping has been made. *Id.* § 161. A finding of dumping has two components: a determination by the Secretary of the Treasury that a class or kind of merchandise is sold in the United States at less than its fair value, and a finding by the International Trade Commission that a domestic industry is injured or is likely to be injured

as a result. *Id.* § 160(a). The amount of the special duty is the difference between the price in the United States and the "foreign market value" or the "constructed value." *Id.* § 161.

The genesis of the Antidumping Act of 1921 was a report of the United States Tariff Commission which concluded that the Antidumping Act of 1916 had not been effective in deterring dumping. Third Annual Report of the United States Tariff Commission (1919), *quoted in part in* H.R. Rep. No. 479, 66th Cong., 2d Sess. 2 (1919). H.R. 10918, 66th Cong., 2d Sess., a bill providing for the assessment of antidumping duties, was passed by the House of Representatives in 1919 on a voice vote. 59 Cong. Rec. 351. Representative Kitchin, who had been the sponsor of the 1916 Act, supported the 1919 bill, and explained the perceived failings of the 1916 legislation:

> In the act of 1916 . . . we have as stringent and as drastic an antidumping proposition as is contained in this bill. . . . The Tariff Commission declare that it is almost impossible to show the intent on the part of the importer to injure or destroy business in the United States by such importation and sale.
>
> That is the trouble with this antidumping act of 1916, which is now the law. You have to show the intent of the foreigner, the intent of the importer, to injure or destroy some particular industry in the United States. The business here might be injured, might be destroyed, by such importations and sales as effectively without such intent as with it.

59 Cong.Rec. 346 (1919). The Tariff Commission also identified several other problems in the administration of the 1916 Act. *See* H.R.Rep. No. 479, *supra*.

The 1919 bill was reported favorably by the Senate Finance Committee, S.Rep. No. 510, 66th Cong., 2d Sess. (1920), but never came to a vote on the floor of the Senate. In 1921, however, an antidumping provision modeled on the 1919 bill was introduced as part of the Emergency Tariff Act of 1921. *See* H.Rep. No. 1, 67th Cong., 1st Sess. 23 (1921); 61 Cong.Rec. 261 (1921) (statement of Mr. Fordney) (1921 antidumping bill "follows closely" 1919 bill). After extensive

amendment in the Senate and in Conference Committee, this provision became the Antidumping Act of 1921.

Thus the raison d'etre of the 1921 Antidumping Act was the perceived inadequacy of the 1916 Act to prevent international dumping. However, Congress chose not to amend the 1916 Act, but rather to enact an entirely new system for the assessment of special dumping duties. The particular language of the 1916 Act which concerns us in this opinion, "actual market value or wholesale price of such articles," is absent from the 1921 Act. Instead, as the preceding summary indicates, the domestic price is first compared with "fair value" as part of the initial determination of liability, and then is compared with the "foreign market value" or the "constructed value." The statute defines the latter two terms, *id.* §§ 164 & 165, and "fair value" is defined in customs regulations. 19 C.F.R. § 153.1 (1979). All three definitions permit the appraiser to make reference to "such or similar merchandise" sold in a foreign country.

The phrase "such or similar merchandise" is itself defined in a separate section of the Act, 19 U.S.C. § 170a(3). That definition grants to the Secretary of the Treasury or his delegate broad discretion to look to the value of merchandise used for like purposes which "may reasonably be compared" to the merchandise under consideration. *Id.* § 170a(3)(C). This is a much more expansive charter than that contained in the 1916 Act. If non-identical merchandise is the basis for the assessment of value, the Secretary is instructed to make "due allowance" for the differences. *Id.* § 161(b)(3). The definition of "such or similar merchandise" and the "due allowance" provision were enacted in 1958 amendments to the Antidumping Act of 1921, 72 Stat. 583 & 586. The scope of application of the expanded definition is expressly limited to the 1921 Antidumping Act. 19 U.S.C. § 170a.[45]

[45] The 1958 definition was modified by a 1975 amendment, the substance of which is irrelevant here. 88 Stat. 2048 (1975). The definition of "such or similar merchandise," as amended in 1975, was reenacted with only editorial changes in the antidumping provisions of the Trade Agreements Act of 1979, Pub.L. No. 96-39, 93 Stat. 181 (1979), 19 U.S.C.A. § 1677(16) (1980).

The foregoing explication was necessary because, as we have noted, the plaintiffs seek to introduce into evidence the findings and assessments by the Treasury Department against various defendants for violation of the 1921 Act, asserting that they establish sales below Japanese fair market value; hence the low price export conspiracy. Plaintiffs also proffer defendants' alleged attempts to cover up the 1921 Act violations as evidence of their conspiratorial intent. A few words are thus in order about the implications of the 1921 Act assessments.

In assessing antidumping duties under the 1921 Act, the Treasury Department determined the "foreign market value" of television receivers sold in Japan on the basis of technical comparisons broadly similar to the comparisons which plaintiffs offer in this litigation.[46] When Congress enacted the 1958 amendment defining the phrase "such or similar merchandise" expansively for purposes of the 1921 Act, it did not amend the 1916 Act by making that definition applicable to the determination of "actual market value or wholesale price" under the 1916 Antidumping Act, although it might have done so. Since that provision of the 1921 Act, as amended in 1958, does not apply to the 1916 Act, private litigants under the 1916 Act are not clothed with the Treasury Department's broad discretion to consider sales of any merchandise which it deems reasonably comparable. Therefore, the fact that the Treasury Department has made certain technical comparisons is of no significance for the dumping claims in the instant litigation. Nor is the fact that the Department has assessed dumping duties on the basis of those comparisons relevant to the 1916 Act claims. The 1916 Act clearly does not create a private right of action for

[46] The plaintiffs have submitted as an exhibit to their reply to the instant summary judgment motions a memorandum to his file written by Lou Balaban of the United States Customs Service, dated April 17, 1975, which summarizes the technical comparisons undertaken by the Customs Service. Exhibit 12, Vol. 5 of Appendix to Plaintiffs' Memorandum in Opposition to Motions for Summary Judgment of Defendants Mitsubishi Electric Corporation and Melco Sales, Inc. (filed Oct. 16, 1978).

violations of the 1921 Act. Instead, as we have previously concluded, the 1916 Act must be construed in light of its incorporation of the appraisement provisions of the Tariff Act of 1913 and of its purpose of extending to importers "the same unfair competition law" applicable to domestic commerce under the Clayton Act.

The question remains whether the Treasury Department's technical comparisons, and the findings and assessments made by the Treasury Department and the International Trade Commission with respect to dumping under the 1921 Act, are relevant to plaintiffs' claims under Sections 1 and 2 of the Sherman Act. We hasten to add, therefore, that we express no opinion as to whether or not any of the findings or comparisons made under the 1921 Act are admissible to support plaintiffs' Sherman Act case; nothing in this opinion involves consideration of the Sherman Act claims.

Against the background of the preceding many-faceted discussion of the text and history of the 1916 Act, we turn to the critical question of the degree of similarity which the Act requires for product comparisons.

V. *The Degree Of Similarity Required For Product Comparisons Under The 1916 Antidumping Act*

A. *Introduction*

In this part of the opinion, we draw upon the more general analysis of the 1916 Antidumping Act which we undertook in Part IV, and decide the specific questions of statutory construction which the parties have raised in their motions and in the responses thereto. Initially, we consider and reject defendants' principal argument: that because of the use of the phrase "such articles" in the text of the 1916 Act, we should impute to Congress a determination that the Act have no application unless identical goods are sold in the United States and in the relevant foreign market, in this case Japan. We reject that argument for five distinct reasons, which are stated more fully

infra: (1) Of the customs decisions upon which defendants rely, only one predates the passage of the Act in 1916, and that decision does not support defendants' construction; (2) the defendants' construction departs from the ordinary meaning of the word "such;" (3) the interpretation of the word "such" adopted in the customs decisions upon which defendants rely is compelled by the disjunctive language of the statutes construed there, and no equivalent consideration supports the adoption of the same construction here; (4) defendants' construction would exempt from the reach of the 1916 Act transactions in non-identical goods which are within the scope of domestic price discrimination law, contrary to the intent of Congress; and (5) defendants' construction of the 1916 Act is inconsistent with the incorporation therein of the customs appraisement standards of contemporary law.

Since we reject the contention that only identical articles may be compared as the basis for dumping claim under the 1916 Act, we address ourselves next to elucidating the precise degree of similarity which the Act requires. In determining how similar articles must be in order to be compared in litigation under the Antidumping Act of 1916, we have consulted two sources to guide our interpretation of the statute.

First, we have looked to the standard governing product comparisons under section 2 of the Clayton Act, as amended by the Robinson-Patman Act. As we found in examining the legislative history of the 1916 Antidumping Act, Congress intended the 1916 Act to extend to importers the same price discrimination law applicable to domestic commerce. The standard which applies under the Robinson-Patman Act is that products must be "of like grade and quality" to give rise to liability for price discrimination. As is explained *infra*, we find that the same standard of "like grade and quality" limited product comparisons under section 2 of the Clayton Act prior to the Robinson-Patman amendents. Since the Clayton Act was passed in 1914, the same standard is applicable under the Antidumping Act of 1916.

Secondly, we have construed the 1916 Act in light of the incorporation therein of the appraisement provisions of ¶ R of the Tariff Act of 1913 through use of the language "actual market value or wholesale price." While the 1913 Tariff Act authorized customs appraisers to refer to sales of similar merchandise, the degree of similarity required was not formulated in any precise way until after passage of the Tariff Act of 1922. We view the decisions of the Court of Customs Appeals interpreting the term "similar" as used in § 402(b) of the 1922 Tariff Act as controlling in our interpretation of the 1913 Tariff Act, since the valuation provisions of the 1922 Tariff Act were intended to continue the valuation system of the 1913 Tariff Act, and there is no reason to believe that customs practice was changed in 1922.

The standards of similarity which we derive from these two sources are consistent with each other, at least as applied to the case at bar. The Robinson-Patman standard has been formulated in the following terms:

> [I]f there are substantial physical differences in products affecting consumer use, preference or marketability, such products are not of "like grade and quality" regardless of manufacturing costs.

Checker Motors Corp. v. *Chrysler Corp.*, 283 F.Supp. 876 (S.D.N.Y.1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969). In an unpublished opinion, the U.S. Court of Appeals for the Third Circuit has adopted the *Checker Motors* formulation. *See* p. 1233, *infra*. The Tariff Act standard was stated by the Court of Customs Appeals as follows:

> [I]f goods are made of approximately the same materials, are commercially interchangeable, are adapted to substantially the same uses, and are so used, ordinarily, they are similar.

United States v. *Irving Massin & Bros.*, 16 Ct.Cust.App. 19, 25 (1928). Although there are verbal differences between the two formulations, both focus on physical differences, commercial interchangeability, and consumer use. That focus is decisive for the present motions.

We first address defendants' "such articles" argument. Following that, we turn to explication of the "like grade and quality" standard, and thereafter to the standard of similarity under the Tariff Acts.

B. *Applicability of the 1916 Act to Non-Identical Goods*

The defendants argue that the Antidumping Act of 1916 has no application here unless the goods sold in the United States and the goods sold in Japan are identical. Their argument is based on the use of the term "such articles" in the Act, which provides in pertinent part:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold *such articles* within the United States at a price substantially less than the actual market value or wholesale price of *such articles*, at the time of exportation to the United States, in the principal markets of the country of their production. . . .

15 U.S.C. § 72 (emphasis added). The defendants contend that the second use of the phrase "such articles" in the above-quoted portion of the statute refers to articles sold in the foreign market, i.e. Japan, and limits the purview of the statute to sales in Japan of articles which are identical to those sold in the United States.[47] The plaintiffs reply that the phrase "such articles" has the same meaning in both places in which it appears in the quoted portion of the statute; that the phrase refers to the articles which are imported into the United States; and that the imported articles can have an "actual market value or wholesale price . . . at the time of exportation to the United States, in the principal markets of the country of

[47] The first use of "such articles" in the quoted portion of the statute plainly refers to the articles which are imported into the United States.

their production" even though no identical articles are sold in the country of their production. We agree with plaintiffs on these points.

The defendants have cited to us nothing in the legislative history of the Antidumping Act of 1916 which indicates that any member of Congress intended the word "such" to mean "identical" or, indeed, that any member of Congress gave any thought at all to the meaning of the word "such." Instead, they have referred us to a line of customs decisions construing the term "such" in the phrase "such or similar merchandise" or "such or similar imported merchandise" in customs appraisement statutes.

The earliest of these decisions, and the only one preceding the enactment of the Antidumping Act in 1916, is *Beer* v. *United States*, 1 Ct.Cust.App. 484 (1911). In *Beer*, the Court of Customs Appeals held that the word "such" in the phrase "such or similar merchandise," as employed in section 11 of the Customs Administrative Act of 1890, meant, "the precise importation as sold by the importer himself." *Id.* at 486-87. *Beer* does not support the defendants: it implies that "such articles" means the very articles imported into the United States, while the defendants' position is that "such articles" refers not to the imported articles, but to other articles sold in Japan which are identical to them. Instead of supporting the defendants, *Beer* supports the plaintiffs in their contention that the phrase "such articles" refers to the articles imported into the United States in both its uses in the 1916 Act.

Subsequent decisions of the Court of Customs Appeals appear superficially to be more favorable to the defendants' positions. In *United States* v. *Johnson Co.*, 9 Ct.Cust.App. 258, T.D. 38215 (1919), the court ruled that "the word 'such' means 'identical'," interpreting ¶ L of the Tariff Act of 1913. This interpretation was soon extended to the same phrase where it occurred in section 402(b) of the Tariff Act of 1922, *United States* v. *Irving Massin & Bros.*, 16 Ct.Cust.App. 19, T.D. 42714 (1928); *United States* v. *Meadows Wye & Co., Inc.*, 15 Ct.Cust.App. 451, T.D. 42643 (1928), and apparently has

been followed ever since. *See, e.g., E. J. Brach & Sons* v. *United States*, 317 F.Supp. 264, 269, 65 Cust.Ct. 718, R.D. 11721 (1970); *United States* v. *Ford Motor Company*, 46 Cust.Ct. 735, A.R.D. 124 (1961). Relying on this line of cases, the defendants would have us rule that the phrase "such articles" in its second appearance in the Antidumping Act of 1916 means "identical articles, but not the very articles imported." Their position is unacceptable for several reasons.

First, as we have noted, the only decision which predates passage of the 1916 Act is inconsistent with the defendants' contention. While subsequent judicial interpretations of related customs statutes may be helpful in the construction of the 1916 Antidumping Act in the appropriate circumstances, *see* pp. 1234-1238 *infra*, the logical link between the 1916 Act and the decisions cited by defendants is highly tenuous. We cannot impute to Congress an intention to adopt in 1916 a judicial construction which was first announced in 1919 (even if the 1919 decision were favorable to defendants, which in fact it is not).

Second, the construction urged by defendants does not square with a fundamental canon of statutory construction: "unless otherwise defined words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). We cannot say that the ordinary meaning of the word "such" is, or was in 1916, as narrow or as precise as defendants urge. Indeed, the plaintiffs have produced copies of many dictionary definitions showing that the word "such" has now and had in 1916 numerous meanings and shades of meaning. While the "ordinary meaning" rule does not help us to select one construction out of the many definitions in common use in 1916, it cautions us not to impute a specialized meaning to the word "such" except on the basis of a strong showing that Congress intended a specialized meaning.

Furthermore, the decisions cited by defendants all involve construction of the statutory phrase "such or similar merchan-

dise" or "such or similar imported merchandise." As a result, the interpretation of "such" adopted in the customs cases is compelled by the disjunctive language of the statutes construed in those cases. A familiar maxim of statutory construction is that words in a statute should not be construed as mere excess verbiage. *E.g., Application of Barker*, 559 F.2d 588, 591-92, (Cust. & Pat.App.1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1238, 55 L.Ed.2d 764 (1978); *United States* v. *Johnson*, 462 F.2d 423, 428 (3d Cir. 1972), *cert. denied*, 410 U.S. 937, 93 S.Ct. 1396, 35 L.Ed.2d 602 (1973). For example, in *Irving Massin, supra*, the Court of Customs Appeals explained the reasons for its interpretation of the phrase "such or similar merchandise" by referring to this same principle:

> If the word "similar" means no more than the word "such," then there is no reason for it being used in the statute. To so construe it, is to lose sight entirely of the ordinary meaning of the word and to adopt a construction based upon the theory that Congress has employed useless and unnecessary language in drafting this act, which, under ordinary circumstances, we may not do. "Similar" merchandise must be construed as different from "such" merchandise in order to give this statute full effect.

16 Ct.Cust.App. at 24 (citation omitted). If the word "such" in the phrase "such or similar" were interpreted to mean anything other than "identical," the word "similar" would be mere surplusage. No equivalent consideration requires or supports the adoption of the same construction here.

Fourth, the legislative history of the 1916 Antidumping Act reveals that the Act was intended to apply to importers "the same unfair competition law" which controlled the pricing decisions of domestic traders. Section 2 of the Clayton Act, the relevant law regulating domestic commerce, did not and does not have so limited a scope as to apply only to discrimination in price between purchasers of articles which are identical to each other. Instead, as is explained in greater detail *infra* at pp. 1231-1234, section 2 of the Clayton Act, as amended by the Robinson-Patman Act of 1936, prohibits discrimination in price between purchasers of articles of "like grade and quality." If

we were to adopt the defendants' proposed reading of the 1916 Antidumping Act, we would be unfaithful to the clearly expressed intention of Congress that importers be subjected to the same pricing law applicable domestically, for the standard of comparability of goods would be narrower under the 1916 Act than under the Clayton Act.

Fifth and finally, the construction urged by the defendants is not consistent with the incorporation in the 1916 Act of the customs appraisement standards of contemporary law. Paragraph R of the Tariff Act of 1913 specifically endorses the appraisement of imported goods by reference to the value of goods sold abroad which are similar but not identical to the goods under appraisement. That paragraph provides, in pertinent part:

> That the words "value" or "actual market value," or "wholesale price," whenever used in this Act, or in any law relating to the appraisement of imported merchandise, shall be construed to be the actual market value or wholesale price of *such, or similar merchandise comparable in value therewith*, as defined in this act.

38 Stat. 189 (emphasis added).[48] In one of the customs decisions upon which the defendants principally rely, the Court of Customs Appeals held in unambiguous terms that the provision we have quoted "authorizes that in arriving [at a determination of actual market value] appraising officers may not only take into consideration sales of the very merchandise imported but sales of similar merchandise." *United States* v. *Johnson Co.*, 9 Ct.Cust.App. at 270, T.D. 38215 (1919).

The statutory provision merely codified the long-established practice whereby customs appraisers would advert to sales abroad of merchandise similar to that undergoing appraisement. The pertinent language of the 1913 Act was a reenactment of an identical provision in the Tariff Act of 1909, § 18, 36

[48] For reasons stated at pp. 1215-1217, *supra*, "actual market value" under the 1916 Antidumping Act must be construed to conform to the provisions of ¶ R. of the 1913 Tariff Act.

Stat. 101. While the 1909 provision was the first specific statutory authorization for reference to "similar merchandise comparable in value" in customs appraisement, it codified prior practice. Earlier customs statutes had made it the duty of customs appraisers "by all reasonable ways and means . . . to ascertain, estimate, and appraise . . . the actual market value and wholesale price of the merchandise." *E.g.*, Customs Administrative Act of 1890, § 10, 26 Stat. 136. The Secretary of the Treasury interpreted the latter provision to require appraisers to look to the value of similar merchandise when necessary:

> Where no sales of identical merchandise are made in the country of production, either for consumption or for export, the market value of similar goods of other manufacturers actually sold should be ascertained and be taken into account.

Treas.Dec. 3222 (1877), reiterated in Treas.Dec. 5806 (1883). *See Erhardt* v. *Ballin*, 150 F. 529 (2d Cir. 1906); *1,209 Quarter Casks and 1,235 Octaves of Sherry Wine*, 2 Benedict 249, 280-81, 24 Fed.Cas. 398, 409 (S.D. N.Y.1868).

We thus are brought full circle, finding the true congruence between the customs appraisement standards of contemporary (1916) law and the notion of comparable non-identical articles. The defendants, arguing for their narrow construction of the term "such articles," have tried to treat these matters as discrete. They direct our attention only to the interpretation of the word "such" in decisions like *Johnson, supra*, while ignoring the context in which the word "such" received that narrow interpretation—a system of customs appraisement in which reference to the value of similar and comparable merchandise was specifically authorized by statute. Their approach does not comport with either logic or reality.

[12] We interpret the phrase "such articles" in the 1916 Act to refer to the articles imported into the United States, and not to other articles sold in Japan which are identical to the imported articles. Our construction follows *Beer* v. *United States, supra*, the only relevant customs decision predating

passage of the 1916 Act. Moreover, our construction conforms to the frequent use of the word "such" in statutes and other legal writing (as well as common usage) to refer back to what has already been stated. In the 1916 Act, the phrase "such articles" merely refers back to the initial use of the word "articles," and does not modify the meaning of the word "articles." In grammatical terms, the word "such" is here used as a pronoun, and not as an adjective.

The actual market value of the imported articles may be determined by reference to sales of similar articles in Japan, for the reasons stated above. The absence of the word "similar" from the text of the 1916 Antidumping Act is not material. By use of the term of art "actual market value," Congress incorporated into the 1916 Act a system of customs appraisement which specifically authorized appraisers to look to the value of goods which were similar but not identical to the goods being appraised. That practice was explicit in the customs statute which was in force in 1916, and had been the policy of the Treasury Department at least since 1877.

Although the foregoing analysis makes it clear that the "actual market value or wholesale price" of the imported articles may be determined by reference to *similar* articles sold in the country from which the articles are imported, our inquiry does not end here. The meaning of the word "similar" in the context of the appraisement of imported merchandise is itself far from pellucid. The remainder of this opinion is devoted mainly to ascertaining the degree of similarity required for product comparisons under the 1916 Antidumping Act, and to applying the standard we formulate to the facts before us.[49]

---

[49] Although the plaintiffs' affiant and expert witnesses aver that U.S. and Japanese consumer electronic products are "comparable" and "similar," their opinions are not controlling. We cannot stop our inquiry here and rule that there is a genuine issue of fact as to the similarity of the products, without exploring the legal standard in greater depth. As we demonstrate in the text to follow, there are available sources of law which control the interpretation of the term "similar" in this litigation. One such source is the Clayton Act, as amended by the Robinson-Patman Act, which is considered

C. *The Standard of "Like Grade and Quality" Under the Clayton Act and the Robinson-Patman Act*

As we have repeatedly stated, the 1916 Antidumping Act was intended to subject importers to the same price discrimination law which applied to domestic commerce. The imposition of liability under the 1916 Act on the basis of product comparisons which could not be the basis for application of the domestic price discrimination law would subject importers to *more rigorous* legal strictures than those applicable to domestic business, since their pricing flexibility would be more limited than that of domestic businesses. Since we may not convert the 1916 Act into protectionist legislation contrary to the intent of Congress, see discussion *supra*, we must construe the 1916 Act to harmonize with domestic price discrimination law.

Since the 1916 Antidumping Act is a price discrimination law, we are also mindful of the Supreme Court's admonition against overbroad interpretations of the Robinson-Patman Act which "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80, 99 S.Ct. 925, 933, 59 L.Ed.2d 153 (1979), *quoting Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63, 73 S.Ct. 1017, 1019, 97 L.Ed. 1454 (1953). This warning is equally applicable to the 1916

---

at pp. 1231-1234, *infra*. The other source is customs appraisement law, which is considered at pp. 1234-1239, *infra*. As the court observed in *Nichols & Company* v. *United States*, 59 C.C.P.A. 67, 72, 454 F.2d 1183, 1187 (1972), "the word 'similar' has a very specific and slightly out of the ordinary meaning in this context in customs law."

Given the more precise legal standard governing the comparability of products, which is derived from these two sources of law, we shall hold that the issues of fact as to the technical comparability of U.S. and Japanese consumer electronic products, while genuine, are not material. Although plaintiffs' affiant and witnesses characterize the technical differences between U.S. and Japanese products as minor or insignificant, the legal significance of those differences is an issue of law to be decided by the court. Legal conclusions stated in an affidavit or an expert witness report do not raise an issue of material fact so as to preclude the grant of summary judgment.

Antidumping Act, another price discrimination law with the same potential for encouraging price rigidity of imported goods.[50]

When the Antidumping Act of 1916 was passed, price discrimination in domestic commerce was prohibited by section 2 of the Clayton Act, ch. 323, 38 Stat. 730 (1914), which subsequently was amended by the Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13). Neither statute applies to international price discrimination, because they prohibit discrimination in price between different purchasers of commodities only if both commodities are "sold for use, consumption, or resale within the United States." 15 U.S.C. § 13(a); 38 Stat. 730. In an earlier decision in this case, Judge Higginbotham determined that the Clayton Act, as amended by the Robinson-Patman Act, does not reach price discriminations between different national markets. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 402 F.Supp. 244 (E.D.Pa.1975).

Under section 2 of the Clayton Act, it was an affirmative defense that price differences were "on account of differences in the grade [or] quality" of the commodities sold.[51] In *Boss Manufacturing Co.* v. *Payne Glove Co.*, 71 F.2d 768 (8th Cir.),

---

[50] The Justice Department has trenchantly criticized the economic impact of the Robinson-Patman Act. United States Department of Justice, Report on the Robinson-Patman Act (1977). Without expressing any opinion on the economic arguments of the Justice Department report, we note our concurrence with the Department's observation that the use of the word "discrimination" to describe the behavior forbidden by the Robinson-Patman Act and by the 1916 Antidumping Act carriers with it no undertones of moral condemnation:

> The word 'discrimination' has a pejorative connotation derived from its use in other contexts, e.g., racial or religious discrimination. A proper understanding of its use in economic terms requires a conscious effort to disassociate the word's social meanings.

Id. at 4 n. 4.

[51] 38 Stat. 730. *See* n. 32, *supra* (quoting section 2 of the Clayton Act in full).

cert. denied, 293 U.S. 590, 55 S.Ct. 104, 79 L.Ed. 684 (1934), the earliest decision interpreting the words "grade" and "quality" in section 2, the court of appeals looked to "the physical facts," rejecting opinion testimony that there were no differences between the two lines of products under comparison.[52] The court concluded that certain cotton flannel gloves and mittens that were similar in construction and appearance to other products sold by the defendants, but of a cheaper grade of material and made by less expert workmen, were not of the same "grade and quality" sufficient to invoke section 2 of the Clayton Act. By focusing on the physical differences between the two lines of gloves and mittens, the court of appeals implicitly rejected the view that the products were comparable because they were within the same common-sense generic categories of "gloves" and "mittens," or were functionally equivalent.

In 1936, the Robinson-Patman amendments shifted the burden to the plaintiff to show that a supplier's products involved in the price differentiation are of "like grade and quality." However, there is no indication in the legislative history that the 1936 Congress intended to alter the substantive meaning of the terms "grade" and "quality" as used in the Clayton Act. *See* F. Rowe, Price Discrimination Under the Robinson-Patman Act 64-65 (1962); Report of the Attorney General's National Committee to Study the Antitrust Laws 157 (1955). Nor have we found any such indication in subsequent case law.[53]

---

[52] 71 F.2d at 771. The opinion cited was written by Judge Wyman. Judge Sanborn concurred, stating, "I agree that the evidence was insufficient to justify the conclusion that there was no difference between the special gloves and the regular gloves offered by defendant to the trade . . .," but finding other grounds dispositive. The third member of the panel, Judge Stone, dissented.

[53] As the Supreme Court has observed, "the legislative history of these amendments leaves no doubt that Congress was intent upon strengthening the Clayton Act provisions, not weakening them." *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 544, 80 S.Ct. 1267, 1271-1272, 4 L.Ed.2d 1385 (1960). Thus if any change were intended by Congress in altering the verbal formulation of the "grade" and "quality" provisions, the change must have been in

Since the standard of "like grade and quality" governs product comparisons under the price discrimination laws applicable to domestic sellers since 1914, and since the Antidumping Act of 1916 was intended to apply the same law to importers, we hold that any reference to sales in a foreign country for the purpose of establishing a claim of international price discrimination under the Antidumping Act of 1916 must be limited to sales of articles which are "of like grade and quality" to the articles sold in the United States, as that term is employed in the Robinson-Patman Act. Put differently, we hold that although the "actual market value or wholesale price" of imported articles in a foreign country may be determined by reference to sales of similar merchandise in the foreign country, the similar merchandise sold in the foreign country must be of "like grade and quality" to the articles sold in the United States, as the latter term is employed in the Robinson-Patman Act. Any other interpretation of the 1916 Act would not be consistent with the clearly expressed intent of Congress.

The standard governing product comparisons under domestic U.S. price discrimination law was stated succinctly by Judge Mansfield in *Checker Motors Corp.* v. *Chrysler Corp.*, 283 F.Supp. 876, 889 (S.D.N.Y.1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969): "[I]f there are substantial physical differences in products affecting consumer use, preference or marketability, such

---

the direction of expanding the coverage of the Act. In other words, the "like grade and quality" provision of the Robinson-Patman Act must adopt either the same standard as the corresponding provision of the Clayton Act, or a less exacting standard which broadened the coverage of the Act. If the moving parties can show that the products are insufficiently similar to meet the standard of "like grade and quality," then a *fortiori* the products are insufficiently similar to meet the equally or more exacting standard of the pre-1936 Clayton Act.

products are not of 'like grade and quality' regardless of manufacturing costs."[54] An illustrative application of this standard is the decision of the Federal Trade Commission in *Universal-Rundle Corp.*, 65 F.T.C. 924 (1964), *order set aside on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd*, 387 U.S. 244, 87 S.Ct. 1622, 18 L.Ed.2d 749 (1967). In that decision, the Commission ruled that two lines of bathroom fixtures manufactured by the respondent were not of like grade and quality even though they were made from the same raw materials by means of the same manufacturing operations. The Commission held that slight differences in the dimensions and water level of two bathtubs, and the use of built-in soap dishes in one tub but not the other, which differences affected the marketability of the bathtubs and were not artificial or fanciful, rendered the bathtubs not of like grade and quality, and precluded application of the Robinson-Patman Act.[55]

In an unpublished opinion, the U.S. Court of Appeals for the Third Circuit has adopted the standard of "like grade and quality" stated by Judge Mansfield in *Checker Motors, supra*. *Willow Run Garden Shop, Inc.* v. *Mr. Christmas, Inc.*, No. 73-2101, slip op. at 4 (August 5, 1974) (disposition noted at 500 F.2d 1401 [3d Cir.]), *rev'g* 1973-2 Trade Cases ¶ 74,816 (D.N.J.1973). The district court in *Willow Run* had granted summary judgment for the defendants in a suit alleging violation of the Robinson-Patman Act. The district court ruled that there were no genuine issues of material fact, and found that

[54] In *Checker Motors*, the plaintiff claimed that Chrysler sold automobiles for use as taxicabs at a lower price than it sold similar automobiles for use as private passenger cars, in violation of the Robinson-Patman Act. The defendant moved for summary judgment, arguing that its taxicabs and its private cars were not "of like grade and quality." The court stated the standard by which "like grade and quality" would be determined, and denied summary judgment on that issue because there was a genuine issue of material fact as to whether or not the differences between Chrysler's taxicabs and its passenger cars were "substantial enough to affect consumer use, preference or marketability." 283 F.Supp. at 889.

[55] 65 F.T.C. at 953-55. *See also id.* at 939-45 (Initial Decision with extensive discussion of relevant law).

Christmas trees and related products sold by the defendant to two different purchasers at different prices were not of "like grade and quality." The court of appeals reversed the grant of summary judgment. The appellate court observed that there were conflicting affidavits in the record as to the effect of the differences between the products sold to the two purchasers upon consumer use, preference or marketability, and held that there was a genuine issue of material fact which barred the grant of summary judgment on the "like grade and quality" issue. After discussing the conflicting affidavits, the court of appeals stated:

> Whether the differences between the various items in each category are minor and insubstantial, as claimed by Willow, or *material enough to affect consumer use, preference, or marketability*, present questions which cannot properly be resolved upon a motion for summary judgment. *See Checker Motors Corp.* v. *Chrysler Corp.*, 283 F.Supp. 876, 889 (S.D.N.Y.1968), *aff'd*, 405 F.2d 319 [2d Cir.], *cert. denied*, 394 U.S. 999 [, 89 S.Ct. 1595, 22 L.Ed.2d 777].

Slip op. at 4 (emphasis added).

The other courts and secondary authorities which have interpreted the statutory phrase "like grade and quality" have followed the same approach as that adopted in *Checker Motors*, *supra*, and *Universal-Rundle*, *supra*, although the verbal formulation of the relevant factors sometimes differs slightly from the one we have quoted. For example, in *Atlanta Trading Corp.* v. *FTC*, 258 F.2d 365, 369-71 (2d Cir. 1958), the Second Circuit applied the "like grade and quality" test in the interpretation of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, and concluded that various pork products were not of like grade and quality despite their common source. In *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 184 F.Supp. 312, 319 (N.D.Ill.1960), *aff'd*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829, 82 S.Ct. 50, 7 L.Ed.2d 32 (1961), the court held that two types of ice cream, one of which was richer in butter fat than the other, were not of like grade and quality. And in *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 1974 Trade Cases ¶ 75,054 at

pp. 96,742-44 (D.Utah 1974), *rev'd on other grounds*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977), the court found that different mixtures of rocket fuel which were identical in functional customer usage were of like grade and quality. *See also Quaker Oats Co.*, 66 F.T.C. 1131 (1964); American Bar Association, Antitrust Law Developments 115 (1975); F. Rowe, Price Discrimination Under the Robinson-Patman Act 69 (1962); Report of the Attorney General's National Committee to Study the Antitrust Laws 158 (1955).

In a subsequent part of this opinion, we will apply the Robinson-Patman standard to the facts before us. First, however, we turn to an examination of the degree of similarity required to make two articles "similar merchandise" under the Tariff Act of 1913. That inquiry uncovers a standard of similarity which is analogous to the Robinson-Patman standard, and constitutes an alternate holding supporting our disposition of the summary judgment motions.

D. *The Standard of Similarity Under the Tariff Acts*

In Part IV, *supra*, we ruled that the phrase "actual market value or wholesale price" in the Antidumping Act of 1916 was drawn from the Tariff Act of 1913. Following the principle stated in *Lorillard* v. *Pons*, *supra*, we found that Congress intended the phrase to have the same meaning in the 1916 Antidumping Act as it had in the 1913 Tariff Act. In Part V-B, *supra*, we found that the Tariff Act and customs practice permitted appraisers to look to "similar merchandise comparable in value" in order to determine the "actual market value" of the imported merchandise. We are now concerned with the construction of the Tariff Act of 1913, as implicitly incorporated by reference in the Antidumping Act of 1916, in order to determine what degree of similarity is required. As the Court of Customs and Patent Appeals has recently stated, "the word 'similar' has a very specific and slightly out of the ordinary meaning in this context in customs law." *Nichols & Co.* v. *United States*, 59 C.C.P.A. 67, 454 F.2d 1183, 1187 (1972).

There are no reported judicial decisions construing the phrase "similar merchandise comparable in value" in ¶ R of the Tariff Act of 1913. The reason is simple: by statute, the decisions of appraisers were not subject to judicial review, in the absence of fraud or of jurisdictional defects. Tariff Act of 1913, ¶ M, 38 Stat. 187; Customs Administrative Act of 1890, § 13, 26 Stat. 137. *See Muser* v. *Magone*, 155 U.S. 240, 15 S.Ct. 77, 39 L.Ed. 135 (1894); *Beer* v. *United States*, *supra*. In 1922, Congress for the first time made appraisement decisions appealable to the Court of Customs Appeals on questions of law. Tariff Act of 1922, § 501, 42 Stat. 966.

Although appraisement decisions were not reviewable in court before 1922, they were subject to administrative review before the Board of General Appraisers. Appraisements could be appealed in a two-step process: first, to a single member of the Board of General Appraisers, and then to a panel of three members, sitting as an administrative court of last resort on appraisement matters. Tariff Act of 1913, ¶ M, *supra;* Customs Administrative Act of 1890, § 13, *supra*.

There are apparently only two reported decisions of the Board of General Appraisers which involve interpretation of the phrase "similar merchandise comparable in value therewith" in ¶ R of the Tariff Act of 1913. Both decisions are reproduced in full in footnotes 57 and 58 *infra*.[56] In the first, the General Appraiser ruled that photographic dry plates sold in England were similar to plates imported into the United States. The only difference between the plates which is mentioned in the General Appraiser's opinion is their size. The General Appraiser commented that to hold ¶ R inapplicable whenever "merchandise in every minor detail the same as that

[56] Some decisions of the General Appraisers were published in the reports of Treasury Decisions; others were published only in reports called Reappraisement Circulars, and are cited as "C.R. ___," an abbreviation which may stand for "Circular Reappraisement." The decisions reproduced at n. 57 & n. 58, *infra*, are in the latter group. We thank Ms. Margaret Evans, Librarian of the United States Customs Court, for making copies of these decisions available to us.

the subject of appraisement" has not been sold "would be simply to create chaos in the work of appraising officers."[57] In the second decision, the General Appraiser decided that glass chimneys for street lamps which were straight were similar to glass chimneys which were made with a bulge. The General

[57] McClelland, G. A.—Decided January 28, 1921.—Opinion.—

The Merchandise which is the subject of this appeal consists of photographic dry plates 3 1/4 by 4 inches, imported from London and invoiced at 2/6 per dozen, less 40 per cent discount. The appraiser advanced them to 3/-per dozen, allowing the same discount. The importing company seeks to maintain the invoice value upon the theory that while similar photographic dry plates are manufactured and sold in England for home consumption this particular size is manufactured expressly for export, and that by reason of such fact the market value ought to be found under the last provision of paragraph L of the tariff act of 1913 based upon the selling price of such plates in the United States, due allowance by deduction being made for estimated duties, etc., as therein provided.

From the evidence submitted I do not believe that this contention is tenable. It is shown that similar plates are manufactured by several English concerns and sold for home consumption in England, and the price lists of several of these manufacturing concerns are in evidence. In all of these price lists the per se prices are the same, but they show varying discounts. The plates of the various manufacturers, including those covered by this importation, differ only as to size. The list price of the size 3 1/2 by 3 1/4 inches, equalling 12 1/4 square inches, is listed at 3/-, while the size 3 1/4 by 4 1/4, equalling 13 13/16 square inches, is listed at 3/6 The plates in question, equaling 13 square inches, are invoiced at 6d. per dozen less than the list price of 3 1/2 by 3 1/2 inches, and it would seem to follow that the market value should be at least what the smaller size plates were listed at.

Paragraph R of the tariff act of 1913, supra, provides—

That the words "value," or "actual market value," or "wholesale price," wherever used in this act, or in any law relating to the appraisement of imported merchandise, shall be construed to be the actual market value or wholesale price of such, *or similar merchandise comparable in value therewith*, as defined in this act.

I find from the evidence that plates similar to those under consideration are freely offered for sale in wholesale quantities in England, and that therefore, for the purpose of appraisement, in view of this provision in Paragraph R, resort may not be had to the provisions of paragraph L, supra. To hold that such recourse had to be taken in all cases where it could not be shown that merchandise in every minor detail the same as that the subject of appraisement had been sold in the principal markets of the country of exportation would be simply to create chaos in the work of appraising officers. The examiner was, it seems to me, not only liberal in the finding of the per se value but was equally liberal in the allowance of discount, and I therefore affirm his action.

Photographic Dry Plates, C.R. 30586, *aff'd mem.*, C.R. 30870 (1921).

Appraiser found that "there is practically the same amount of glass, the same amount of workmanship, and the same price for the straight as for the bulged glass."[58]

These administrative decisions are not particularly helpful. They indicate that "similar merchandise" need not be the same as that under appraisement in every detail, but offer no guidance as to how much difference between articles is consistent with their being "similar."

In the Tariff Act of 1922, Congress revised the statute governing customs appraisement. Section 402(b) of the Tariff Act of 1922 defined "foreign value," which corresponded to

[58] Decided November 2, 1921.

Sullivan, G. A.—Opinion.—The merchandise under consideration consists of lamp chimneys purchased in Germany, the entered value being marks 12.30 per dozen, and the purchase price being marks 18.64 per dozen. They were appraised at the purchase price. It appears this is the price required to be paid by exporters, and that the home price for use in Germany is marks 12.30 per dozen.

There may be some question as to whether or not the identical merchandise is sold for domestic use. It is unquestioned that similar or comparable merchandise is sold in Germany for domestic use, the only difference being that the merchandise under consideration consists of a street lamp chimney glass bulged, while the comparable merchandise consists of a street chimney lamp glass without the bulge. The latter is used in Germany; the former from a sale made to an American importer to be used in the city of Baltimore.

It is clear from the testimony there is practically the same amount of glass, the same amount of workmanship, and the same price for the straight as for the bulged glass. That being the fact, the domestic price is what governs, and I sustain the entered value.

These importations were made prior to the emergency tariff act of 1921.

Blown Glass Chimneys, C.R. 31289, *aff'd mem.*, C.R. 31459 (1921) & 31608 (1922).

"actual market value" in the 1913 Tariff Act.[59] "Foreign value" was defined as "the market value or the price . . . at which *such or similar merchandise* is freely offered for sale to all purchasers in the principal markets of the country from which exported. . . ." 42 Stat. 949 (emphasis added). The inclusion of

[59] Between 1913 and 1921, "actual market value" as defined in ¶ R of the 1913 Tariff Act was the principal valuation standard for imported merchandise. If "actual market value" under ¶ R could not be calculated, appraisement would be made on the basis of cost of production or of wholesale price in the United States, as provided in ¶ L of the 1913 Act. *See Goodyear Tire & Rubber Co.* v. *United States*, 11 Ct. Cust.App. 351 (1922). In the Emergency Tariff Act of 1921, Congress added a new standard for the appraisement of imported merchandise: export value, defined as follows:

> Sec. 302. That for the purposes of this title the export value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, and plus, if not included in such price, the amount of any export tax imposed by the country of exportation on merchandise exported to the United States.

42 Stat. 15-16 (1921). The principal difference between this definition and the one in ¶ R of the 1913 Act, quoted in full at n. 36, *supra*, is that export value as defined in the 1921 Act is the price at which merchandise is offered for sale in the relevant foreign market "for exportation to the United States." The Supreme Court had ruled in *United States* v. *Passavant*, 169 U.S. 16, 18 S.Ct. 219, 42 L.Ed. 644 (1898), that actual market value had reference to the price at which merchandise was offered for sale in the foreign market for home consumption in the foreign country, interpreting § 19 of the Customs Administrative Act of 1890. The same definition of actual market value was subsequently incorporated into ¶ R of the 1913 Tariff Act, *compare* 169 U.S.

the phrase "such or similar merchandise" in the 1922 Tariff Act was intended to continue unchanged, and not to alter, the power which customs appraisers had to consider "similar merchandise comparable in value therewith" under the 1913 Tariff Act. The legislative history of the 1922 Tariff Act reveals that

at 21-22, 18 S.Ct. at 222 *with* n. 36, *supra*. By 1921, because of the postwar currency inflation in Europe, the export value and the actual market value for home consumption of the same goods were often highly divergent. *See* R. Smith, Customs Valuation in the United States 138-39 (1948); B. Levett, Through the Customs Maze 37-38 (1923). Congress provided in § 303(a) of the Emergency Tariff Act of 1921 that thereafter all references to the value of imported merchandise should "be construed to refer . . . to actual market value as defined by the law in existence at the time of the enactment of this Act, or to export value as defined by section 302 of this Act, whichever is higher." 42 Stat. 16 (1921). The Antidumping Act of 1916 was excepted from the change in valuation made by § 303(a). *See* p. 1216, *supra*.

To summarize, immediately prior to the enactment of the Tariff Act of 1922, imported merchandise was appraised by the following hierarchy of appraisement standards:

> (1) The actual market value as defined in ¶R of the 1913 Act, or the export value as defined in § 302 of the 1921 Act, whichever was higher;
>
> (2) The cost of production, or the wholesale price in the United States, as defined in ¶L of the 1913 Act, if actual market value could not be ascertained.

In the Tariff Act of 1922, Congress continued the valuation system of existing law, with minor changes. H.R.Rep. No. 1223, 67th Cong., 2d Sess. 148 (1922) (quoted in the text following this footnote). However, Congress changed the name "actual market value" used in the 1913 Act to "foreign value," and shortened its definition somewhat. Section 402(a)-(c) of the Tariff Act of 1922 read as follows:

> Sec. 402. VALUE.—(a) For the purposes of this Act, the value of imported merchandise shall be—
>
> (1) The foreign value or the export value, whichever is higher;
>
> (2) If neither the foreign value nor the export value can be ascertained to the satisfaction of the appraising officers, then the United States value;
>
> (3) If neither the foreign value, the export value, nor the United States value can be ascertained to the satisfaction of the appraising officers, then the cost of production;
>
> (4) If there be any similar competitive article manufactured or produced in the United States of a class or kind upon which the President has made public a finding as provided in subdivision (b) of section

Congress intended to continue the valuation system of existing law. The House managers in the conference committee explained the legislative history of the appraisement section of the 1922 tariff bill:

> The House bill provided for the "American valuation plan". . . . The Senate amendment strikes out this provision in the House bill and substitutes, with minor changes,

---

315 of Title III of this Act, then the American selling price of such article.

(b) The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

(c) The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States. If in the ordinary course of trade imported merchandise is shipped to the United States to an agent of the seller, or to the seller's branch house, pursuant to an order or an agreement to purchase (whether placed or entered into in the United States or in the foreign country), for delivery to the purchaser in the United States, and if the title to such merchandise remains in the seller until such delivery, then such merchandise shall not be deemed to be freely offered for sale in the principal markets of the country from which exported for exportation to the United States, within the meaning of this subdivision.

42 Stat. 949 (1922). It is apparent both from the place which "foreign value" occupied in the overall valuation system established in § 402(a) and from the definition of "foreign value" in § 402(b) that despite minor changes in the definition, Congress intended "foreign value" to correspond to "actual market value" as defined in ¶ R of the 1913 Tariff Act, *see* n. 36, *supra*. Consequently we may consult the construction of the term "similar" in decisions interpreting § 402(b) of the Tariff Act of 1922 in order to determine the meaning of the word "similar" as used in the Tariff Act of 1913.

> *the foreign valuation system of existing law*. . . . [T]he House recedes with an amendment making clerical changes.

H.R. Rep. No. 1223, 67th Cong., 2d Sess. 148 (1922) (emphasis added). *See* S. Rep. No. 595, 67th Cong., 2d Sess. 4-9 (1922); H.R. Rep. No. 248, 67th Cong., 1st Sess. 21-27 (1921).

Since Congress did not intend that the 1922 Tariff Act alter the 1913 Tariff Act with respect to appraisement by reference to sales of similar merchandise, we may consult the construction of the term "similar" in interpretations of § 402(b) of the 1922 Tariff Act to inform our analysis of the 1913 Tariff Act and, ultimately, of the 1916 Antidumping Act. In *United States v. Irving Massin & Bros., supra*, the Court of Customs Appeals announced the following rule to govern product comparisons under the 1922 Tariff Act:

> [I]f goods are made of approximately the same materials, are commercially interchangeable, are adapted to substantially the same uses, and are so used, ordinarily, they are similar, within the meaning of section 402(b).

16 Ct.Cust.App. at 25. In *United States* v. *Wecker & Co.*, 16 Ct.Cust. App. 220, 225 (1928), the court explained the applicable standard:

> The question of similarity is, in each case, to be measured by much the same homely rule that applies to the prospective customer who enters a store seeking some utilitarian article of a certain specified name and style; he finds the article requested is not in stock but that another article, of approximately the same price and which will perform the same functions, is capable of the same use *and may be substituted therefor*, is available. Such an article is a similar article, notwithstanding the price, the methods of construction, and the component materials may be somewhat different; but, *for all utilitarian purposes, one is a substitute for the other*. It is in this sense, we believe, that the word similar was used in said section 402(b).

(emphasis added). The same standard has been applied in

customs appraisement cases since 1928 up to the present.[60] In *C. J. Tower & Sons* v. *United States*, 50 C.C.P.A. 76, 81 (1963), the Court of Customs and Patent Appeals stated that:

> the overriding consideration in determining similarity, be it merely similarity of materials or overall similarity of merchandise for appraisement purposes is *commercial interchangeability* rather than considerations of ultimate use or cost of production.

---

[60] The valuation system in § 402 of the Tariff Act of 1930 was essentially the same as that in § 402 of the Tariff Act of 1922. *Compare* 46 Stat. 708 (1930) (codified with amendments at 19 U.S.C. § 1402 with 42 Stat. 949 (1922) (quoted in pertinent part at n. 59, *supra*). In the Customs Simplification Act of 1956, Congress revised the valuation system, 70 Stat. 943 (1956) (codified at 19 U.S.C. § 1401a), while providing that the 1930 system should remain in effect with respect to certain imported articles. *See* 19 U.S.C. § 1402.

While the details of the appraisement provisions are not relevant here, what is relevant is that the appraisement statutes continued to refer to "such or similar merchandise," and the customs courts continued to interpret the word "similar" in that phrase by referring to the leading cases of *Irving Massin, supra*, and *Wecker, supra*, decided under the Tariff Act of 1922. For example, in *United States* v. *Eggen*, 55 C.C.P.A. 95, 100 (1968), the Court of Customs and Patent Appeals quoted the legal standard for determining similarity from *Massin* and also analyzed the *Wecker* decision. In *United States* v. *Ford Motor Co.*, 46 Cust.Ct. 735, 740, the court set forth the standard of similarity stated in *Massin*, quoting virtually identical language from a subsequent decision of the Court of Customs and Patent Appeals which adhered to the *Massin* rule. Since these decisions are applications of the *Massin* rule, which we have held should also be applied in the interpretation of the 1913 Tariff Act, and thereby to the interpretation of the 1916 Antidumping Act, we are justified in relying on *Eggen, supra*, and *Ford Motor, supra*, in the construction of the 1916 Act.

The Trade Agreements Act of 1979 includes both an antidumping provision which we have previously considered, p. 1223 & n. 45, *supra*, and a revision of the valuation system for imported goods. The new valuation law includes a statutory definition of "similar merchandise" which is essentially the same as the definition found in customs case law beginning with *Irving Massin, supra*, and *Wecker, supra*. The definition provides, *inter alia*, that "similar merchandise" must be "commercially interchangeable with the merchandise being appraised." Pub.L. No. 96-39, 93 Stat. 201 (1979), 19 U.S.C.A. § 1401a(h)(4) (1980).

(emphasis in original). Two customs decisions from the 1960's are particularly pertinent here because they involve products which are functionally similar but are not commercially interchangeable because of different technical conventions which are followed in the United States and in a foreign country. In both cases, the courts ruled that the imported article and the article sold for use in the foreign country were *not* similar for customs appraisement purposes.

In *United States* v. *Eggen*, 55 C.C.P.A. 95, C.A.D. 939 (1968), the Court of Customs and Patent Appeals held that metric size ball bearings sold in the West German market were not "similar" to inch size bearings that were exported to the United States because the products were neither commercially nor mechanically interchangeable, saying at page 101:

> [T]he evidence that the bearings are not *mechanically* or *commercially interchangeable* clearly amounts to substantial evidence to support the Appellate Term's conclusion of dissimilarity. . . .

(emphasis supplied).

Similarly, in *United States* v. *Ford Motor Co.*, 46 Cust.Ct. 735, A.R.D. 124 (1961), the Customs Court held that left-hand-drive automobiles made in Ireland for export to the United States were not "similar" to the right-hand-drive autos made there for home use. The Court said:

> We are in accord with the trial court that the evidence presented establishes that the NASS [left-hand-drive] vehicles are not similar to the cars produced for home consumption in Ireland. . . . One could not be economically converted into the other, nor are they commercially interchangeable.
>
> As was stated by the trial court, *it is well settled that, as a general rule, 'commercial interchangeability' is one of the essential features of similarity. . . .*
>
> Here, while the NASS [left-hand-drive] vehicles may be made of some of the same materials as the cars for Irish consumption, they are not commercially interchangeable, nor, because of different rules of the road and other legal

requirements, are they adapted to the same use. (emphasis added).

Like metric ball bearings and right-hand-drive automobiles, electronic products made for use in Japan are adapted to different technical conventions from those which are followed in the United States. Although the absence of commercial interchangeability of those products with their U.S. counterparts may be the result solely of those different conventions, the teaching of customs law is that "similarity" should still be determined by the test of commercial interchangeability. Thus even if all the differences between electronic products manufactured for use in Japan and electronic products manufactured for use in the United States are necessary to conform to the different technical requirements of broadcasting and electrical power distribution in the two countries, and even if there are no other differences between the products, still they are not similar under relevant law unless they are commercially interchangeable.

We now turn to the application of the two rules—the standard of like grade and quality under the Robinson-Patman Act and the standard of similarity under customs law—to the facts before us.

VI. *Standards For Summary Judgment; Application Of The Legal Standards Of Comparability To The Facts*

Rule 56 of the Federal Rules of Civil Procedure permits the grant of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). The burden of demonstrating that there is no genuine issue of material fact rests on the moving party. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Summary judgment may not be granted if there is "the slightest doubt" about material facts. *Tomalewski* v. *State Farm Life In-*

surance Co., 494 F.2d 882, 884 (3d Cir. 1974).[61] Consequently, a motion for summary judgment may not be granted on the ground that if a verdict were rendered for the adverse party the court would set it aside as against the weight of the evidence. *Perks* v. *Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979), *quoting Rosenthal* v. *Rizzo*, 555 F.2d 390, 394 (3d Cir.) *cert. denied*, 434 U.S. 892, 98 S.Ct. 268, 54 L.Ed.2d 178 (1977). Similarly, summary judgment is not appropriate if the resolution of a material issue of fact turns on the credibility of witnesses. *Poller* v. *Columbia Broadcasting System Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); *Remak* v. *Quinn*, 611 F.2d 36 (3d Cir. 1979). All inferences from the evidence must be drawn in favor of the party opposing the motions—here, the plaintiffs. *Small* v. *Seldows Stationery*, 617 F.2d 992 (3d Cir. 1980).

Although we recognize that the standards governing the grant of summary judgment are strict, we are convinced that those standards are met here. We have stated the material

---

[61] The "slightest doubt" formulation of the evidentiary standard for summary judgment has been explictly rejected by the Second Circuit. *Beal* v. *Lindsay*, 468 F.2d 28[illegible] (2d Cir. 1972). The National Commission for the Review of Antitrust [illegible] and Procedures, appointed pursuant to Executive Order 12022 to make recommendations on "[r]evision of procedural and substantive rules of law needed to expedite the resolution of complex antitrust cases," criticized the "slightest doubt" formulation as "an unwarranted gloss on the 'genuine issue' requirement." National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General at 70, 80 F.R.D. 509, 566 (1979). However, the "slightest doubt" formulation has been adopted by the Third Circuit, *Tomalewski*, supra, 494 F.2d at 884, and by other circuits *see* Antitrust Commission Report at 79 n.44, 80 F.R.D. at 575, and is binding on this court, which must apply the law as stated by the U.S. Court of Appeals for the Third Circuit. Of course, in order to preclude the grant of summary judgment, any doubt must be based on "significant probative evidence" rather than mere allegations. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968); *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932, 935-36 (3d Cir.) (en banc), *cert. denied*, 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62 (1970).

facts as to which there is no genuine issue in Part III, *supra*. As we noted there, the facts related are not subject to even the "slightest doubt" because they are admitted by the plaintiffs. Moreover, we have made no inferences from those facts to plaintiffs' detriment except those which are compelled by the rules of logic. A court is not required to suspend its ability to reason when considering a summary judgment motion, nor to draw inferences from the facts of which they are not logically susceptible. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 287-89, 88 S.Ct. 1575, 1591-92, 20 L.Ed.2d 569 (1968); *Chirinos de Alvarez* v. *Creole Petroleum Corp.*, 613 F.2d 1240, 1244-45, (3d Cir., 1980).

We found in Part III that U.S. and Japanese television receivers are physically different in that they have different VHF and UHF tuners and different power transformers. As a result, TV receivers intended for use in Japan, if used in the United States, could receive only 4 VHF television channels and a limited number of UHF channels, and would be in serious danger of failing because of overheating. As a result of the physical differences between the two types of receivers it would, in the words of plaintiffs' expert and affiant, be "ridiculous" for a consumer in the United States to try to use a Japanese domestic TV receiver. We found that U.S. and Japanese TV receivers would differ markedly in consumer use, consumer preference, and marketability, since any rational consumer in the United States would prefer a receiver manufactured for use in the United States to one manufactured for use in Japan.[62]

[62] The determination of the effects of the undisputed physical differences on consumer use, consumer preference, and marketability is necessarily hypothetical since it is undisputed that Japanese domestic electronic products have not been marketed in the United States. Our inference that the products are not usable to consumers or marketable in the country for which they were not designed is based on the rules of logic, *see First National Bank of Arizona*, *supra*, and on the characteristics of a hypothetical "rational consumer." The use of the term "rational" here is not meant to refer to any economic theory of maximization of utility, but rather to the ordinary common-sense meaning of the word. For example, we deem it clear beyond peradventure that a rational consumer would prefer a TV set which receives all broadcasts to one that only receives broadcasts on a limited number of channels.

Similarly, radios, phonographs, and tape and cassette recorders intended for use in Japan and in the United States are physically different in two respects. Except for battery-operated products, they have different power supply components, or different alternating-current motors, or both; and radios which receive FM broadcasts have different FM tuners. As a result of these physical differences, non-television products designed for use in the United States which are not battery-operated would not operate satisfactorily if they were used in Japan. The audio output of all radios, phonographs, and tape and cassette recorders would include an objectionable hum, and the motors of phonographs and tape and cassette records would run at the wrong speed. In addition, radios which receive FM broadcasts would receive transmissions on only about a tenth of the FM band. We found in Part III that these physical differences in non-television products would affect consumer use, consumer preference, and marketability. The only exceptions to this finding were battery-operated electronic products which do not receive FM radio broadcasts.

We are mindful of the statements of plaintiffs' experts Brugliera, Horn, and Lukas that the physical differences between U.S. and Japanese products upon which we rely to grant summary judgment are insignificant from a technical or a cost standpoint. However, for reasons which we have stated at great length, the controlling legal standards are ones that speak in terms of consumer use, consumer preference, and marketability. They do not speak in terms of technical significance or cost factors. The determination of the *legal* significance of the undisputed physical differences is for the court, and not for plaintiffs' experts. Thus, although the statements of plaintiffs' experts as to the technical insignificance of those differences and the irrelevance of the differences to manufac-

turing costs are plainly sufficient to create a genuine issue of fact, it is an issue which is not material to the disposition of these motions.

For the reasons stated in Part III and briefly restated here, it is absolutely clear, *i.e.*, not subject to question, that with respect to nearly all categories of consumer electronic products, there are substantial physical differences between products manufactured for use in Japan and those manufactured for use in the United States, and those differences render articles manufactured for use in each country unusable and unmarketable in the other. Consequently, with narrow exceptions, the products are not of like grade and quality.

It is equally clear that consumer electronic products manufactured for use in the two countries, with the same exceptions, are not commercially interchangeable and are not adapted to the same use. Consequently, with the same exceptions, the products are not similar under customs appraisement law. The *Eggen* decision, concerning metric ball bearings, and the *Ford Motor* decision, concerning right-hand-drive automobiles, are highly pertinent here, because in those cases the customs courts ruled that products which are designed to conform to the different technical conventions of the U.S. and other nations are not similar, within the meaning of customs appraisement law.

Since the products, with certain exceptions, meet neither of the tests which we have held must be applied to determine their comparability for purposes of the Antidumping Act of 1916, they are not comparable for purposes of that Act. To reiterate, the exceptions we have noted include only a small class of consumer electronic products. These are phonographs, tape and cassette recorders, and non-FM radios, and only products in those categories which are battery-operated. With respect to this class of products, the defendants have proffered no evidence to demonstrate that there is no genuine issue of fact material to their comparability under the 1916 Antidumping Act.

Except with respect to this narrow class of products, plaintiffs' claims under the 1916 Antidumping Act rests on the comparison of products sold in the United States and products sold in Japan, which products are not comparable under the 1916 Antidumping Act for the reasons which we have stated at great length. Accordingly, the defendants' motions for summary judgment will be granted with respect to all television receivers, all products which are not solely battery-operated, and all products which receive FM radio transmissions. The motions will be denied with respect to all other products, a residual category which consists only of battery-operated consumer electronic products in the following three categories: phonographs, tape and cassette recorders, and radios which do not receive FM transmissions.

Since NUE's claims under the Antidumping Act of 1916 involve only television receivers, and we have held that U.S. and Japanese television receivers are not comparable under the 1916 Act, we will dismiss Count I of NUE's Complaint, which states its 1916 Act claims. The residual category of non-television products which are not affected by our order, described *supra*, is included within Zenith's claims under the 1916 Act claims. Because a portion of Zenith's claims survive our summary judgment order, we do not dismiss those counts of Zenith's Complaint and Counterclaim which state its dumping claims.[68]

---

[68] We are uncertain whether or not there *are* any products in this residual category which Zenith has sought to compare for purposes of its dumping claims. The list of technical comparisons of non-television products which plaintiff provided in the FPS, v. 17 at 8151-64, describes the products very briefly, *e.g.*, "AM radio." This brief description is insufficient to enable us to determine whether a particular product is solely battery-operated and receives no FM radio transmissions, the two characteristics which together would protect the products from our summary judgment order. If there are no such products, then we have granted summary judgment for defendants on all of the plaintiffs' dumping claims. If the defendants can demonstrate that there are no products in this residual category, they may of course move for dismissal of Count VII of Zenith's Complaint and Count VI of Zenith's Counterclaim. We will take this matter up at our next regularly scheduled pretrial conference. *See* n. 28, *supra*.

We have reflected long and hard on the issues which have been resolved in this lengthy opinion. During those reflections, we have conjured the image of an American industrialist or labor union official or public official, concerned about the health of American industry, who possessed a TV set manufactured in Japan, and who had just returned from a trade mission to Tokyo where, in his hotel room, he had turned on a TV set made by the same manufacturer as his set at home, which had a similar cabinet and an equally clear and bright picture. That indivdual might well say, a la Gertrude Stein: a TV set is a TV set is a TV set. He or she might think that we should not construct a chain of analysis which absolves the Japanese TV manufacturers, who have in the decades of the 1960's and '70's made such inroads into the U.S. market, from the asserted consequences thereof. We felt some initial discomfiture over this putative lay reaction, but the discomfiture quickly abated when we focused on three considerations, two of which have been advanced at length in this opinion. First, the 1916 Act is not a protectionist act, but an antitrust act, and the purpose of antitrust acts is to foster competition (albeit fair competition) for the benefit of the consumer. Second, we cannot rewrite an Act of Congress to achieve a result which some may think desirable. Third, the plaintiffs' conspiracy claims under the Sherman Act are bottomed on much the same factual ground as their claim under the 1916 Act. The plaintiffs are proceeding on the Sherman Act case and, if it survives the defendants' summary judgment motions addressed thereto, they will go to trial on the Sherman Act claims this fall.

This reaction is consistent with that of Judge Schwartz in *Pezetel*. He concluded that the 1916 Act did not cognize a claim where the goods were, in essence, specially manufactured for the American market (there being no golf courses in Poland and no golf carts sold there), even though the alleged consequences for the American manufacturer were the same as those alleged here.

An appropriate order follows. The order includes the statement necessary to certify it for an interlocutory appeal pur-

suant to 28 U.S.C. § 1292(b). We turn now to a discussion of the factors justifying an immediate appeal of this opinion and order.

VII. *Certification For Interlocutory Appeal Under 28 U.S.C. § 1292(b)*

Under 28 U.S.C. § 1292(b), a district judge may certify an order for interlocutory appeal if 1) it involves a "controlling question of law;" 2) there is "substantial ground for difference of opinion" with respect to that question; and 3) immediate appeal "may materially advance the ultimate termination of the litigation." In a prior opinion in this litigation, we examined in some detail the recent case law in the Third Circuit interpreting § 1292(b). 478 F.Supp. 889, 942-46 (E.D.Pa. 1979). We do not repeat the analysis there, but write briefly to explain why the accompanying order includes the statement necessary to certify it for immediate interlocutory appeal.[64]

[64] Certification of an order for immediate interlocutory appeal under 28 U.S.C. § 1292(b) is accomplished by placing in the order itself a statement that the court is of the opinion that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. This statement is prescribed by the language of § 1292(b).

Neither the plaintiffs nor the defendants have formally moved for certification of this opinion and order; obviously they could not since, as of this writing, they had not seen it. At a recent hearing, however, counsel for the parties, indicated in response to our inquiry that they would assuredly seek certification if the legal issue were decided adversely to their position. Pretrial Order No. 236 (transcript of pretrial conference of April 2, 1980). Subsequently, however, plaintiffs' counsel informed us that plaintiffs would prefer to examine our opinion before deciding whether or not to seek § 1292(b) certification.

We have the authority to certify our order under § 1292(b) *sua sponte*. *See, e.g., Ettinger* v. *Central Penn National Bank*, 2 B.R. 385 (E.D.Pa. 1979) (Bechtle, J.); *Bernstein* v. *Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re United States Financial Securities Litigation*, 75 F.R.D. 702 (S.D.Cal. 1977), *rev'd on other grounds*, 609 F.2d 411 (9th Cir. 1979). Be-

It is plain that the order involves a "controlling question of law." That phrase includes at least "every order which, if erroneous, would be reversible error on final appeal," as well as other questions which are sufficiently "serious to the conduct of the litigation." *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974). Our interpretation of the Antidumping Act of 1916 presents a pure question of law which plainly would constitute reversible error if it is, in fact, erroneous. It is therefore a controlling question of law under § 1292(b).

There is a substantial ground for difference of opinion on the interpretation of the 1916 Antidumping Act. As we have noted, the few prior decisions construing that Act had no occasion to explore it in the depth which we have attempted to reach herein. Accordingly, this opinion and order not only involve an issue which is of first impression, but also involve an Act which, despite its venerable age (64 years), is virtually a *statute* of first impression. While we are confident that our analysis of the statute is correct, we are aware that our analysis is highly complex, and that the issues presented are novel. Moreover, we have engaged in the always difficult enterprise of construing a statute which is not clear on its face, a task compounded by the statute's vintage. These circumstances compel us to recognize that our decision might be erroneous, and that there is accordingly a substantial ground for difference of opinion within the meaning of § 1292(b).

The final criterion of § 1292(b) is also satisfied here. An immediate appeal unquestionably will materially advance the ultimate termination of the litigation. The pricing behavior of the defendants and their intent is not only crucial to plaintiffs'

cause we are certain that the order should be certified, and in order to save the time that would be consumed by proceedings on a separate motion for certification, we have decided to include the certification in the order granting summary judgment. We are concerned over time because we wish to avoid slippage in the trial date. This case will be a decade old on December 21, 1980.

claims under the 1916 Antidumping Act, it is also central to their antitrust claims under the Sherman Act, which have not been considered in this opinion. Accordingly, a great deal of information concerning defendants' prices and intentions will be presented to the finder of fact at the trial of this litigation, now scheduled to begin in October 1980, whether or not the Court of Appeals reviews the instant opinion and order in advance of the trial. If this opinion and order were not certified for interlocutory appeal, but were reversed after the conclusion of the trial, we would be required in a subsequent trial of the 1916 Act dumping claims to retry in essence the major portion of the Sherman Act case. Moreover, even trial of the portions of the case discrete to the dumping claim might take longer, if only because of the need for general jury orientation as to the background of the litigation. Since the anticipated length of trial is now estimated at 12 months, a retrial of a major portion of the litigation would be an enormous waste of the resources of the judicial system, as well as the parties, witnesses, lawyers, jury, and everyone else involved in the litigation.

For these reasons we not only certify the accompanying order for immediate interlocutory appeal, but also urge the Court of Appeals to grant the plaintiffs leave to appeal. The exercise of the Court of Appeals' discretion to permit appeal of a certified order is apparently governed in part by the uniqueness, exceptionality, or extraordinary importance of the question of law involved. 478 F.Supp. at 945-46. As we have noted, our decision to certify our order is prompted in large part by the exceptional novelty and complexity of the legal question here presented. Moreover, a prompt and authoritative disposition of the question is extremely important to the prudent management of the litigation.

In fact, the certification procedure of 28 U.S.C. § 1292(b) was intended specifically to expedite the disposition of "big" cases like M.D.L. 189. A committee of the Judicial Conference, which proposed the statute, stated that it "should and will be used only in exceptional cases where a decision of the appeal

may avoid protracted and expensive litigation, as in antitrust and similar protracted cases." 1958 U.S. Code Cong. & Admin. News, pp. 5255, 5260. The report of the House Judiciary Committee explicitly adopted the view of the Judicial Conference, and added:

> There should be some way, for example, in long-drawn-out cases such as antitrust and conspiracy cases, to dispose of vital questions which are raised in the trial without having to wait for the taking of testimony and the conclusion of trial before the questions can be finally determined on appeal.

H.Rep. No. 1667, 85th Cong., 2d Sess. 1-2 (1958). In *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433-34 (3d Cir. 1958), Judge Maris, writing for the Court of Appeals sitting en banc, quoted a large portion of the House Judiciary Committee report, and held:

> It is quite apparent from the legislative history of the Act of September 2, 1958 that Congress intended that section 1292(b) should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.

Id. at 433. This is, of course, not "ordinary litigation."

In actual practice, the scope of application of § 1292(b) has not been restricted narrowly to "exceptional cases." *See* 16 C. Wright, Miller, Cooper, and Gressman, Federal Practice and Procedure § 3929 (1977); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv.L.Rev. 607 (1975). While the legislative history does not preclude the use of § 1292(b) procedures in other cases, it is clear that the statute was framed with special attention to the problems of protracted and expensive litigation, which seem to arise most frequently in big antitrust cases. Because Congress intended that § 1292(b) procedures be used to expedite the resolution of cases like the one before us, and because of the extraordinary burden that the case has been on the litigants and this court, we

feel especially justified in invoking the aid of the Court of Appeals by certifying this opinion and order for interlocutory appeal.[65]

Third Circuit Rule 23 requires that we state the controlling question of law which is the basis of the certification of our order for interlocutory appeal, although the scope of review is within the discretion of the appellate court. *See* 478 F.Supp. at 946. We state the controlling question thus: Are consumer electronic products manufactured for use in the United States and those manufactured for use in Japan comparable in a proceeding under the Antidumping Act of 1916, 15 U.S.C. § 72, even though: (1) the products are adapted to the technical conventions of television and FM radio broadcasting, and of the transmission of electrical power, which differ as between the two countries; (2) accordingly, the products have different tuners, power transformers, and electric motors; and (3) as a result, the products differ in consumer use and marketability and are not commercially interchangeable?

Pretrial Order No. 237

AND NOW, this 14th day of April 1980, upon consideration of the foregoing Opinion, and of various defendants' motions for summary judgment on plaintiffs' claims under the Antidumping Act of 1916, 15 U.S.C. § 72, it is ORDERED as follows:

1. With respect to television receivers, defendants' motions are GRANTED.

---

[65] That portion of our order which dismisses Court I of the NUE complaint in Civil Action No. 74-3247 might also be appealable as a final judgment under Federal Rule of Civil Procedure 54(b) if the requisites of that Rule are met. *See generally Curtiss-Wright Corp.* v. *General Electric Co.*, 597 F.2d 35 (3d Cir.) *rehearing en banc denied*, 599 F.2d 1259 (3d Cir. 1979), *cert. granted*, 444 U.S. 823, 100 S.Ct. 43, 62 L.Ed.2d 29 (1979); *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975). Since we have determined that the order should be certified for interlocutory appeal under § 1292(b), we do not reach the issues related to certification under Rule 54(b) for appeal as a final judgment.

2. With respect to all products which are not solely battery-operated, defendants' motions are GRANTED.

3. With respect to all products which receive FM radio transmissions, defendants' motions are GRANTED.

4. With respect to products which are not included in paragraphs 1, 2, or 3, defendants' motions are DENIED.

5. Count I of the Complaint of National Union Electric Corporation in Civil Action No. 74-3247 is DISMISSED.

6. We are of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation. Accordingly, this order is certified to the court of appeals for review pursuant to 28 U.S.C. § 1292(b). The controlling question of law is as follows: Are consumer electronic products manufactured for use in the United States and those manufactured for use in Japan comparable in a proceeding under the Antidumping Act of 1916, 15 U.S.C. § 72, even though: (1) the products are adapted to the technical conventions of television and FM radio broadcasting, and of the transmission of electrical power, which differ as between the two countries; (2) accordingly, the products have different tuners, power transformers, and electric motors; and (3) as a result, the products differ in consumer use and marketability and are not commercially interchangeable?

No. 83-2004

IN THE

Supreme Court of the United States

October Term, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,

Petitioners

v.

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Edwin P. Rome
(Counsel of Record)
William H. Roberts
Arnold I. Kalman
BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
Attorneys for Respondents, Zenith Radio Corporation and National Union Electric Corporation

Of Counsel:
Philip J. Curtis
John Borst, Jr.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

COUNTER-STATEMENT OF QUESTIONS PRESENTED

This is a lengthy and complex antitrust case, still at the interlocutory, pretrial stage. It involves Sherman Act charges of unlawful combination and conspiracy by the Japanese television industry to restrain and monopolize trade and commerce in television receivers and other consumer electronic products in the American market. It also involves individual, as well as conspiracy, claims under the Antidumping Act of 1916. The Court of Appeals for the Third Circuit has rendered two interlocutory decisions that both aspects of this totally factual case should proceed to trial on the merits. Only the Sherman Act conspiracy issues are addressed in the petition, and the individual Antidumping Act issues must be tried in any event.

The Court of Appeals appendix in this case, which began more than thirteen years ago, consists of 18,780 pages in forty-one volumes. The district court's "Case Management Order," Pretrial Order No. 154 (478 F.Supp. at 946-960), required plaintiffs with preclusive effect to set forth in narrative fashion each "fact" and each "subsidiary fact" they intended to prove at trial, together with separate reference to each document, excerpt of testimony, and witness that would be relied on at trial to establish each such subsidiary fact. Plaintiffs set forth their case in chief in detail in a 17,000-page Final Pretrial Statement, in 1200 pages of experts' reports, and in thousands of pages of computer-generated price comparisons. Some 250,000 pages of exhibits and underlying data were placed in the record, and at least 206 witnesses gave depositions or affidavits, in addition to prior testimony given by a number of petitioners' officers in another proceeding. Based upon a fourteen-month study of the voluminous appendix, two full days of oral argument, and over 600 pages of briefs, the Court of Appeals below unanimously concluded "that as to most of the defendants the record discloses material issues of disputed fact which made entry of summary judgment [in their favor] improper." (45a). The questions arising out

of that judgment are essentially factual in nature, and may be restated as follows:

1. Whether this Court has either jurisdiction or discretion to review a related but separate judgment of the Third Circuit, involving the Antidumping Act of 1916, where the petition seeking review of the antitrust ruling raises no Questions Presented relative to the Antidumping Act decision.

2. Whether this Court should reassess the massive factual record to determine if the Third Circuit's inferences and conclusions are adequate under Rule 56 of the Federal Rules of Civil Procedure to support its unanimous decision that summary judgment was improper and that the case should be remanded for trial on the merits.

3. Whether the Third Circuit was correct in holding that summary judgment is improper in this case (a) where the Court of Appeals applied well-established principles of proof of antitrust conspiracy by the direct and circumstantial evidence, (b) where factual disputes are found as to such material issues as the alleged conspiracy and the purported "foreign sovereign compulsion" defense, and (c) where the record also contains uncontradicted expert opinion evidence that further establishes the existence of disputed issues.

4. Whether the Court of Appeals was correct in ruling admissible respondents' uncontradicted expert opinion evidence, based on data which the experts attested without contradiction was of a type reasonably relied upon by experts in their fields, and in considering such evidence together with other direct and circumstantial evidence in holding that summary judgment is improper in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Rule 28.1 of the Rules of the Court, Respondents submit the following statement: Zenith Radio Corporation has no parents or non-wholly-owned subsidiaries. National Union Electric Corporation is a wholly-owned subsidiary of Dometic, Incorporated, which in turn is a wholly-owned subsidiary of A.B. Electrolux. NUE has no non-wholly-owned subsidiaries.

COUNTER-STATEMENT OF THE CASE

In this litigation, which the court below described as "complex" (205a), two American television manufacturers, respondents Zenith Radio Corporation and National Union Electric Corporation, challenge an unlawful combination and conspiracy among twenty named co-conspirators comprising the principal Japanese television manufacturers doing business in the United States, their trading companies and their United States subsidiaries, and others, to restrain and monopolize trade and commerce in television receivers and other consumer electronic products in the United States. At an early stage in this litigation, after exhaustive discovery by deposition, interrogatories and document production, and on the basis of an extensive factual record refuting defendants' challenge to *in personam* jurisdiction, venue and service of process, all of these companies were held to be present in the United States and transacting business here and availing themselves of the protection of the laws of the United States. 402 F.Supp. 262 (E.D. Pa. 1975). The petition does not challenge those findings. Plaintiffs seek treble damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §15 and 26, for defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, Section 7 of the Clayton Act, 15 U.S.C. §18, Section 2(a) of the Clayton Act, 15 U.S.C §13(a), Section 73 of the Wilson Tariff Act, 15 U.S.C. §8, and the Antidumping Act of 1916, 15 U.S.C. §72.

The Court of Appeals for the Third Circuit on December 5, 1983, unanimously vacated summary judgments for the petitioners in this litigation and remanded this case for trial. On appeal from summary judgments entered by the district court, a panel of the Court of Appeals, comprised of Chief Judge Collins J. Seitz, Circuit Judge John J. Gibbons, and Circuit Judge Thomas J. Meskill (of the Second Circuit, sitting by designation), ruled unanimously that plaintiffs' admissible direct and circumstantial evidence

was sufficient to overcome defendants' motions for summary judgment and to require a trial. The Court also unanimously reversed many of the district court's pretrial evidentiary rulings, reversed the summary judgments on the antitrust claims, and remanded the case to the district court for trial. (34a-197a).

In a second opinion, arising out of an earlier interlocutory appeal from the district court's decision granting defendants partial summary judgment based on the statutory construction of the Antidumping Act of 1916, 15 U.S.C. §72, the same panel unanimously rejected the district court's construction of the Antidumping Act of 1916, upheld the sufficiency of respondents' evidence of petitioners' violation of that statute, and reinstated all of plaintiffs' claims under the Antidumping Act of 1916. (198a-223a).

The Court denied the petitions for rehearing. (235a).

These rulings followed thirteen years of pretrial proceedings in which the Japanese defendants have delayed in providing pricing information and other discovery and have filed a battery of dilatory pretrial motions, including, among others: (1) motions challenging *in personam* jurisdiction, venue, and service of process, 402 F.Supp. 262 (E.D. Pa. 1975); (2) motions to strike certain paragraphs from the NUE and Zenith complaints (Orders dated February 13 and 20, 1975); (3) motions attacking the constitutionality of the Antidumping Act of 1916 on grounds of asserted "vagueness", 402 F.Supp. 251 (E.D. Pa. 1975); (4) a motion challenging subject matter jurisdiction of the court, 494 F.Supp. 1161 (E.D. Pa. 1980); (5) a motion challenging Zenith's standing to sue, 494 F.Supp. 1246 (E.D. Pa. 1980) (*Illinois Brick* doctrine); (6) a motion challenging NUE's standing to sue, 498 F.Supp. 991 (E.D. Pa. 1980) (*Bangor Punta* doctrine); (7) a motion challenging application to their United States subsidiaries of the Antidumping Act of 1916 on grounds of alleged repugnance to the United States-Japan Treaty of Friendship, Commerce and Navigation, 494 F.Supp. 1263 (E.D. Pa. 1980); (8) motions challenging plaintiffs' right to trial by jury on grounds of alleged "complexity", 478 F.Supp. 889 (E.D. Pa. 1979), *vacated on interlocutory appeal*, 631 F.2d 1069 (3d Cir. 1980); (9) objections to transfer pursuant to 28 U.S.C. §1404(a) and consolidation of the NUE action (Order dated August 18, 1976, E.D. Pa. 1976); (10) motions seeking pretrial summary judgment based on asserted inapplicability of Antidumping Act of 1916, 494 F.Supp. 1190 (E.D. Pa. 1980), *rev'd in part, aff'd in part*, 723 F.2d 319 (3d Cir. 1983) (198a-223a); (11) motions and objections resisting discovery in this case of their submissions to the United States Treasury Department during administrative proceedings under the Antidumping Act of 1921 in *Television Receivers, Monochrome and Color, From Japan*, TD. 71-76 (Pretrial Order No. 9 dated February 19, 1975); (12) motions for pretrial summary judgment based on the statute of limitations (Orders of February 20, 1975, December 9, 1976); (13) multiple motions for summary judgment on distinct issues under §1 of the Sherman Act, §2 of the Sherman Act, §2(a) of the Clayton Act, as amended, §7 of the Clayton Act, and §73 of the Wilson Tariff Act; (14) two mandamus proceedings and one interlocutory appeal pursuant to 28 U.S.C. §1292(b); (15) *in limine* pretrial motions raising a panoply of evidentiary objections to plaintiffs' proof principally under Rules 104, 403, 702-704, 801-805, 901-902 of the Federal Rules of Evidence; and (16) petitioners' present application to this Court, which may consume nearly one more year, by reason of petitioners' motion for extension of time to file their petition for rehearing below, their application for a 90-day stay of the Court of Appeals' mandate, and their action in maneuvering the filing of their petition for a writ of certiorari to shortly before this Court's summer recess.

Defendants' delaying tactics also included their filing, in December 1976 — *two years after they filed their answers to Zenith's complaint* — of belated, frivolous counterclaims against Zenith seeking in excess of $1.2 billion in

alleged damages based on the allegation that Zenith's efforts to vindicate its legal rights constituted so-called "sham litigation" and were actionable under the Sherman Act. Defendants subsequently utilized these belated counterclaims as the vehicle for delaying trial still further and for harassing Zenith's customers in a nationwide deposition program involving defendants' depositions of forty-nine persons from thirty-two companies — a three-year discovery campaign that generated an additional 10,093 pages of transcripts, 2,851 pages of exhibits, and the production of tens of thousands of other subpoenaed documents by non-parties to the litigation.

Consideration of the Japanese manufacturers' unmeritorious summary judgment motions, and their equally unmeritorious pretrial evidentiary objections, has already consumed over five years. It has generated more than one hundred twenty-five briefs, seven opinions totalling over 1,200 printed pages in petitioners' appendix in this Court, over twenty thousand pages of appendices in the Court of Appeals, and numerous related motions, replies, and other papers. All of this time, expense and judicial effort has been invested solely in order to save these defendants the trouble of addressing the merits of this case at a trial. Petitioners are now attempting to further delay a trial by seeking review of these determinations, which as petitioners even concede are purely "interlocutory." (Pet. at 8).[1]

Petitioners informed the Court of Appeals in a prior interlocutory appeal, in which they contended that this case was too "complex" to be tried to a jury, that this case

1. References to the Petition for Certiorari are abbreviated 'Pet.' Page references to the Appendix To Petition for A Writ of Certiorari are given in the form '____a' with the page number preceding. Page references to the Joint Appendix in the Court of Appeals are given in the form '____A' with the page number preceding. Emphasis is supplied throughout unless otherwise noted.

involves "an avalanche of complex evidentiary materials."[2]

Nonetheless, petitioners' counsel told the court below that appellate review in this case required the arduous examination of this detailed factual record:

> MR. MILLSTEIN: The fact is that whether you like it or not, *you have to look at the record. That's what the case is all about* and the Rule 56 argument I am just going to go right past. Unfortunately, Rule 56 does not bar your looking at the record. *You are going to have to look at that record, Your Honor. We took months doing it and the lower Court took months doing it. I don't know how this court has the time to do it.* But unfortunately, as I read the authorities, you have got the same burden as the District Court, if you want to reverse something.[3]

The Court of Appeals devoted fourteen months to the task. Petitioners are now asking this Court to sift through this forty-one volume record of 1[illegible],780 pages again to reassess the same factual questions which the unanimous court below resolved against them. It would be inappropriate and unnecessary for this Court to review those factual issues, which are of importance only in this particular case. See *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1925). That is especially true here, where no trial record has yet been made, because the ruling below is purely interlocutory.

The fundamental issue below in the antitrust segment of this case was conspiracy. A summary of the facts becomes important because petitioners have deliberately

2. Brief of Appellants, dated December 3, 1979, in No. 79-2540, United States Court of Appeals for the Third Circuit, at 8.

3. Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 12, 1982, at 97-98.

omitted any statement of the facts in their petition. As a principal means of achieving the object of their conspiracy, the Japanese manufacturers and their affiliates secretly conspired to drive down price levels for these products in the United States by establishing and maintaining low, dumping price levels for their massive imports of television receivers and other consumer electronic products imported and sold within the United States, and, to simultaneously establish and maintain high price levels in the Japanese market, which during the relevant time period remained closed to competition from imports of the products of United States manufacturers, of other foreign manufacturers, and even of defendants' products manufactured at their lower labor-cost Taiwanese and Korean factories whose production was devoted to the United States. The purpose and effect of this predatory international trade practice — known as "dumping" and illustrated in this record in its collusive form — was to drive United States manufacturers out of business by depressing prevailing United States prices to unprofitable levels until dwindling revenues or financial losses caused United States manufacturers to abandon the business, as in the case of National Union Electric Corporation's Emerson Division, or to become seriously weakened and attractive targets for acquisition at distress prices by defendants and their co-conspirators.

The conspiracy was formed and implemented in a single continuous course of conduct in the United States and Japan which involved secret meetings among some of the highest officers of these foreign corporations in hotel rooms, trade and export association offices and in meetings with large United States importers of these products. Petitioners secretly fixed and maintained prices in Japan that were more than 50% higher than the prices they jointly established for the same products imported and sold in the United States. They lied to the Government of Japan concerning their actual United States import prices. To conceal and continue their dumping campaign, these corporations also gave their cooperative adherence to a system of concealing their actual United States import prices. They entered hundreds of millions of dollars of consumer electronic products through United States customs on entry documents and invoices on which they reported falsely inflated import prices, and to conceal the actual dumping prices, they and their confederates paid extra duty, risked criminal prosecution, risked forfeiture of the shipments and furtively refunded importers' deliberate overpayments through Swiss and Hong Kong bank accounts, secret international telegraphic fund transfers, travellers' checks and other clandestine channels and means. They lied to the United States Treasury Department in the ensuing administrative antidumping investigation by reporting falsely inflated prices as the actual prices. The Fair Trade Commission of Japan has on three separate occasions invoked the Japanese antimonopoly laws against these companies, and criminal proceedings and customs fraud investigations and antidumping investigations in the United States have followed in the wake of defendants' well-planned and well-executed assault on the United States consumer electronics industry.

As a result of these practices, the absolute volume of imports and the combined share of United States sales represented by the Japanese defendants' consumer electronic products increased many-fold. Plaintiffs' computer-generated, model-by-model price comparisons of petitioners' Japanese and United States models disclose mean percentage margins between Japanese factory sales prices and the factory sales prices of television receivers imported into the United States of 59.22% (average for Hitachi, Matsushita, Mitsubishi, Sanyo, Sharp and Toshiba) for color television receivers and 58.48% (average for same) for monochrome receivers. (1958A-59A; 2485A-86A). Retail "price points" of television receivers and other consumer electronic products in the United States market declined sharply. (4269A-98A; 4304A-4530A). As a result of petitioners' practices, United States

production and United States producers' aggregate share of domestic sales plummeted. (2486A-88A). The number of companies producing television receivers in the United States declined. Underutilization and idling of United States television receiver assembly plants resulted. (1960A; 2491A-93A). United States producers suffered a decline in operating profits. (1968A-69A). The average number of persons employed in United States establishments in this industry and man-hours worked on television receivers declined. (1960A-64A). Elaborate studies of the industry done by federal agencies having special expertise in analyzing the effects of imports on domestic commerce describe in detail the injury which United States manufacturers sustained. (4191A-4208A). Economic studies prepared by plaintiffs' expert economic witnesses, verified by affidavit, corroborate the Government's findings. (App. Vols. 5 and 6, and 3107A-13A). The operating results of other domestic manufacturers that survived reflect these effects. (4211A-31A; 4237A-4268A; 1918A-1980A; 2475A-2517A; 4119A-4530A). Many established television manufacturers with profitable operations in other fields of business did not survive.

On December 4, 1970, the United States Department of the Treasury found that ". . . television receiving sets . . . from Japan are being . . . sold at less than fair value . . ." because ". . . exporter's sales prices were lower than home market prices by amounts that were more than minimal . . ." (4190A). The Tariff Commission's unanimous finding in 1971 was that the United States television industry ". . . is being injured by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended." (4191A-4199A).

REASONS FOR DENYING THE PETITION

Petitioners present three questions for interlocutory review. None of them warrants review by this Court. They involve only narrow, interlocutory evidentiary rulings and factual determinations that are of significance only in this case. Accordingly, the petition should be denied.

The Petition on its face presents a serious, threshold question of jurisdiction that arises from petitioners' less than candid Statement of the Questions Presented. Not one of those questions fairly includes the question of the sufficiency of respondents' showing of the element of specific intent under the Antidumping Act of 1916. As stated, petitioners' Questions Presented embrace only issues in the "antitrust conspiracy case". The Court of Appeals' decisions on December 5, 1983, however, resulted in *two* judgments (224a-228a and 229a-233a), one involving only the claims under the Antidumping Act of 1916, 15 U.S.C. §72, and the other involving petitioners' evidentiary objections and the propriety of summary judgment on the antitrust conspiracy issue. Yet in the body of their Petition (Pet. at 8) and again in the conclusion (Pet. at 28, in the reference to *two* "judgments"), petitioners attempt, without further explanation, to smuggle into these proceedings issues involving the Antidumping Act of 1916 claims.[4] Petitioners thus attempt to expand the review sought beyond the issues identified in the Questions Presented.

This procedure is improper and violates Rule 21.1 of this Court, which provides that "[o]nly the questions set

4. Thus, petitioners state (Pet. at 8):

> Finally, in a separate opinion handed down on the same day, the panel also reversed the District Court's dismissal of respondents' claims under the Antidumping Act of 1916. Applying its unprecedented standard for inferring a conspiracy to the 1916 Act, the panel held that respondents had established a *prima facie* case of concerted action that would satisfy the specific predatory intent requirement of that Act. (219a-221a). *If this Court reverses the antitrust judgment of the Court of Appeals it would thus necessarily reverse the Antidumping Act judgment as well.*

forth in the petition or fairly included therein will be considered by the Court." For this reason, respondents do not address the separate issues involving the 1916 Antidumping Act judgment. Moreover, since the individual Antidumping Act claims against each defendant must therefore proceed to trial, piecemeal interlocutory review by this Court of the sufficiency of proof of the antitrust conspiracy claims at this stage would be particularly inappropriate.

Furthermore, the Court of Appeals — unanimously reversing most of the trial court's *thirteen* basic *in limine* rulings on evidentiary matters — determined that the pretrial record, correctly viewed for summary judgment purposes, would present a *prima facie* case at trial, and, thus, presented factual issues under Rule 56(e) preventing the grant of judgment. Petitioners never explain what purpose would be served by review by this Court of less than all the interlocutory evidentiary rulings of the court below — rulings that redefined the summary judgment record with respect to the antitrust conspiracy claims. There is no demand for any specific relief. Certainly, this Court could not reinstate the trial court's grant of Rule 56 judgments on the antitrust conspiracy claims, as petitioners concede that the trial court's judgments rested upon an improper definition of the summary judgment record.

These reasons alone warrant denial of the petition.

I. REVIEW OF THE INTERLOCUTORY ORDER BELOW REVERSING SUMMARY JUDGMENT IN THIS PRIVATE ANTITRUST ACTION WOULD INVOLVE ONLY REASSESSMENT OF THE SUFFICIENCY OF A MASSIVE FACTUAL RECORD AND WOULD BE INAPPROPRIATE

Petitioners are now asking this Court to reassess the forty-one volume record of 18,780 pages and rule again on the same factual questions which a unanimous Court below has resolved against them. There is no need for this Court to review the factual issues again. The facts and inferences

reviewed by the Court of Appeals involved voluminous evidence of petitioners' conspiracy in one of the unusual antitrust conspiracy cases in which there is *direct*, as well as circumstantial evidence. However, in an effort to manufacture an "issue" that the decision below does not genuinely present, petitioners have seriously misstated the holding of the Court of Appeals, and they have misstated the nature of the evidence in this record, by repeatedly mischaracterizing this case as one involving only evidence of "parallel acts and other circumstantial evidence." (Pet. at i, 5, 6, 7, 9, 10).

This premise of the petition is wrong.

The Court of Appeals repeatedly emphasized that the summary judgment record contains *direct evidence* of the conspiracy that respondents allege.[5] Moreover, it is precisely because in this case there is such direct evidence of petitioners' concert of action that the Court of Appeals distinguished other precedents that involve only circumstantial evidence of conscious parallelism as *not* "dispositive" in this case. (165a). The Court recognized that "[u]nlike most of those [cited] cases . . ., this case presents a record in which there is *both direct evidence* of certain kinds of concert of action *and circumstantial evidence* having some tendency to suggest that other kinds of concert of action may have occurred." The Court of Appeals correctly concluded that "none of those conscious parallelism cases can be dispositive on the propriety of summary judgment". (164a-165a). Because of the length of the 1214-page appendix accompanying the Petition, the pertinent portion of the Court of Appeals' opinion is set forth at greater length for the convenience of the Court (164a-165a):

5. The Court specifically referred to respondents' "*direct evidence*" at least seven times in its opinion: at 165a; 166a; 172a; 173a; 174a; and 176a. The Court said that "[h]ere, *direct evidence* and circumstantial evidence may validly be considered to cumulate and reinforce with respect to the ultimate facts in issue." (165a).

Cases in which, as under section 1 of the Sherman Act and section 73 of the Wilson Tariff Act, liability depends upon the existence of a conspiracy usually will require determining the permissible limits of inferences which may be drawn from circumstantial evidence. . . . There are, however, limits beyond which reasonable inference-drawing degenerates into groundless speculation, limits having due process aspects. Those limits are defined in each case by the laws of logic, which inform the court whether there is a reasonable probability that the asserted conclusion follows from the proven facts. It is not surprising therefore that the courts have had frequent occasion to address the minimum quantum of circumstantial evidence sufficient to support an inference of conspiracy.

This court has in a series of cases dealt with the problem of discerning those limits. The context in which that problem has been most frequently presented is in cases in which the court has been asked to draw an inference of concert of action from the circumstantial evidence of conscious parallel conduct by the defendants. . . . While conscious parallel conduct has some tendency suggestive of concert of action, the tendency is so slight that we have held that circumstance, standing alone, to be legally insufficient. [citations omitted] These cases are merely illustrations of the more general proposition that there are legal limitations upon the inferences which may be drawn from circumstantial evidence, which must be determined in light of the ultimate fact in issue and the totality of relevant circumstantial evidence having any tendency to make the existence of that fact more probable.

When there is direct evidence of concert of action — a written agreement, or a memorandum of what transpired at a meeting, for example — the legal problem facing a court is different. Then it is not faced with the limitations of the inference-drawing process, for such direct evidence "tends to show the existence of a fact in question [concert of action], without the intervention of the proof of any other fact. . . ." Black's Law Dictionary 414 (5th ed. 1979). Rather, the court must simply determine whether, if the fact-finder were to credit the direct evidence of the fact in issue, the existence of that fact would have the legal significance urged by the proponent of the credited evidence. Would direct evidence of a horizontal agreement to fix resale prices in Japan, for example, have any legal significance in this action? *Unlike most of the cases referred to in the preceding paragraph, this case presents a record in which there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred. Thus, none of those conscious parallelism cases can be dispositive on the propriety of summary judgment in this case.* [Footnote 55 omitted]

The Court of Appeals simply gave effect to the direct evidence in the record, as well as the circumstantial evidence. It did not fashion any new "exception" or "new rule of law."

Petitioners raise the spectre that the Third Circuit's opinion involves a significant departure from existing law, asserting that the Court of Appeals employed a rule which permits an inference of conspiracy from circumstantial evidence that was equally or more probative of competition among the Japanese manufacturers than of collusion. They are wrong. They have failed to point to a single passage in which the Court articulated any such standard. The Court of Appeals *nowhere* states such a principle in its opinion. The Court of Appeals also does not state, acknowledge, or so much as imply that it was announcing *any* "new rule" concerning proof of conspiracy.

The Court which heard this appeal was well-acquainted with the legal precepts in this area,[6] and could recognize what is, or is not, a departure from settled principles, and could identify an "unprecedented exception" or "a new rule of law," as petitioners claim (Pet. at 11), had its decision actually involved such a "departure". But the Court did not. Petitioners, for their own purposes, are simply attempting to manufacture an "issue" from what the Court of Appeals *did not say*. They do not present a question that genuinely arises in this case.

The Court of Appeals has not rewritten the standard for summary judgment in antitrust conspiracy cases. Nor has it in appropriate instances hesitated to terminate unmeritorious antitrust conspiracy cases by summary judgment or directed verdicts.[7] This simply was not such a case. The Court of Appeals specifically "*approved for protracted cases*" the district judge's innovative interpretation of F.R.Civ.P. 56, which was designed to streamline consideration of summary judgment motions in these cases. (60a-64a). Under this interpretation of Rule 56, the trial court may require the plaintiff prior to trial to set forth its

6. Chief Judge Seitz authored the Third Circuit decisions in the leading antitrust conspiracy decisions of *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), and *Venzie Corp. v. U.S. Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975). Judge Gibbons authored the decision in *Schoenkopf v. Brown & Williamson Tobacco Co.*, 637 F.2d 205 (3d Cir. 1980).

7. *See, e.g., Tose v. First Pennsylvania Bank*, 648 F.2d 879 (3d Cir. 1981), *cert denied*, 454 U.S. 893 (1981) (affirming directed verdict for defendants); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205 (3d Cir. 1980) (affirming directed verdict for defendant); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (affirming directed verdict for defendant); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975) (affirming judgment n.o.v. for defendants); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961) (affirming directed verdict for defendants).

entire case in a comprehensive Final Pretrial Statement, *with preclusive effect*, and may address the sufficiency of that evidence on summary judgment motions filed by defendants which are unsupported by any detailed factual showing by affidavit or otherwise.[8] Far from "undermining" the utility of summary judgment in complex cases, as petitioners incorrectly assert (Pet. at 17), the Court of Appeals reaffirmed this use of summary judgment as an effective weapon for terminating unmeritorious claims in protracted cases by shifting to the plaintiff the initial burden to come forward with sufficient evidence. Here, however, plaintiffs' evidence satisfied even this more stringent standard. *Compare, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970) ("[n]o defense to an insufficient showing is required").

A. *There Is No "Conflict" Among The Circuit Courts.*

The cases that petitioners allege "conflict" with the Third Circuit's decision in this case are readily distinguishable. In each of those cases, the *only* evidence of conspiracy was circumstantial.

In *Proctor v. State Farm Mut. Auto Ins. Co.*, 675 F.2d 308 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982), the majority upheld summary judgment in defendants' favor, specifically stating that "[a]ppellants have *pointed to no direct evidence* to support their allegations that appellees met and agreed to establish a uniform labor rate or otherwise to fix the price of automobile body repair work." 675 F.2d at 334. In *Weit v. Continental Illinois National Bank and Trust Co. of Chicago*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), the majority of the divided Seventh Circuit panel stated: "Our review of the record leads us to the conclusion that *the circumstantial*

8. Here, for example, the four Sanyo defendants, the two Toshiba defendants, and the three Hitachi defendants (the latter with one narrow exception) filed *no affidavits at all* to support their summary judgment motions.

evidence in support of the complaint is so insubstantial when measured against the evidence in support of defendants' denials as to preclude a verdict for plaintiffs." 641 F.2d at 466.

The holdings in *Weit* and *Proctor* stand in stark contrast to the Third Circuit's decision in this case, which rests firmly on undisputed direct evidence of petitioners' concerted action.[9]

It is not surprising, therefore, that petitioners in their briefs in the Court of Appeals never even *cited Weit* or *Proctor* to support their position.

B. *There Is No "Conflict" With This Court's Decisions in Cities Service and Monsanto.*

Petitioners' strained effort to place the Third Circuit's decision in "conflict" with this Court's decision in *First National Bank of Arizona v. Cities Service*, 391 U.S. 253 (1968), is also without merit. There, plaintiff adduced evidence only of defendants' simple failure to deal with plaintiff. Although plaintiff pointed to "other evidence" to support the inference of a conspiracy, *all* of that evidence was likewise *circumstantial*.[10] Contrary to petitioners' suggestion, none of it was *direct* evidence. The Court twice emphasized that the only evidence was circumstantial, first in pointing specifically to *"the one fact that he has produced*, Cities' failure to make a deal with him for Iranian Oil", 391 U.S. at 286, and again in stating that *"the only evidence"* of participation in a conspiracy was the plaintiff's "allegation that the failure to deal resulted from conspiracy." 391 U.S. at 289. The refusal to deal, without more, was insufficient.[11]

By contrast, once again, the Court of Appeals in this case explained that "[*h*]*ere direct evidence and circumstantial evidence may validly be considered to cumulate and reinforce with respect to the ultimate facts in issue.*" (165a-166a).

Nor does the teaching of *Monsanto Corp. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984), "conflict" with the Third Circuit's decision in this case. In that case, the Court upheld a jury's finding of conspiracy because "there was substantial *direct* evidence of agreements to maintain prices". 104 S.Ct. at 1471. The Court reaffirmed that "[e]vidence of this kind plainly is relevant and persuasive as to a meeting of minds." Indeed, in formulating the applicable standard (104 S.Ct. at 1471), this Court quoted with approval Judge Aldisert's opinion for the Third Circuit in *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980), and thereafter adopted the quoted passage verbatim as the definitive standard. 104 S.Ct. at 1473. The Third Circuit's decision in this case does not conflict with Judge Aldisert's statement of the correct standard in *Edward J. Sweeney & Sons*.

Petitioners also repeatedly suggest that, although direct evidence exists of petitioners' concert of action, it is not direct evidence of "the conspiracy alleged." (Pet. at 6,

9. The two other cases petitioners cite in Footnote 10 of their Petition are distinguishable on the same ground. In *Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102 (2d Cir. 1975), the Court had before it only circumstantial evidence. In *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 884 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1777 (1983), the Court explicitly stated that *"appellants presented no direct evidence of conspiracy."*

10. Petitioners' far-fetched suggestion that the record in *Cities Service* also contained "direct evidence" of conspiracy (Pet. at 12) is a remarkable misrepresentation of the facts of that case. Examination of the Court's opinion at the pages petitioners cite, 391 U.S. at 263-64, 276, 283-85, 286-87, will show that plaintiff in *Cities Service* adduced no direct evidence and that the Court did not characterize any of the evidence as "direct evidence," notwithstanding petitioners' use of quotation marks.

11. The Court's discussion in *Cities Service* of *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), and *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), points to the same conclusion. There was no direct evidence in either of those cases.

10, 11, 13). Petitioners are plainly incorrect, and their technique of fragmenting the evidence is precisely what this Court cautioned against in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), where it said: "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' " Respondents alleged a *single* conspiracy to maintain and stabilize high television receiver prices in Japan and to establish and maintain low, dumping level prices in the United States. The resultant international price structure, which *direct* evidence shows that the defendants collusively established, is the concerted predatory dumping system that injured Zenith and put NUE out of business. One aspect of that alleged conspiracy involved the setting of high prices in Japan. "Considerable direct evidence" of this exists, as the Court below found. (172a-173a). Indeed, counsel for petitioners acknowledged the uncontradicted direct evidence of these price-fixing agreements during oral argument in the Court of Appeals, a concession the Court of Appeals duly noted in its opinion. (174a).[12] Circumstantial and direct evidence of other aspects of the arrangement also exist.

Petitioners also seriously misstate the Court of Appeals' holding in this case when they suggest that the Court adopted a rule for inferring conspiracy from circumstantial evidence alone ("parallel acts and other circumstantial evidence," as petitioners persistently mischaracterize it) without considering whether the actions of the co-conspirators were consistent with competition or with collusion, or whether such acts were contrary to each company's economic self-interest. The abundant direct and circumstantial evidence in this record of petitioners' admitted concert of action (174a) showed petitioners' course of conduct was totally *inconsistent* with any "inference" of "competition." Moreover, the Court of Appeals in this case *affirmed* summary judgment as to Sears, Roebuck & Co., Motorola, Inc. and the two Sony defendants. The majority of the Court found no direct evidence connecting those defendants, and held the circumstantial evidence of conspiracy insufficient, *i.e.* insufficient to show a course of conduct contrary to economic self-interest, or more consistent with collusion than with competition, or, in the case of the Sony defendants, insufficient to establish motive. (181a; 182a; 185a). Far from ignoring such factors, the Third Circuit took specific account of them. The fact that the Court could not affirm summary judgment as to the twenty other defendants means only that the combination of direct and circumstantial evidence implicating those defendants was sufficient — not that the Court applied some unspoken "new rule" or silently created some novel "exception".

12. Although petitioners attempt (Pet. at 13) to limit the time period of these agreements to only a "two-year period," the Court of Appeals specifically rejected petitioners' arguments and pointed to the abundant record evidence that supports the reasonable inference that these agreements "operated over a longer period". (174a).

Although the Court of Appeals found it unnecessary to place exclusive reliance on such evidence, there was abundant evidence with respect to petitioners of conduct contrary to petitioners' individual economic self-interest and abundant evidence of motive. For example, petitioners' conduct at their Television Export Council and the Television Export Examination Committee in knowingly participating in a common scheme to conceal their actual dumping-level prices from the Japanese Government contradicted their independent economic self-interest to compete with each other and prevent one another from obtaining an illicit competitive edge in pricing. Their joint

concealment of their actual prices from U.S. Customs in the course of importation of these products into the United States also involved a continuous course of cooperative conduct that would have been contrary to their independent economic self-interest in the same way. None of these defendants ever reported one another to U.S. customs authorities for importing at *actual* prices lower than the false prices petitioners reported on their United States customs invoices and customs entry documents.[13] The conduct of Japanese manufacturers, the trading companies and their United States subsidiaries in jointly shielding the false invoicing scheme and dumping campaign from detection during the Treasury Department's Antidumping Act of 1921 investigation again required close cooperation to achieve their common purpose in continuing the dumping. The Japanese manufacturers' uniform practice of exporting the output of their Korean and Taiwanese factories across the Pacific Ocean to the United States, rather than selling part of that lower labor-cost output in the Japanese market in an effort to capture from one another additional market share in Japan, provides further circumstantial corroboration of interdependence, collusion and action contrary to individual economic self-interest. Again, petitioners' false reporting of "phantom" check prices after the non-renewal of the formal cartel agreements, the Manufacturers' Agreements and JMEA Rules in 1973, was interdependent

13. In fact, they discussed ways of jointly continuing to conceal these practices. At one meeting of representatives of the Japanese manufacturers and large importers on October 26, 1970, Matsushita's attorney, Mr. Millstein, proposed the filing of a lawsuit against the U.S. Treasury Department and "defended the notion that a litigation might provide protection against 'double pricing' exposure," reasoning that if the importers could win a determination of no dumping, "the government would be in a poor position to press double pricing charges" because it might seem to be "harassment" — the importer's representative noting, however, that the "weakness in the . . . logic lies in the premise of winning a determination of an absence of dumping." (6338A).

conduct that would otherwise have been contrary to defendants' individual economic self-interest because it required them to (i) pay extra Japanese taxes (on falsely reported higher prices), (ii) risk criminal prosecution for customs fraud, and (iii) risk forfeiture of the goods entered on false invoices. Success of the scheme required uniform adherence by all. These severe risks would have been irrational to assume unless petitioners knew that all others would give their adherence to it and that the benefit from doing it — preventing detection — would thereby be realized. These defendants had to admonish their customers to continue to open their letters of credit at prices higher than the actual negotiated prices and to forego interest on large sums the customers overpaid to conceal the actual prices. They had to incur additional administrative expenses to maintain double sets of accounts to track the millions of dollars of overpayments, and to transmit the overpayment funds back to the U.S. importers through clandestine channels, such as Swiss and Hong Kong bank accounts, travellers' checks, and international telegraphic transfers. They had to create additional documentation to disguise these payments as facially legitimate charges for non-existent "excessive inspection" or "rework" or other fictitious "commissions" and "services".

Petitioners' motives to participate in the conspiracy were also explained with clarity in the reports filed by plaintiffs' expert economic witnesses.[14]

14. For example, Dr. DePodwin explained how by acting together and exchanging statistics, the defendants were able to entrench their position in the United States market to a degree that individual action by them would never have achieved (1619A; 1628A). In addition, the Nehmer Report ("Economic Analysis of Evidence Relating to Japanese Electronic Products Antitrust Litigation," 2257A) explained how by conspiring, the Japanese companies were able to charge higher prices and earn greater profits in the Japanese market and lower their prices in the United States market to a level sufficient to reduce or eliminate U.S. competition, while maintaining an acceptable rate of return overall. *(Id.)*.

Review by this Court of the 41-volume, 18,780 page factual record in this case would involve nothing but another review of facts and is unnecessary and inappropriate.

II. THE COURT OF APPEALS' PRETRIAL RULING THAT UNRESOLVED FACTUAL ISSUES PRECLUDE SUMMARY JUDGMENT WITH RESPECT TO PETITIONERS' PURPORTED DEFENSE OF "SOVEREIGN COMPULSION" DOES NOT WARRANT INTERLOCUTORY REVIEW BY THIS COURT

No issue relating to petitioners' claimed "sovereign compulsion defense" is properly before the Court. As petitioners even point out (Pet. 5-6), the district court expressly refrained from deciding any of the many legal and factual questions surrounding their alleged "sovereign compulsion defense" in this case, which is predicated on a note that three third-echelon employees of the Japanese Ministry of International Trade and Industry ("MITI") caused to be sent to the clerk of the district court in 1975, relating to conduct that occurred between ten and twenty years ago. (393a-394a). The Court of Appeals also found it unnecessary to reach the question of the effect, if any, to be given to this document. (188a-189a).

Petitioners deliberately chose not to raise the false issue of their alleged "sovereign compulsion defense" in the Court of Appeals. At oral argument in the Court below, petitioners' liaison counsel made it clear that defendants "[did] not press it on this appeal":

> [Plaintiffs' counsel] points to these check price agreements about which I think your Honors know very well, we like to refer to them as government mandated export agreements because of the record that has been developed down below about MITI [the Ministry of] [I]nternational [T]rade and [I]ndustry having required it *but whether they did or not is obviously of no importance on this appeal and we do not press it on this appeal* because the fact is that the plaintiffs cannot show they were in any respect injured . . . ."[15]

Neither petitioners nor respondents raised this issue below in the questions presented in their briefs.[16]

It is well-established that this Court will not grant certiorari to decide in the first instance an issue which has not been decided by the lower courts, and which was not pressed. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-363 (1958). No satisfactory reason exists here to depart from that principle.

Petitioners quibble with the language of the Court of Appeals' opinion in describing the formal cartel agreements as "sponsored," "encouraged," or "mandated" and suggest that the Court of Appeals "found that a fact-finder could conclude that these arrangements were, in fact, not mandated." (Pet. at 20). The court below said no such thing. In describing the agreements, the court said: "the minimum price agreements appear to have been encouraged, *if not mandated by MITI*." (178a). The court's disposition simply made it unnecessary for it even to consider whether a fact-finder could conclude that these arrangements were, or were not, "mandated."

To be sure, defendants' "sovereign compulsion defense" based on this note is a false issue for many other reasons. Significant portions of the evidence of petitioners'

---

15. Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 22, 1982, at 88-89.

16. Petitioners relegated mention of their contention in the district court regarding this note to passing mention in a *footnote* in their Joint Brief in the Court of Appeals, Joint Brief of Appellees, in Nos. 81-2331/2332/2333, at 44 n.34, and to a reference in the separate brief of Mitsubishi Electric Corporation ("MELCO") in the context of a discussion of MELCO's unmeritorious objection to subject matter jurisdiction. (MELCO Brief at 10-11).

conduct were not dealt with in the note and therefore all these issues must await trial. MITI did not direct petitioners to fix prices in Japan, to dump, to commit customs fraud by filing false U.S. Customs invoices, to lie about their prices to the U.S. Treasury Department in the 1921 Antidumping Act proceedings, to lie to MITI about their true prices, to collude with one another to continue to conceal their prices and to continue their dumping campaign, or to transform aspects of their export arrangements into an industrial bludgeon to be jointly wielded in the United States. The note itself describes an unwritten "direction" of uncertain content and scope by persons unknown on a date or dates unknown to persons unknown at places unknown with legal effect, if any, unspecified. Defendants' *non-compliance* with the "direction", however, is undisputed. Moreover, the course of conduct involved did not occur wholly within the territorial boundaries of Japan, since, as Judge Higginbotham found early in this case, the defendants are here in the United States, transacting business and availing themselves of the protection of United States law in the conduct of their business. 402 F.Supp. 262 (E.D. Pa. 1975); *see Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Petitioners' unconditional ability to withdraw from the formal cartel arrangements,[17] a right protected by Japanese statute, the absence of any sanction for non-compliance, the absence of any formal decree, the absence of any statement of any Japanese legal officer as to the legal effect, if any, of the "direction", the existence of an unexercised legal right to review of any "direction" which if exercised would have resulted in invalidation of any "direction" — a fact at least showing petitioners' lack of *bona fides* in reliance on the alleged "direction"—the fact that MITI's so-called "administrative guidance" is not even a defense to charges under the *Japanese* antimonopoly laws, and defendants' total failure to conform their conduct to the "direction", all combine to deprive the note of any remaining significance whatever.

The Court of Appeals, however, had no occasion to address these other legal and factual issues. The Court below took the note at face value, but held that "summary judgment on that ground is not possible for several reasons" (188a-189a):

> We may assume, without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act. See, e.g., *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). On this record, summary judgment on that ground is not possible for several reasons.
>
> First, we note that NUE and Zenith rely on the minimum price agreements primarily as evidence of a low export price conspiracy. Moreover, it cannot be

17. For example, the "withdrawal" provision of the first agreement, for the latter half of 1963 states (5778A):

> (Withdrawal) Article 7. A party to this agreement wishing to withdraw may withdraw 30 days after he has notified the Council [Television Export Council] to that effect.

Similar or identical withdrawal provisions appear in each of the Manufacturers' Agreements for the following years. (5875A; 6008A; 18391A-456A). Continued participation in the JMEA Rules was likewise voluntary. Those Rules applied only to members of the JMEA, a voluntary association. It is undisputed that no Japanese manufacturer or exporter was required to belong to the JMEA. Non-members of the JMEA were not required to observe the JMEA's internal rules, which were adopted by vote of the members at meetings of the JMEA. Japanese law specifically protects the right of exporters to withdraw from such arrangements by providing expressly by statute that approval of those arrangements can be given only if withdrawal from the agreement is not restricted. Export and Import Trading Act, Act No. 299, 5 August 1952, Section 5-bis, subsection (v).

said with any degree of certainty that the minimum prices, claimed by the NUE and Zenith experts to be dumping prices, were in fact determined by the Japanese Government. It is possible to conclude that the government merely provided an umbrella under which the defendants gained an exemption from Japanese antitrust law, and fixed their own export prices. Second, there is abundant evidence suggesting that many defendants departed from the agreed-upon minimums and took steps to conceal their departure from MITI. Thirdly, there is no record evidence suggesting that the five-company rule originated with the Japanese Government. Finally, the evidence about price stabilization in the Japanese home market suggests unequivocally that this activity violated the laws of Japan.

> *Clearly, therefore, a summary judgment in defendants' favor on the defense of sovereign compulsion would be improper.*

The factual issues identified by the court are clear, and its decision is correct. Petitioners' actual course of conduct makes their reliance on the note nothing but a sham. *Cf. California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) ("If the end result is unlawful, it matters not that the means used in violation may be lawful").

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962), this Court said that "acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme," as here defendants' allegedly "immune" conduct was made a constituent element in their broader, unlawful scheme. And, as the Court said in *Loewe v. Lawlor*, 208 U.S. 274, 299 (1908), "[t]he most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of

the plot by law." The Court of Appeals correctly held that any significance the note may have can be determined only after reviewing the totality of petitioners' course of conduct — not simply by isolating a single constituent element — particularly where defendants in that single constituent element did not even *comply* with the "direction" they now attempt to hide behind.

For good reason, petitioners deliberately chose not to press this last-ditch issue in the court below. They have not yet even created a record of this purported "sovereign compulsion defense" at a trial. For these reasons and because numerous factual issues are presented by its attempted invocation here before the lower courts have addressed it, interlocutory review would be inappropriate. Final disposition of the legal issues should await the development of a full factual record and the determination of all the legal and factual questions in the lower courts.

III. THE COURT OF APPEALS' INTERLOCUTORY RULING ON THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE UNDER RULE 703 OF THE FEDERAL RULES OF EVIDENCE WAS CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT

The Third Circuit's unanimous determination that the opinions of respondents' economic experts — set forth in over 1,500 pages of reports and affidavits — are admissible was correct. The Third Circuit's application of Rule 703 does not conflict with that of any other circuit.[18]

18. *See American Universal Insurance Co. v. Falzone*, 644 F.2d 65, 66-67 (1st Cir. 1981); *Brink's Inc. v. City of New York*, 717 F.2d 700, 710-712 (2d Cir. 1983); *Seese v. Volkswagenwerk, A.G.*, 648 F.2d 833, 844-845 (3d Cir. 1981), *cert. denied*, 454 U.S. 867 (1981); *Wilder Enterprises, Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1143-1144 (4th Cir. 1980); *Bauman v. Centex Corporation*, 611 F.2d 1115, 1120-21 (5th Cir. 1980); *Mannino v. International Manufacturing Company*, 650 F.2d 846, 851-853 (6th Cir. 1981); *Baumholser v. Amax Coal Co.*, 630 F.2d 550, 552-553 (7th Cir. 1980); *United States v. Hollman*, 541 F.2d 196, 200-201 (8th Cir. 1976); *United States v. Sims*, 514

(101a-105a). The Third Circuit's additional ruling that *properly supported* expert opinion evidence may suffice to demonstrate the existence of factual issues and thus defeat summary judgment (106a) does not conflict with any decision in any other circuit.[19] Review by this Court of these interlocutory evidentiary issues would involve only questions of admissibility of evidence under familiar legal rules, questions of significance only in this case. The petition should accordingly be denied.

Respondents' experts have not yet testified. The rulings below were based on the verified pretrial, written summaries of their opinions which the experts prepared as part of plaintiffs' compliance with the Case Management Order, Pretrial Order No. 154. Petitioners' motions *in limine* never disputed the professional qualifications of respondents' distinguished experts to render these opinions. Petitioners did not assert, nor did the district court find, that respondents' experts selected the data on which they based their opinions in a manner inconsistent with accepted standards. Based largely on petitioners' own discovery responses, the experts determined that petitioners' behavior was *not* consistent with the competitive model, and, moreover, that the best economic explanation of these events was collusion among the petitioners. (100a-101a, 109a-120a, 169a-180a). After its own review of the factual record and the experts' written reports, the

NOTE *(Continued)*

F.2d 147, 149 (9th Cir. 1975), *cert. denied*, 423 U.S. 845 (1975); *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981); *see* also J.B. Weinstein and M.A. Berger, *Weinstein Evidence* ¶703[03]. In the cases petitioners cite, the experts offered only unsupported conclusions.

19. *See Hughes v. American Jawa, Ltd.*, 529 F.2d 21, 24-26 (8th Cir. 1976); *Bieghler v. Kleppe*, 633 F.2d 531, 533-534 (9th Cir. 1980); *California Steel and Tube v. Kaiser Steel Corporation*, 650 F.2d 1001, 1003 (9th Cir. 1981); *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*, 659 F.2d 903, 911-912 n.15 (9th Cir. 1981), *aff'd on other grounds*, 103 S.Ct. 1713 (1983).

Third Circuit agreed. (172a, 174a-175a, 179a). This ruling is not controversial. Courts have long recognized the relevance and value of economic evidence as proof of the existence or non-existence of conspiracy in antitrust cases.[20]

Petitioners presented no expert economic opinion evidence of their own, no evidence to show that the factual data on which respondents' experts relied was *not* of a type customarily relied upon by experts in their fields of expertise (101a-104a), and no economic evidence to show that respondents' experts' opinions lacked sufficient foundation for admissibility. Respondents' experts' *uncontradicted* affidavits and reports established without contradiction, as the Court of Appeals correctly determined, that the materials on which they had relied were of the type customarily and reasonably relied upon by experts in their fields. (102a). Respondents' experts made no unsupported factual assumptions.

The Court of Appeals' pretrial, interlocutory ruling on the admissibility of the expert opinion evidence in this case was correct, involves no conflict and raises no important question warranting further review by this Court.

CONCLUSION

The petition is an improper attempt to induce a piecemeal, pretrial review of the antitrust segment of a case that in any event must go to trial on the individual 1916 Antidumping Act claims not addressed in the petition. In deciding the antitrust issues, the Court of Appeals applied familiar settled principles to a lengthy record of direct and circumstantial evidence unique to the case. No controversial or otherwise certworthy principle of general impor-

20. *See, e.g., Continental Baking Company v. United States*, 281 F.2d 137, 141-146 (6th Cir. 1960); *Standard Industries, Inc. v. Mobil Oil Corporation*, 475 F.2d 220, 227-228 (10th Cir. 1973), *cert. denied*, 414 U.S. 829 (1973); *Ohio Valley Electric Corporation v. General Electric Company*, 244 F.Supp. 914, 930 (S.D.N.Y. 1965).

tance is involved. There is no conflict among the circuits; prior controlling decisions of the Court were fully recognized and correctly applied by the appellate court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

Edwin P. Rome
(Counsel of Record)
William H. Roberts
Arnold I. Kalman
BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103

Attorneys for Respondents, Zenith Radio Corporation and National Union Electric Corporation

Of Counsel:
Philip J. Curtis
John Borst, Jr.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

Dated: July 6, 1984

(1)

No. 83-2004

IN THE

Supreme Court of the United States

October Term, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Petitioners

v.

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS

Edwin P. Rome
(Counsel of Record)
William H. Roberts
Arnold I. Kalman
BLANK, ROME, COMISKY & MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
Attorneys for Respondents, Zenith Radio Corporation and National Union Electric Corporation

Of Counsel:
Philip J. Curtis
John Borst, Jr.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

11pp

TABLE OF AUTHORITIES

No. 83-2004

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Petitioners

v.

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS

On July 6, 1984, the same day respondents' brief in opposition was filed, the Government of Japan filed a motion for leave to file a brief *amicus curiae* and brief *amicus curiae* in support of the petition for a writ of certiorari. Such a motion is not favored. (Rule 36.1). However, Rule 36.1 allows no time and makes no provision for filing "an objection concisely stating the reasons for withholding consent" (*cf.* Rule 36.3), where the motion and brief support the petition but are filed simultaneously with the brief in opposition. The respondents accordingly file this supplemental brief (Rule 22.6) to explain their reasons for

withholding consent and their views on the substantive arguments advanced by the Government of Japan.[1]

The Government of Japan, like the petitioners, misinterprets the decision of the Third Circuit and extracts therefrom issues that are not properly before this Court. There is simply no reason to permit such an *amicus* brief to be filed, nor do the arguments advanced in that brief justify granting certiorari "in order that the contents of the 1975 Statement of the Government of Japan and the attached Note Verbale [dated May 29, 1984] may be given proper consideration." (Brief at 6).[2] Such "proper consideration" may be given here and now.

1. The Government of Japan asserts that the court below "disregarded the Japanese Government's Statement" and "questioned whether the export agreements and regulations in fact originated with the Japanese Government." (Brief at 2). From this, it is lamely suggested that the court below determined "*in effect*" that conduct "within Japanese territory pursuant to the direction of the Japanese Government . . . may constitute a violation of the United States antitrust laws." (*Id.*).

These suggestions are simply incorrect. In its opinion, the Court of Appeals specifically acknowledged the claim made below by petitioner, Mitsubishi Electric Corporation, that the Japanese Ministry of International Trade and Industry ("MITI") "mandated" certain export cartel agreements to which the petitioning Japanese manufacturers and trading companies became parties. (177a-178a; 188a). For the reasons it stated, however, the court below found it unnecessary to address any of the legal and factual issues involving the content of the so-called "MITI note." Instead, the Court of Appeals *assumed, without deciding*, that a "government-mandated export cartel fixing minimum prices would be outside the ambit of Section 1 of the Sherman Act." (188a). The court below never "questioned" the content of the "MITI note" and never questioned whether the export agreements and regulations "originated with" MITI, although the court below did specifically state that there were genuine issues of fact concerning other aspects of petitioners' conduct that precluded summary judgment. The Court of Appeals' decision did not contradict any assertion contained in the MITI note which had been sent to the district court in April 1975. In view of these misperceptions of the Court of Appeals' decision, the questions the Government of Japan attempts to raise by its motion cannot properly be brought before the Court in this case.

2. The Government of Japan suggests that this case involves only "the activity of its own nationals within its territory." (Brief at 5). This also is incorrect. In an extensive opinion filed by the Honorable A. Leon Higginbotham, then the district court judge to whom these cases were assigned, the petitioning Japanese companies were held to be present in the United States, transacting business here and availing themselves of the protection of the laws of the United States. 402 F.Supp. 262 (E.D.Pa. 1975). The Petition does not even attempt to question that finding. Peti-

1. A similar motion and brief *amici curiae* to which respondents did not give consent were filed July 7 by the American Association of Exporters and Importers and Consumers for World Trade. Those *amici* address an issue not before the Court for reasons stated in the Brief in Opposition. Moreover, those *amici* overlook this Court's holding in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), that agreements having the purpose or effect of depressing price levels are *per se* unlawful.

2. There is a serious question whether the Note Verbale of May 29, 1984, which was not introduced into the record before the Court of Appeals or before the district court is properly before this Court. There is also a serious question whether this Court can take judicial notice of such a non-record statement by the Embassy of Japan to the State Department. The Government of Japan asserts no authority to support its effort to inject that note into judicial consideration in this fashion. Moreover, the belated attempt to rewrite the April 1975 note in the May 29, 1984 note under the pretext of "reaffirming" the 1975 note is an improper attempt to intrude into the judicial processes of the United States.

tioners' single course of conduct transcended actions undertaken solely within the territorial boundaries of Japan. It involved acts in both the United States and Japan by defendants and their confederates and also caused serious damage in the United States. The sovereignty of Japan is in no way implicated when alien corporations doing business here, and their local subsidiaries in the United States, unreasonably restrain trade and commerce here and otherwise violate the laws of the United States.

3. The Government of Japan suggests that this case involves only conduct undertaken "pursuant to the direction of the Japanese Government." (Brief at 2). Petitioners' course of conduct went far beyond the scope of any "directions" of MITI. MITI did not direct petitioners to fix prices in Japan. In fact, the *Fair Trade Commission of Japan* brought no fewer than three separate proceedings against these Japanese manufacturers for violation of the Japanese antimonopoly laws—proceedings that centered on some of the same concerted conduct that made up the overall course of conduct which respondents have challenged in this case. MITI also did not "direct" petitioners to dump in violation of United States statutes, or to lie about their actual import prices on United States customs entry documents, or to lie about their prices to the United States Treasury Department by submitting false responses in the 1921 Antidumping Act proceeding involving television receivers from Japan, or to collude concerning methods to conceal their actual prices and to make clandestine payments necessary to continue their dumping campaign in the United States. Indeed, as the Court of Appeals noted, there is record evidence that "*would permit a finding that efforts were made to conceal this activity . . . from MITI.*" (179a).

The Government of Japan certainly did not direct defendants to lie to MITI about their actual prices on consumer electronic products imported and sold in the United States. It never "directed" them to lie to the Japanese tax

authorities or to pay Japanese taxes on the basis of prices they falsely reported to the Japanese tax authorities as the "actual" prices on sales to United States purchasers. It never "directed" them to conspire to supply false statistical data concerning the value of domestic and export shipments of these products to MITI and other Japanese governmental agencies to conceal their dumping, as the minutes of petitioners' "Statistics Committee" of the Electronic Industries Association of Japan show they did.[3] Petitioners' clandestine payment scheme also involved wholesale violation of Japan's Foreign Exchange Control Law.

Petitioners did not comply with any "direction" from MITI in doing what they have done. They did not do what they claim to have been "directed" to do, and they committed other acts, as part of a broader scheme, that none of them can claim they were "directed" to do. The Government of Japan, like the United States Customs Service and the United States Treasury Department, was simply duped by these companies. Petitioners' belated effort to resurrect the "MITI note" issue, which they deliberately and explicitly chose not to press below,[4] is nothing but a

3. As characterized by the court below, one such document "suggests that at [the December 26, 1966 meeting of the EIAJ Statistics Committee] the members of the committee agreed to modify their accounting practices so as to conceal from [Japanese] government agencies the extent of the disparity between export and domestic prices." (125a). Petitioners later contended unsuccessfully below that this document, consisting of notes of the meeting, was inadmissible in evidence because it was not shown to be "authentic," although they produced it from their own files in discovery.

4. At oral argument in the Court of Appeals below, petitioners' liaison counsel, Mr. Zoeller, made it clear that defendants "[did] not press it on this appeal":

> [Plantiffs' counsel] points to these check price agreements about which I think your Honors know very well, we like to refer to them as government mandated export agreements because of the record that has been developed down below about MITI [the Ministry of] [I]nternational [T]rade and

sham. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *Loewe v. Lawlor*, 208 U.S. 274, 299 (1908). The Court of Appeals correctly held that factual issues concerning petitioners' *actual* course of conduct precluded summary judgment. The Government of Japan cannot and does not claim for these petitioners an immunity for overall unlawful conduct which is not recognized under United States law.

CONCLUSION

The Government of Japan seeks to raise a false issue not even pressed below by petitioners. The brief of the Government of Japan raises no new or sufficient reason for granting the petition.[5] The Court of Appeals in this case gave due consideration to the 1975 note in the record below. For compelling reasons unrelated to its content, the Court of Appeals for the Third Circuit unanimously ruled that summary judgment clearly could not be granted on this ground. Further review is thus unnecessary. The legal

NOTE — *(Continued)*

[I]ndustry having required it but whether they did or not is obviously of no importance on this appeal and *we do not press it on this appeal* because the fact is that the plaintiffs cannot show they were in any respect injured . . ." (Transcript of Oral Argument Before The Court of Appeals for the Third Circuit on October 22, 1982, at 88-89.)

5. The suggestion at footnote 2 of the Brief that the Court "may wish to request the views of the United States concerning the questions discussed" in the *amicus* brief can thus be put to one side. Since the questions discussed in the *amicus* brief are not genuinely presented in this case, the views of the United States could add nothing to this Court's consideration of these irrelevant questions. Moreover, the Government of Japan in the Note Verbale dated May 29, 1984, requested the Government of the United States to file an *amicus curiae* brief before the Court to reflect the views of the Government of Japan. See *Appendix to Brief of Government of Japan*, at 1a-4a.

issue sought to be raised was not reached below. It will probably never be reached in this case, which is still at the interlocutory, pretrial stage. Final disposition should await the development of a complete factual record at trial and the determination of all the legal and factual questions in the lower courts.

Respectfully submitted,

Edwin P. Rome
(Counsel of Record)
William H. Roberts
Arnold I. Kalman
BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
Attorneys for Respondents, Zenith Radio Corporation and National Union Electric Corporation

Of Counsel:
Philip J. Curtis
John Borst, Jr.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

Dated: July 17, 1984

No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

—v.—

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

IRA M. MILLSTEIN
A. PAUL VICTOR
WEIL GOTSHAL & MANGES
New York, New York
Counsel for the Matsushita Petitioners

CARL W. SCHWARZ
METZGER, SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.
Counsel for the MELCO Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, New York
Counsel for the Mitsubishi Petitioners

DONALD J. ZOELLER
Counsel of Record
MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7000
Counsel for the Toshiba Petitioners

PETER J. GARTLAND
WENDER MURASE & WHITE
New York, New York
Counsel for the Sharp Petitioners

KEVIN R. KEATING
WHITMAN & RANSOM
New York, New York
Counsel for the Sanyo Petitioners

July 18, 1984

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF FOR PETITIONERS

1. Respondents have raised no valid ground for denying the petition for certiorari. Instead, they have attempted to dissuade this Court from reviewing the important legal questions presented by the petition by asserting, without specific citation or support, that this Court must review what the District Court characterized as the "mountain of 'evidence' " proffered by respondents (Pet. App. 621a). But this Court need not review that "mountain" in order to correct the erroneous legal holdings of the Court of Appeals.

The District Court sifted through all of respondents' "evidence," painstakingly applied well-established legal standards, and concluded that a fact finder could not permissibly infer the conspiracy alleged.[1] The Court of Appeals, as petitioners' counsel explained below (Opp. 5), had "the same burden as the District Court" in reviewing the summary judgment record. Accordingly, it too had to examine respondents' "mountain." In its review, however, the Court of Appeals applied very different—and we submit erroneous—legal standards from those applied by the District Court. Based upon these different legal standards, the Court of Appeals reversed the District Court's summary judgment and consigned the parties, and an already over-burdened court system, to years more of protracted litigation and enormous expense.

The issue before this Court is thus clearly framed: what are the appropriate legal standards for reviewing the "mountain of 'evidence' " proffered by respondents—those applied by the District Court or the very different ones applied by the Court of Appeals? More specifically, petitioners seek to have this Court rule upon three clear-cut legal questions which ask whether, in reviewing the summary judgment record, the Court

---

1 This is not surprising for, as the head of the Antitrust Division found afte examining respondents' "best evidence" for more than "six months," there is "no evidence of concerted predatory conduct . . . either at an earlier period or at the present time." (Pet. App. 23a).

of Appeals applied the correct legal standards for: (i) inferring the alleged conspiracy; (ii) determining the effect to be given a duly issued statement by a friendly foreign government attesting that certain conduct challenged by respondents was compelled by that government acting within its sovereignty; and (iii) determining the admissibility and effect of expert testimony which was found to be based upon false and unsupported factual assumptions.

To answer these three questions of law, this Court need look no further than the opinions below, its own precedents, and common sense; the answers do not require this Court to make a *de novo* trip through the record.

If this Court finds that the Court of Appeals, as we assert, applied erroneous legal standards, it has two alternatives: (i) it may remand the case to the Court below with instructions to apply the correct legal standards. It will then be up to the Court of Appeals--not this Court—to consider the summary judgment record under the proper legal standards; or (ii) it may conduct its own review to determine whether to reinstate the District Court's judgment.[2]

The Conspiracy Inference Issue

2. The clear antitrust question presented by the petition is whether the Court of Appeals applied the correct legal standard in reversing the District Court's conclusion that there is no significant probative evidence capable of supporting a permissible inference of the conspiracy alleged. Specifically, the issue before the Court is whether, in a case "in which there is both direct evidence of certain kinds of concert of action [but not of the conspiracy alleged] and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occured" (Pet. App. 165a), an alleged conspiracy may be inferred from the totality of that evidence without satisfying the contrary-to-independent-economic-self-interest test for inferring a conspiracy that was set forth by this

2 *See, e.g., Board of Education v. Pico*, 457 U.S. 853, 862-63 (1982); *Kleppe v. Sierra Club*, 427 U.S. 390, 396-98 (1976).

Court in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) ("*Cities Service*").

Notwithstanding respondents' representations to the contrary (Opp. 13-14, 18-21), the Court of Appeals created a new exception to the *Cities Service* standard in this case. As even respondents concede (Opp. 11), the Court of Appeals held that its prior decisions applying the *Cities Service* test were *not* applicable to this case because of the existence of "direct evidence of certain kinds of concert of action" (Pet. App. 165a). As a consequence of this ruling, the Court of Appeals did not even review, let alone reverse, the explicit findings of the District Court that *all* of the evidence relied upon by respondents to infer the alleged "low price" conspiracy—*e.g.*, the "parallel" acts of charging lower prices in the U.S. than in Japan and the offering of secret rebates to customers—was completely consistent with each petitioner's independent economic self-interest in competing for business in the United States and more probative of competition than conspiracy (Pet. App. 478a-479a; 497a-502a). Respondents' unsupported contentions that there is evidence of conduct by petitioners against their economic self-interests (Opp. 19-21) are thus irrelevant to this appeal, since the District Court found that there is no such evidence in the record, and the Court of Appeals nowhere even discussed this point in its decision.

3. Similarly, despite respondents' assertions to the contrary, the Court of Appeals did not find that the summary judgment record contains "direct evidence of the conspiracy that respondents allege" (Opp. 11). Respondents allege a unitary conspiracy to stabilize high prices in Japan *and* to fix artificially low prices in the United States (Pet. App. 48a). The Court of Appeals did not find "direct evidence" of this alleged conspiracy.

Neither of the two categories of "direct evidence of certain kinds of concert of action" which the Court of Appeals relied upon—the "direct evidence" relating to the alleged agreement to stabilize prices in the Japanese domestic market during the years 1964-66 (Pet. App. 172a-173a) or the "direct evidence"

relating to the MITI-mandated export control arrangements (Pet. App. 177a)—was found to be "direct evidence" of respondents' alleged unitary conspiracy to fix artificially low prices in the United States.

The "direct evidence" relating to price stabilization in Japan was found by the District Court to relate exclusively to the Japanese domestic market (Pet. App. 421a-432a). The Court of Appeals did not reverse this finding. Indeed, the District Court explicitly found, and the Court of Appeals did not question, that there is *no* direct evidence in the record of any connection between the alleged price stabilization in Japan and petitioners' exports to the United States (Pet. App. 455a-463a; 608a; 615a-616a). Even the Court of Appeals recognized that "direct evidence of some kinds of concert of action like price fixing in Japan" is, at best, "*circumstantial* evidence of [the alleged] broader conspiracy" (emphasis provided) (Pet. App. 165a).

Similarly, the "direct evidence" relating to the MITI-mandated export control arrangements was not found to constitute "direct evidence" of the alleged conspiracy to fix artificially low prices in the United States. On their face, such arrangements established *minimum* export prices and *maximum* customer limitations (Pet. App. 177a-178a)—provisions which could only have led to *higher* export prices (Pet. App. 327a-328a). Thus, while the arrangements were relied upon by the Court of Appeals as a circumstantial "feature" of the alleged unitary conspiracy (Pet. App. 167a, 178a-180a), they were not, and could not be, considered "direct evidence" of this alleged agreement.[3]

3 Indeed, since only the purported predatory agreement to fix artificially *low* prices in the United States (the "export side" of the alleged unitary conspiracy) arguably raises issues within the subject matter jurisdiction of the United States and states a claim for which competitors of the petitioners might claim injury, the two categories of so-called "direct evidence" relied upon by the Court of Appeals—which, at best, evidence arrangements designed to *increase* prices—certainly cannot constitute any basis for dispensing with the *Cities Service* inference standard. There is simply no evidence in the record which could even arguably be characterized as "direct evidence" of the alleged conspiracy to fix artificially low prices in the United States.

That the Court of Appeals recognized there was no "direct evidence" of the conspiracy alleged by respondents is demonstrated by the Court's affirmance of summary judgment in favor of the Sony defendants. While respondents have argued that this affirmance was based upon the absence of "direct evidence" against the Sony defendants (Opp. 19), just the opposite is true. The Court of Appeals held that the same two categories of "direct evidence of certain kinds of concert of action" found to be applicable to the petitioners (*i.e.*, alleged price stabilization in the Japanese domestic market (Pet. App. 176a) and the MITI-mandated export control arrangements (Pet. App. 183a-184a)) *were* applicable to the Sony defendants. Nevertheless, it found such "direct evidence" to be "entirely too speculative" to reverse summary judgment—at least in the absence of any evidence that the Sony defendants charged "low" prices in the U.S., offered secret rebates, or engaged in other "parallel" acts in the export market found to be applicable to the petitioners (Pet. App. 184a-185a). Had the "direct evidence of certain kinds of concert of action" been "direct evidence" of the unitary conspiracy alleged by respondents, the Court of Appeals could not have held such evidence to be "entirely too speculative" to keep the Sony defendants in the case (Pet. App. 185a).[4]

4. In an effort to obscure the widespread applicability and importance of the antitrust issues presented by the petition, respondents' brief completely ignores the danger to competition policy that will arise if the lower courts are permitted to

4 Respondents' attempt to distinguish *Cities Service* and its progeny (Opp. 16-17) completely misses the point. The issue is not whether *Cities Service* and cases following it involved "direct evidence" of the conspiracies alleged. Obviously, they did not, or there would have been no need to draw *any* inferences. Rather, the issue is whether those cases involved evidence of "parallel" acts only, as respondents have argued, or whether they actually involved, as petitioners have demonstrated (Pet. 11-13), the same type of evidentiary mix present in this case: a combination of "parallel" acts with other circumstantial evidence, including evidence which could be characterized as "direct evidence of certain kinds of concert of action."

cast aside *Cities Service* in a case such as this, in which competitors are trying to infer a "low price" conspiracy from the charging of lower prices in the U.S. than in Japan, the offering of secret rebates and other "parallel" acts which mirror competition (Pet. 15-17). As emphasized in the Brief Amicus Curiae filed by the American Association of Exporters and Importers and the Consumers for World Trade, this is an extremely serious public policy concern that warrants this Court's review. Dispensing with the *Cities Service* standard in this case will cast a significant chill upon competitors desiring to charge lower prices in the United States than in a foreign market, directly undermine the consumer welfare objectives of the Sherman Act,[5] and encourage the filing of vexatious lawsuits by companies trying to shield themselves from legitimate competition.[6]

5. There is also no merit in respondents' argument that the interlocutory character of the Court of Appeals' summary judgment ruling renders this case inappropriate for review (Opp. 5). While this Court does not ordinarily review interlocutory decisions, issues of law respecting the grant or denial of summary judgment must necessarily be reviewed in this procedural posture. *Cities Service* was a case in which this Court addressed antitrust inference issues in the context of a summary judgment ruling. And it is precisely the *Cities Service* issue that is raised by the Court of Appeals' decision. Thus,

5 *See Copperweld Corp. v. Independence Tube Corp.*, 52 U.S.L.W. 4821, 4825 (U.S. June 19, 1984) (the primary objective of the Sherman Act is to foster "consumer interests").

6 It is of particular importance to apply the safeguards of *Cities Service* in a case such as this—which does not involve an economically plausible assertion that companies might agree to raise their prices in the United States to increase profits, but rather is based upon the inherently implausible assertion that companies would conspire to maintain "low, dumping price levels" (Opp. 6). As Professor Easterbrook has explained, this "story . . . does not make sense, and we are left with the more plausible inference that the Japanese firms . . . . just engaged in hard competition." F. Easterbrook, *The Limits of Antitrust* (University of Chicago Program in Law and Economics Working Paper No. 20, March 30, 1984), 28-9. Copies of this article have been lodged with the Clerk and served on respondents.

unless this Court grants certiorari to review this issue in the summary judgment context, the Third Circuit's new exception to the *Cities Service* summary judgment standard will evade review—effectively sounding the death knell to the use of summary judgment as an important case management tool by district courts trying to bring large antitrust conspiracy cases under control.[7]

6. There is similarly no substance to respondents' contention that the absence of an express reference to the Court of Appeals' Antidumping Act judgment in the questions presented deprives this Court of jurisdiction to review those aspects of the Antidumping Act decision which are expressly dependent upon the Court of Appeals' conspiracy analysis (Opp. 9-10). The petition points out that the Court of Appeals based its determination that there was sufficient evidence to create a genuine issue of material fact with respect to petitioners' "specific intent" under the 1916 Antidumping Act upon the *very same* inference of conspiracy which it found to be permissible in its antitrust decision (Pet. 8). This was true for respondents' claims of both concerted and *individual* 1916 Act violations (Pet. App. 218a-222a). Since the legal standards for drawing such a conspiratorial inference are precisely the issues set forth in the questions presented, it is obvious that the identical 1916 Act issues are "fairly included" within the petition, and that a reversal of the Court of Appeals' antitrust judgment will necessarily entail reversing the Court of Appeals' 1916 Act judgment as well (*See* Pet. 1, 8, 28).

7 Nor is there any basis for respondents' argument that the various evidentiary rulings by the Court of Appeals make interlocutory review by this Court inappropriate (Opp. 10). The Court of Appeals' rulings on the admissibility of respondents' documentary evidence are not material to the outcome of this appeal. Even assuming the admissibility of all of the documentary evidence discussed by the Court of Appeals, application of the correct legal standard for inferring a conspiracy would compel an affirmance of the District Court's judgment. Indeed, as previously pointed out (Pet. 3-4, n.4), the District Court assumed the admissibility of all of respondents' key documentary evidence, but still found a complete absence of any proof showing actions by petitioners contrary to their economic self-interests.

The Act of State and Sovereign Compulsion Issues

7. Respondents simply ignore the fundamental act of state issue presented by the Court of Appeals' decision: the failure of the Third Circuit to give *conclusive* effect to the duly issued statement of the Japanese Government (the "MITI Statement," Pet. App. 6a-14a) attesting that export controls which the Court of Appeals held could be a "feature" of the alleged conspiracy were actually mandated by the Government of Japan (Pet. 20-22). While respondents argue that the Court of Appeals took the MITI Statement "at face value" (Opp. 25), the Government of Japan vehemently disagrees.[8] The fact is that the Court of Appeals did not even mention the MITI Statement, and held that conduct which the Japanese Government stated that it mandated could be found to be evidence of a private conspiracy (Pet. App. 179a-180a, 188a-189a). This ruling directly contravenes this Court's decision in *United States v. Pink*, 315 U.S. 203, 220 (1942), and constitutes a serious affront to the Government of Japan.

Respondents urge this Court not to consider the act of state and sovereign compulsion issues presented by the Third Circuit's decision until after the "development of a full factual record" (Opp. 27). In other words, respondents take the position that these issues are not ripe for review until after the fact finder is permitted to inquire into whether the Government of Japan was telling the truth when it stated that it compelled the export control arrangements at issue in this case. But it is precisely this inquiry that is prohibited by the act of state doctrine (Pet. 23-24). It is imperative that certiorari be granted *before* the fact finder is permitted to make this inquiry, which will irreparably and unlawfully infringe upon the sovereignty of Japan.

8. In an effort to sidestep the real issues presented by the petition, respondents have constructed a mythical argument by

8 *See* the Note Verbale from the Government of Japan to the United States Department of State protesting the Third Circuit's decision (Jap. Gov. Br. App. 1a *et seq.*).

petitioners that the act of state and sovereign compulsion doctrines protect conduct which exceeds that compelled by the Japanese Government (Opp. 23-25). This is simply not the case. The Court of Appeals did not rely upon just non-government mandated behavior to infer the alleged conspiracy. It held that the export controls which the Japanese Government has stated that it compelled can be considered "features" of such a conspiracy in violation of U.S. law (Pet. App. 167a, 179a-180a). Indeed, the MITI-mandated "five-company rule" is the very linchpin of the Court of Appeals' conspiracy theory (Pet. App. 167a-168a), placing the act of state and sovereign compulsion doctrines directly at issue in this case.

9. Respondents' brief also ignores what the District Court recognized to be the "enormous implications for U.S. trade policy" of resolving the act of state and sovereign compulsion issues in this case (Pet. App. 387a). The Japanese Government, in both its Brief Amicus Curiae before this Court, and in its official diplomatic protest to the United States, has made clear its view that the decision of the Court of Appeals will "seriously hamper the smooth execution of the trade policy of the Japanese Government" and cause "increased uncertainty in the trade relations between Japan and the United States" (Jap. Gov. Br. App. 1a, 3a). Moreover, petitioners have been informed that the Governments of Great Britain and Australia, as well as other foreign governments, have made formal demarches to the United States Department of State expressing their concern over the serious implications that the Court of Appeals' decision poses for trade relations with the United States. Such legitimate concerns, raised by our major trading partners, are compelling reasons for this Court to grant certiorari.

10. There is no merit to respondents' claim that petitioners are precluded from raising before this Court their arguments under the act of state and sovereign compulsion doctrines (Opp. 22-23). As even respondents concede (Opp. 23, n.16), petitioners specifically addressed these issues in their briefs on appeal before the Third Circuit, and respondents replied to

them, although there was no need to press them at that time because the District Court had granted summary judgment on different grounds. However, when the Court of Appeals reversed the District Court's judgment, and went on to permit a conspiracy to be inferred from, among other things, petitioners' participation in the export control arrangements, the act of state and sovereign compulsion doctrines immediately were called into question. The sovereign compulsion point was expressly ruled upon in the Court of Appeals' decision (Pet. App. 188a-189a), and the conclusivity of the MITI Statement was reargued in the petition for rehearing which was denied by that Court.

The Expert Testimony Issue

11. Finally, respondents' discussion of Fed. R. Evid. 703 (Opp. 27-30) completely skirts the important expert testimony issue presented by the petition: whether expert testimony *found to be based upon false and unsupported factual assumptions* may nevertheless be admitted into evidence to defeat summary judgment, once it is found that the data the expert relied upon are "of the type" upon which other experts in his field reasonably rely. Respondents do not even address the conflict between the Third Circuit and other Courts of Appeals on this important issue (Pet. 26-28).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, it is respectfully prayed that this Court issue a writ of certiorari to review the judgments of the Court of Appeals.

Dated: July 18, 1984

Respectfully submitted,

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
KENNETH STEINTHAL
MARTIN S. HYMAN
MINDY J. SPECTOR
ELIZABETH A. JAFFE

WEIL GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
Tel.: (212) 310-8000

RAYMOND T. CULLEN

MORGAN LEWIS & BOCKIUS
120 South Broad Street
Philadelphia, Pa. 19109
Tel.: (215) 481-9500

Attorneys for Matsushita Electric Industrial Co., Ltd.; Matsushita Electric Corporation of America; Matsushita Electric Trading Co.; and Matsushita Electronics Corporation

DONALD J. ZOELLER
Counsel of Record

JOHN L. ALTIERI, JR.
ROBERT A. CANTOR
HAROLD G. LEVISON
ROBERT A. JAFFE
SHELLEY B. O'NEILL

MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
Tel.: (212) 510-7000

PATRICK T. RYAN

DRINKER BIDDLE & REATH
1100 Phila. Nat. Bank Bldg.
Philadelphia, Pa. 19107
Tel.: (215) 925-2700

Attorneys for Toshiba Corporation and Toshiba America, Inc.

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
STEPHEN P. MURPHY
PAUL J. PANTANO, JR.

METZGER SHADYAC & SCHWARZ
1275 K Street, N.W.
Washington, D.C. 20005
Tel.: (202) 289-4520

H. WILLIAM TANAKA
LAWRENCE R. WALDERS
B. JENKINS MIDDLETON

TANAKA WALDERS & RITGER
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Tel.: (202) 223-1670

CHARLES J. BLOOM

CONRAD KERR BLOOM
HITCHNER & O'BRIEN, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Hitachi, Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; and Hitachi Sales Corporation of America

JIRO MURASE
PETER J. GARTLAND
GENE Y. MATSUO
PETER A. DANKIN
LANCE GOTTHOFFER

WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022
Tel.: (212) 832-3333

MATTHEW J. BRODERICK

DECHERT PRICE & RHOADS
1500 Market Street
Philadelphia, Pa. 19102
Tel.: (215) 972-3400

Attorneys for Sharp Corporation and Sharp Electronics Corporation

HOKEN S. SEKI
GEORGE E. JARVIS
DAVID A. DOPSOVIC

SEKI & JARVIS
520 Madison Avenue
New York, N.Y. 10022
Tel.: (212) 759-2303

HENRY T. REATH
FRANK A. LUCHAK

DUANE MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, Pa. 19102
Tel.: (215) 544-6300

JOHN T. DOLAN
ARNOLD B. CALMANN

CRUMMY, DEL DEO, DOLAN & PURCELL
Gateway One
Newark, N.J. 07102
Tel.: (201) 522-2235

DONALD F. TURNER

WILMER CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 872-6000

Attorneys for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

CHARLES F. SCHIRMEISTER
PETER C. WILLIAMS

REID & PRIEST
40 West 57th Street
New York, N.Y. 10019
Tel.: (212) 603-2000

STEPHEN W. ARMSTRONG

MONTGOMERY MCCRAKEN WALKER & RHOADS
Three Parkway
Philadelphia, Pa. 19102
Tel.: (215) 563-0650

Attorneys for Mitsubishi Corporation and Mitsubishi International Corporation

PATRICK H. SULLIVAN
JAMES S. MORRIS
KEVIN R. KEATING
MICHAEL S. PRESS

WHITMAN & RANSOM
522 Fifth Avenue
New York, N.Y. 10036
Tel.: (212) 575-5800

CHARLES J. BLOOM

CONRAD KERR BLOOM
HITCHNER & O'BRIEN, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Sanyo Electric Co., Ltd.; Sanyo Electric Trading Co., Ltd.; Sanyo Electric, Inc.; and Sanyo Manufacturing Corporation

(9)

No. 83-2004

Office-Supreme Court, U.S.
FILED
JUL 23 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,
v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

~~MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF~~

and

SUPPLEMENTAL BRIEF OF PETITIONERS

IRA M. MILLSTEIN
A. PAUL VICTOR
WEIL GOTSHAL & MANGES
New York, New York
Counsel for the Matsushita Petitioners

CARL W. SCHWARZ
METZGER, SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.
Counsel for the MELCO Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, New York
Counsel for the Mitsubishi Petitioners

DONALD J. ZOELLER
Counsel of Record
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7000
Counsel for the Toshiba Petitioners

PETER J. GARTLAND
WENDER MURASE & WHITE
New York, New York
Counsel for the Sharp Petitioners

KEVIN R. KEATING
WHITMAN & RANSOM
New York, New York
Counsel for the Sanyo Petitioners

July 23, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15pp

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*, *Petitioners*,

v.

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

On July 17, 1984, after the filing of the petition for a writ of certiorari and the brief in opposition in this case, and just before the filing of petitioners' reply brief, respondents filed in this Court, without a motion seeking leave, an argumentative seven-page supplemental brief addressed to the merits of the brief amicus curiae filed by the Government of Japan. Respondents' supplemental filing contravenes the rules of this Court. The rules entitle respondents to file one 30-page brief in opposition, which they did on July 6, 1984. The rules do not grant parties the right to file supplemental briefs to dispute the substantive contentions set forth in briefs amicus curiae.

Respondents' pretext for filing their supplemental brief is that they did not previously have an opportunity to state "the reasons for withholding [their] consent" to the filing of the Government of Japan's amicus brief. (Supp. Br. 1). In fact, however, respondents did set forth their reasons for withholding consent in a two-page letter, dated July 3, 1984, addressed to counsel for the Government of Japan and filed with the Clerk of this Court. Respondents also implicitly argue that the amicus curiae brief of the Government of Japan constitutes an "intervening matter" under Rule 22.6 which respondents are entitled to bring to the Court's attention and to discuss in a supplemental brief. (Supp. Br. 1). Rule 22.6, however, cannot be given this suggested meaning without granting every party the opportunity to file a supplemental brief in response to every amicus brief submitted to this Court.

In short, respondents have filed a supplemental brief without warrant from the rules of this Court and have deprived petitioners of the opportunity to file a reply brief addressing all of respondents' substantive contentions. Under ordinary circumstances, we would therefore object to the filing of such a document. In this instance, however, the supplemental brief filed by respondents is so revealing of the fundamental defect in their position—and so well illustrates the need for review of the act of state and sovereign compulsion issues raised by the petition—that we do not oppose its filing.

If this Court accepts the supplemental brief filed by respondents, petitioners request an equal opportunity to address the subject discussed therein—*i.e.*, the significance of the amicus curiae brief of the Government of Japan to the issues raised by the petition.

Accordingly, petitioners respectfully request the Court's permission to file the attached supplemental brief addressed to the same matters discussed by respondents.

Respectfully submitted,

DONALD J. ZOELLER

MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7000

Counsel of Record for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

---

1. Respondents' supplemental brief, attacking the amicus curiae brief of the Government of Japan, underscores the importance of the act of state and sovereign compulsion issues presented by the petition and the pressing need for this Court to review the judgments of the Court of Appeals. Having already denigrated the official Statement of the Government of Japan attesting that certain conduct challenged by respondents was mandated by the Japanese Government,[1] respondents now go so far as to suggest that

---

[1] Respondents characterize the Statement of the Japanese Government as a "note that three third-echelon employees of the Japanese Ministry of International Trade and Industry ("MITI") caused to be sent to the clerk of the District Court in 1975 . . ." (Opp. Br. 22), while the fact is that the "note" was twice officially transmitted to the District Court by the Embassy of Japan, once through the Department of State and once directly. (Pet. App. 6a-14a).

this Court not even permit the Government of Japan to make its views known in a brief amicus curiae.

There is no reasonable basis for denying the Government of Japan the right to address this Honorable Court.[2] The accusatory language and intemperate tone of respondents' supplemental brief—"Japan seeks to raise a false issue" (Supp. Br. 6), "[the Japanese Government Note Verbale is an] improper attempt to intrude into the judicial processes of the United States" (Supp. Br. 2, n.2)—plainly demonstrates that unless the courts adhere to the rule established by this Court in *United States v. Pink*, 315 U.S. 203, 220 (1942), they invite the very type of contentious disrespect for the statements and laws of a friendly foreign nation that the act of state doctrine was designed to prevent. That disrespect inevitably causes international tensions, and the views of the Government of Japan, as expressed in its amicus brief, are the best indication that those international tensions are present in this case. The amicus brief of the Japanese Government, explaining the effect of its own sovereign acts, should not only be received by this Court but should be given the same thoughtful consideration that the United States would expect to be given to its own formal representations in the courts of a foreign nation when its interests are involved.

---

[2] Indeed, in 1978 this Court requested that foreign governments file briefs amicus curiae, when they wish to make their views known to the Court. *See* Department of State Circular Diplomatic Note to Chiefs of Mission in Washington, August 17, 1978, and Letter from the Solicitor General of the United States to the Legal Advisor of the Department of State, May 2, 1978, Dept. of State File Nos. P78 0154-2042 and P78 0185-0044.

2. Respondents' argument that "[t]he Court of Appeals' decision did not contradict any assertion contained in the MITI note" (Supp. Br. 3) is inconsistent with both the language and the necessary effect of the opinion below. As forcefully pointed out in the amicus curiae brief of the Japanese Government, the Court of Appeals failed to accept as conclusive the representation of the Japanese Government that the minimum price agreements and the JMEA regulations (of which the "five-company rule" was a part) were mandated by the Government of Japan pursuant to its trade policy. These rulings permit a factfinder to question the veracity of the Statement of the Government of Japan and clearly warrant review by this Court.

3. Respondents' claim that the Government of Japan "suggests that this case involves only" the activity of the Japanese petitioners within Japan is both disingenuous and misleading. (Supp. Br. 4). The amicus curiae brief of the Japanese Government, as well as the 1975 Statement and the 1984 Note Verbale, dealt exclusively with Japanese law, the sovereign acts of the Government of Japan regulating Japanese exports and the effect of those sovereign acts upon the Japanese petitioners. The Government of Japan has never "suggested" that "this case" involves only those matters or that the act of state and sovereign compulsion doctrines apply to anything other than government-mandated conduct controlling exports *from Japan*. What the Government of Japan and petitioners object to is the express holding of the Court of Appeals that *the Japanese Government-mandated export controls* could be a "feature" of an actionable antitrust conspiracy. (Pet. App. 167a-168a).

The Japanese Government, no less than the United States Government, is entitled to restrain and control the exportation of goods from its own territory. It is significant in this connection that the Government of the United States, in the exercise of its own sovereignty, controls the commercial activity of United States corporations and individuals with regard to exports from the United States. Unlike the Japanese Government export controls at issue in this case, export controls imposed by the United States have regulated commercial activity taking place completely outside United States territory.[3] There can be no question that a sovereign nation has the right to control the export activity of its own nationals.

4. Respondent's supplemental brief similarly mischaracterizes the brief of the Government of Japan as suggesting that only conduct compelled by the Japanese Government is involved in "this case." (Supp. Br. 4). Respondents argue that the Japanese petitioners have engaged in "other acts, as part of a broader scheme" (Supp. Br. 5) which were not compelled by their government and which are not, therefore, immune from antitrust liability. The amicus brief of the Government of Japan does not deal with such "other acts." Rather, the Japanese Government and petitioners contend that the act of state and sovereign compulsion doctrines apply only to the export control agreements and regulations mandated by the Japanese Government and that such immunized conduct "is not illegal, either standing alone *or as part of a broader scheme* itself violative of the Sherman Act." *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965) (emphasis added).

---

[3] The United States exercises mandatory control over United States exports to achieve foreign policy objectives. *See, e.g.*, section 6, Export Administration Act of 1979, as amended, 50 U.S.C. app. § 2405. This power has been used to control the activities of foreign-based subsidiaries and licensees of United States companies. *See, e.g.*, 15 C.F.R. § 385.2(c), revised, 47 *Fed. Reg.* 27250 (1982), rescinded, 47 *Fed. Reg.* 51858 (1982); *see also* Note, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. Pa. L. Rev. 355, 360, 369 (1984) (United States mandatory export regulation reaches not only "the export activities of American citizens and corporations, but also the export activities of foreign corporations owned or controlled by United States shareholders, including foreign subsidiaries of American corporations.").

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: July 23, 1984

Respectfully submitted,

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
KENNETH STEINTHAL
MARTIN S. HYMAN
MINDY J. SPECTOR
ELIZABETH A. JAFFE

WEIL GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
Tel. (212) 310-8000

RAYMOND T. CULLEN

MORGAN LEWIS & BOCKIUS
120 South Broad Street
Philadelphia, Pa. 19109
Tel.: (215) 481-9500

Attorneys for Matsushita Electric Industrial Co., Ltd.; Matsushita Electric Corporation of America; Matsushita Electric Trading Co.; and Matsushita Electronics Corporation

DONALD J. ZOELLER
Counsel of Record

JOHN L. ALTIERI, JR.
ROBERT A. CANTOR
HAROLD G. LEVISON
ROBERT A. JAFFE
SHELLEY B. O'NEILL

MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
Tel.: (212) 510-7000

PATRICK T. RYAN

DRINKER BIDDLE & REATH
1100 Phila. Nat. Bank Bldg.
Philadelphia, Pa. 19107
Tel.: (215) 925-2700

Attorneys for Toshiba Corporation and Toshiba America, Inc.

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
STEPHEN P. MURPHY
PAUL J. PANTANO, JR.

METZGER SHADYAC & SCHWARZ
1275 K Street, N.W.
Washington, D.C. 20005
Tel.: (202) 289-4520

H. WILLIAM TANAKA
LAWRENCE R. WALDERS
B. JENKINS MIDDLETON

TANAKA WALDERS & RITGER
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Tel.: (202) 223-1670

CHARLES J. BLOOM

CONRAD KERR BLOOM HITCHNER & O'BRIEN, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Hitachi, Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; and Hitachi Sales Corporation of America

JIRO MURASE
PETER J. GARTLAND
GENE Y. MATSUO
PETER A. DANKIN
LANCE GOTTHOFFER

WENDER MURASE & WHITE
400 Park Avenue
New York, N.Y. 10022
Tel.: (212) 832-3333

MATTHEW J. BRODERICK

DECHERT PRICE & RHOADS
1500 Market Street
Philadelphia, Pa. 19102
Tel.: (215) 972-3400

Attorneys for Sharp Corporation and Sharp Electronics Corporation

HOKEN S. SEKI
GEORGE E. JARVIS
DAVID A. DOPSOVIC

SEKI & JARVIS
520 Madison Avenue
New York, N.Y. 10022
Tel.: (212) 759-2303

HENRY T. REATH
FRANK A. LUCHAK

DUANE MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, Pa. 19102
Tel.: (215) 544-6300

JOHN T. DOLAN
ARNOLD B. CALMANN

CRUMMY, DEL DEO, DOLAN & PURCELL
Gateway One
Newark, N.J. 07102
Tel.: (201) 522-2235

DONALD F. TURNER

WILMER CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 872-6000

Attorneys for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

CHARLES F. SCHIRMEISTER
PETER C. WILLIAMS

REID & PRIEST
40 West 57th Street
New York, N.Y. 10019
Tel.: (212) 603-2000

STEPHEN W. ARMSTRONG

MONTGOMERY MCCRAKEN WALKER & RHOADS
Three Parkway
Philadelphia, Pa. 19102
Tel.: (215) 563-0650

Attorneys for Mitsubishi Corporation and Mitsubishi International Corporation

PATRICK H. SULLIVAN
JAMES S. MORRIS
KEVIN R. KEATING
MICHAEL S. PRESS

WHITMAN & RANSOM
522 Fifth Avenue
New York, N.Y. 10036
Tel.: (212) 575-5800

CHARLES J. BLOOM

CONRAD KERR BLOOM HITCHNER & O'BRIEN, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Sanyo Electric Co., Ltd.; Sanyo Electric Trading Co., Ltd.; Sanyo Electric, Inc.; and Sanyo Manufacturing Corporation

(11)

No. 83-2004

IN THE
Supreme Court of the United States
October Term, 1983

MATSUSHITA ELECTRICAL INDUSTRIAL
CO., LTD., et al.,
Petitioners

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

**SUPPLEMENTAL BRIEF OF RESPONDENTS
IN RESPONSE TO THE BRIEF
OF THE UNITED STATES AS AMICUS CURIAE**

Edwin P. Rome
(Counsel of Record)
William H. Roberts
Arnold I. Kalman
BLANK, ROME, COMISKY &
MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
*Attorneys for Respondents,
Zenith Radio Corporation and
National Union Electric
Corporation*

Of Counsel:
Philip J. Curtis
John Borst, Jr.

Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

19pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

No. 83-2004

IN THE

Supreme Court of the United States

October Term, 1983

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD., et al.,

Petitioners

v.

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION,

Respondents

SUPPLEMENTAL BRIEF OF RESPONDENTS IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

Respondents file this supplemental brief in reply to the Government's brief *amicus curiae*.

I. The Government's brief is based on two serious misinterpretations of the Court of Appeals' opinions in these cases: first, that the Court of Appeals adopted a standard of sufficiency of conspiracy evidence that conflicts with *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1978), and, second, that the Court of Appeals held that private conduct compelled by a foreign government can be a "predicate for liability."

(A) The Court of Appeals' opinion in these cases — where the Government concedes there is *direct* evidence of petitioners' conspiracy (Brief at 9)—clearly does not "conflict" with *Cities Service*, in which, as the Government also concedes, the plaintiff sought to prove conspiracy "*solely on the basis of circumstantial evidence in the form of parallel conduct.*" (Brief at 8).

(B) The Court of Appeals simply never held that private conduct compelled by a foreign government can be a "predicate for liability."

These misinterpretations undercut the Government's suggestion that "plenary review" of the antitrust segment[1] of these cases might be appropriate at the interlocutory stage.

II. The Government refers to trumped-up, identically-phrased expressions of alleged "concern" from several foreign governments, all based on the identical misinterpretation and prepared by curious coincidence in the same two-week period in November, 1984, *one year* after the Court of Appeals' decision and after this Court invited the Government to express its views. That the Government would seriously rely on such obviously orchestrated material speaks for itself.

---

1. The Court of Appeals entered two judgments on December 5, 1983--one with respect to the antitrust segment of the cases (*"the Antitrust Opinion"*) and one with respect to respondents' separate claims under the Antidumping Act of 1916 (*"the Antidumping Opinion"*). (224a-228a and 229a-233a). *See*, Respondents' Brief in Opposition at 9-10, 29-30. The Government takes "no position on the correctness" of the Court of Appeals' conclusion that petitioners were not entitled to summary judgment on respondents' Antidumping Act claims. (Brief at 11, n.12). Petitioners presented no question for review from the separate Antidumpting Act judgment in the Court of Appeals.

The Government acknowledges, therefore, that respondents' claims under the Antidumping Act of 1916, 15 U.S.C. 72, which include claims of petitioners' *unilateral* violation of that Act, must proceed to trial in any event when it states (Brief at 7, n.7) that, at best, "guidance from this Court concerning the evaluation of evidence of the alleged antitrust conspiracy would assist on remand in dealing further with the issue of specific intent in connection with the antidumping claims." Since the record contains abundant evidence of petitioners' fraud, guilty knowledge, and other evidence of specific intent that satisfies that intent requirement, independent of the conspiracy evidence, respondents' individual antidumping claims would be unaffected by any ruling on the conspiracy issue and would proceed to trial.

III. The Government essentially admits that this litigation is *sui generis*,[2] and the Court of Appeals' decision has no important implications for either antitrust policy or foreign trade policy.

(A) If the sufficiency of the conspiracy evidence in these cases ever warranted review by this Court, it can be more properly and adequately reviewed *after* a trial. No important antitrust policy requires interlocutory review in this Court. The Government's concern that lawful competition might be discouraged by the Court of Appeals' decision is also unwarranted. Foreign competitors who, unlike petitioners, compete lawfully and do not belong to predatory foreign price-fixing cartels that fix prices in closed foreign markets abroad, and engage in collusive dumping in the United States, and in systematic customs fraud schemes to shield their dumping from detection by the United States Customs Service, have no reason to fear United States law. The Government's far-fetched prediction that the Third Circuit's reversal of summary judgment in its Antitrust Opinion will somehow retard judicial use of summary judgment procedures in antitrust cases is a ridiculous afterthought that involves no antitrust policy issue of practical significance. The Government has cited not a single case to support its prediction. If anything, the Court of Appeals' Antitrust Opinion streamlines summary judgment procedures in complex cases.[3]

---

2. The Government rejects (by declining to endorse) petitioners' claim of a circuit "conflict" on any question of law and concedes that the antitrust claims in these cases involve no commonly recurring fact pattern such that a decision by this Court might provide guidance to the lower courts in deciding other similar cases.

3. The Court of Appeals *approved* the summary judgment procedure the district court devised — a procedure which, combined with preclusive pretrial order procedures, transforms Rule 56 summary judgment motions into the functional equivalent of Rule 50(a) directed verdict motions by relieving antitrust defendants of their normal F.R.Civ.P. 56(c) burden of producing conclusive evidence by affidavit to rebut the charges of a complaint and by permitting the trial court to test the sufficiency of a private antitrust plaintiff's proofs prior to a trial. (64a).

(B) The Government's suggestion that this Court make a premature ruling on petitioners' false issue of "foreign sovereign compulsion" on this interlocutory record is unsound. Petitioners chose not to press that issue in the Court of Appeals, telling that Court that it was "*obviously of no importance on this appeal*."[4] The issue was invented only in petitioners' recent frantic search for an issue that sounded like it might be something important. Having been elaborately importuned *seven months* ago by these same Japanese petitioners and by representatives from Japan,[5] the Government nonetheless refused at that time to become involved in any of this business and *declined* to confer any patina of certworthiness by supporting the petition. The Government offers no reason why what was unimportant then has any more "practical importance" now.

IV. The Government's substantially different Questions do not alter the fact that review of the sufficiency of the evidence below necessarily entails examination of a substantial factual record.[6] The Court of Appeals devoted *fourteen months* to that task — a project the Government evidently has not even undertaken itself. There is no good reason why this Court should now resift through the forty-odd volumes of evidence simply to second-guess Chief Judge

4. Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 22, 1982, at 88-89.

5. In May and June, 1984, the Antitrust Division met with peititioners' counsel and with some representatives from Japan who urged the Antitrust Division to support the petition for certiorari. The Government received the May 29, 1984 Note Verbale from Japan at that time. *See*, Brief Amicus Curiae of the Government of Japan at 1a. Petitioners' roadshow also played at the State Department. Notwithstanding all this prodding and inducement, the Government properly elected not to support the petition at that time.

6. As petitioners' own counsel told the Court of Appeals: "*You are going to have to look at the record, Your Honor. We took months doing it and the lower Court took months doing it. I don't know how this court has the time to do it*." (Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 12, 1982, at 97-98).

Seitz and Circuit Judges Gibbons and Meskill, who unanimously resolved these purely factual issues against petitioners.

I. THERE IS NO "CONFLICT" WITH *CITIES SERVICE*.

1. Respondents' complaints charge a *single* continuing conspiracy to establish a differential between the prices of petitioners' consumer electronic products in the Japanese market (a market which for all practical purposes is closed to competition from foreign producers of television receivers, including respondents and other American television manufacturers)[7] and the prices of petitioners' television and other consumer electronic products imported and sold within the United States--a conspiracy petitioners designed and carried out for the ultimate purpose of driving down and holding down United States price levels to put their United States competitors out of business and thereby to monopolize United States trade and commerce in these products. Petitioners' price levels in the closed Japanese market, their sharply lower United States import price levels, and their collusion in establishing and maintaining the large disparity between these price levels, are integral components of the single Sherman Act conspiracy charged in these cases.

2. The Government concedes there is *direct* evidence[8]

7. The Court of Appeals pointed to the extensive evidence barriers to competition by American or other non-Japanese manufacturers in the Japanese home market. (170a).

8. This evidence includes even an admission to that effect during oral argument by petitioners' liaison counsel in the Court of Appeals (174a). It also includes signed admissions of some of petitioners' executives, business diaries, memoranda and minutes of meetings and much other direct evidence of a conclusive nature concerning petitioners' secret collaboration on pricing, production, and shipment of consumer electronic products, all of which the Court of Appeals held to be admissible. Other highly probative documentary evidence includes a memorandum of a December 1966 meeting of petitioners' "Statistics Committee" of the Electronic Industries Association of Japan, which is reproduced in translation in the addendum to this brief. (A-1 to A-3).

of petitioners' horizontal[9] and vertical price-fixing activities in Japan and circumstantial evidence of United States import price collusion, but asserts that the Court of Appeals' unanimous decision is "inconsistent" with *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968). In *Cities Service*, as the Government itself realizes, the Court spoke only of the sufficiency of evidence "to prove the existence of an anticompetitive conspiracy *solely on the basis of circumstantial evidence in the form of parallel conduct*." (Brief at 8). This plainly is not such a case. The alleged "conflict" with *Cities Service* is manufactured and obviously does not exist.

3. The Government attempts to stretch *Cities Service* into a stringent standard to be applied even in *direct evidence* cases,[10] but to do so the Government must outrageously distort the Court of Appeals' Antitrust Opinion and the record. To push this square evidentiary peg into its round conceptual hole, the Government is forced to dismember petitioners' conspiracy by artificially constructing *two* "conspiracies"—a "Japan-side conspiracy" and a separate "United States-side conspiracy." Ignoring the direct evidence, the Government apparently suggests that the circumstantial evidence of the "United States-side conspiracy" must be viewed *separately*, and that *separately* it should satisfy some unarticulated but more exacting "standard" which the Government claims to find in *Cities Service*, even though in that case conspiracy was predicated, as the Government says, "*solely on the basis of circumstantial evidence in the form of parallel conduct*."[11]

9. The Government repeatedly mischaracterizes the price-related direct evidence as evidence only of "*resale price maintenance*." (Brief at 3, 9, 10). There is extensive record evidence of petitioners' *horizontal* price-fixing involving *ex-factory* prices.

10. The absurdity of the Government's suggestion is nowhere more starkly apparent than in its restatement of petitioners' first Question Presented.

11. Besides ignoring the direct evidence, the Government also incorrectly assumes that the only circumstantial evidence of its artificially-constructed "United States-side conspiracy" is evidence of "parallel conduct." The Government overlooks the extensive evidence of *motive* and circumstantial evidence *other than* the "parallel conduct" evidence. The Court of Appeals catalogued (169a-172a) many other types of evidence, which it summarized as showing a "set of economic circumstances providing a strong incentive for horizontal price stabilization, the feasibility of such a program, an opportunity to meet for the purpose of agreeing on it, and pricing activity in the export market consistent with the existence of such an agreement". (172a). The Court then considered the combination of this evidence and the *direct evidence* of petitioners' collusion on Japanese market prices (173a), as well as considerable evidence of collusion on export pricing (176a-179a), including evidence which, together with the other evidence, "would permit a fact finder *to infer a motive to sell at prices low enough to eliminate competition in the United States market by American firms*" (177a), *and evidence that petitioners had a motive "for entering a conspiracy to sell at low prices."* (177a).

As the Court of Appeals realized, the evidence of motive and intent, the many other kinds of circumstantial evidence (besides parallel acts), and the abundant direct evidence of conspiracy removed this case from the class of antitrust conspiracy cases where liability is predicated solely on the basis of otherwise ambiguous circumstantial evidence in the form of "parallel conduct". The direct and circumstantial evidence here unambiguously established petitioners' conspiracy.

4. The Government's dismemberment of petitioners' conspiracy violates the basic teaching of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), that "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." 370 U.S. at 699. The Court of Appeals properly viewed the conspiracy evidence as a whole, and stated that "[h]ere, direct and circumstantial evidence may validly be considered to cumulate and reinforce with respect to the ultimate facts in issue." (165a). In doing so, it explicitly followed *Continental Ore*. (166a).

II. THE COURT OF APPEALS NEVER REACHED THE "SOVEREIGN COMPULSION ISSUE".

5. If any important foreign policy implications existed at the interlocutory stage of these cases, the Government

surely would have brought them to the Court's attention seven months ago, instead of rejecting the opportunity to do so. The Government's hypothetical rhetoric[12] concerning this bogus issue now has a hollow ring.

6. The Court of Appeals' opinions contain no holding that conduct compelled by a foreign government can be "a possible predicate for liability" under United States antitrust law. What petitioners once claimed they were "compelled" to do is forming a cartel to fix "minimum prices" at which certain kinds of television receivers were to be imported into the United States *during the 1960s and early 1970s*. Petitioners did not contend that they were compelled to sell in the United States *at* the "minimum prices"; by definition petitioners were free to sell at any United States import prices *above* those "minimum prices." They claimed only that they were "compelled" not to sell *below* those prices. Nor did petitioners ever contend they were "compelled" to sell their television receivers in the Japanese market at prices that were *higher* than the prices at which they sold their television receivers in the United States, *i.e.*, to dump. But petitioners did sell television receivers at United States import prices below the "minimum prices," and they colluded with one another and with certain large United States importers of these goods uniformly and falsely to report to U.S. Customs those "minimum prices" as the transaction prices, instead of the *actual lower prices*. They did this to conceal the fact that they were dumping, thus making it possible for them acting in concert to continue to do so.

The Government acknowledges that the Court of Appeals could appropriately "consider the existence of compelled conduct as evidence that some other alleged event has taken place" (Brief at 18, n.23), but incorrectly asserts that the Court of Appeals "relied on the check price agreement as one of the crucial pieces of evidence of the alleged conspiracy that would preclude the grant of summary judgment." (Brief at 5). There is no such holding by the Court of Appeals. On the contrary, the Court of Appeals explicitly "*assume[d]* without deciding that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of" the Sherman Act (188a), and "*assume[d]* that the minimum price agreement, of which all the Japanese defendants were members, was mandated by the Ministry of International Trade and Industry." (220a).[13] The Court said that "[p]laintiffs offer this evidence to show that *defendants used the prices in that agreement as reference prices*." (220a) (emphasis added). The Court of Appeals thus referred to petitioners' written "minimum price" agreements as evidence that "some other alleged event has taken place"—a use the Government specifically acknowledges to be entirely appropriate. (Brief at 18 n.23).

Properly understood, neither of the Court of Appeals' Opinions involves any question that could conceivably have a bearing on contemporary trade issues.

III. THE ADMISSIBLE EXPERT OPINION EVIDENCE OF CONSPIRACY INDEPENDENTLY SUFFICES.

7. The Government takes no position on the admissibility of respondents' expert economic opinion evidence. (Brief at 6, n.6). But respondents' principal economic experts summarized under oath their opinions (which the

12. The hypothetical air of the Government's observations on this score is reflected in the hypothetical terms in which it couches them, *e.g.*, its suggestion that, because of uncertainty about the meaning of the Court of Appeals' Antitrust Opinion denying summary judgment, Japan and other foreign governments "*may*" be reluctant to accommodate proposals by the United States to resolve trade controversies by voluntary restraint agreements, and by its unsupported speculation that such a response "*could*" deprive the United States of a useful tool in international trade disputes. The explanation for this cagey terminology lies in the fact that intervening reality has already refuted this hypothesis. The Government has recently successfully concluded "voluntary restraint" arrangements with the Western European countries and Japan involving steel imports. The Court of Appeals' decision was no impediment to those arrangements.

13. As the Government concedes. See Brief at 5, 16.

Court of Appeals' held would be admissible at trial) that petitioners conspired. The expert opinion evidence of conspiracy sufficed by itself to defeat petitioners' summary judgment motions. Review by this Court limited to the first two questions of the petition could not alter the Court of Appeals' separate antitrust judgment below.

CONCLUSION

Review of the fact-bound antitrust segment of this *sui generis* litigation would have no practical significance beyond these cases, which present no clear-cut or frequently recurring legal issue for the Court to decide. Piecemeal interlocutory review of the antitrust segment would not involve respondents' distinct Antidumping Act claims (or, for that matter, petitioners' multimillion-dollar counterclaims pending against Zenith in the district court), which must be tried in any event, as the Government acknowledges. (Brief at 5 n.5). The trial of the antidumping claims should not be further delayed by premature review of the interlocutory rulings on the Sherman Act conspiracy segment of the cases.

The petition for certiorari should be denied.

Respectfully submitted,

Edwin P. Rome
(Counsel of Record)
William H. Roberts
Arnold I. Kalman
BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
Attorneys for Respondents, Zenith Radio Corporation and National Union Electric Corporation

Of Counsel:
Philip J. Curtis
John Borst, Jr.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

ADDENDUM

Confidential to
Outside the Company

(Han-Sui) Ma-Ko. 1-143
[Sales Promotion]

TO: (Ko-Kei) Cho [Chief, the Plant Accountants' Section]

January 6, 1967

On the Matter of Reporting of Production and Shipments in value of Color Television Sets for the MITI Current Production Statistics

(Han-Sui) Ma.
[Sales Promotion]

Chief Ma. Section (Han-Sui) [Sales Promotion]	(Han-Sui) Ma. [Sales Promotion]
Jan. 6, 1967	Jan. 6, 1967
Shiokawa	Oguri

Regarding the above-captioned matter, the following agreement was reached at the Statistics Committee of the Electronic Industries Association [of Japan] on December 26 of last year with respect to the report to the Ministry of International Trade and Industry of the actual results of color TV sets; since we wish to implement the agreement beginning with the shipment for January 1967, your cooperation is cordially requested;

TO WIT:

1. The contents of the agreement at the Statistics Committee of the Electronic Industries Association.

Although no datum is presently available which shows the domestic shipment in value of color television sets, it can be obtained by subtracting the Customs Statistics of the

Ministry of Finance from the Current Production Statistics of the Ministry of International Trade and Industry. According to this, the unit price will approximately amount to 150,000 yen, and the export unit price will show that the domestic unit price is higher than the export unit price by a factor of 2.3 or more. This, in turn, may give rise to a misunderstanding that the domestic price is too high or may engender a suspicion overseas that Japan is engaged in dumping. Therefore, it was agreed that when the report is to be filed with the MITI the amount obtained by subtracting the advertising expenses, the service expenses and the rebates from the domestic shipment in value be reported, thereby narrowing the price gap between the Current Production Statistics and the Customs Statistics.

2. An Implementation Guideline for the Reporting to the Ministry of International Trade and Industry.

Subtraction of the advertising expenses, the service expenses and the rebates will result in a price which is lower than the current invoice price by 13%. However, a precipitous drop by as much as 13% would be problematical; therefore, the implementation will be made as follows:

Beginning with the Shipment January 1967	Reduce the Domestic for Shipment in value by 4%
For the Shipment for February 1967	Reduce the Same by 8%
For the Shipment for March 1967	Reduce the Same by 8%

Thereafter, the reporting of the value obtained by sub tracting 13% from the domestic shipment in value will be continued. In the event that the Ministry of International Trade and Industry inquires about the decrease in the unit price as a consequence of implementing the above, kindly reply that the advertising expenses, the rebates and the service expenses have been subtracted in accordance with the reporting provisions for the MITI Statistics.

END.

For Office Use V192 Copies sent to: (Shu-1) Cho, (Ka-Ji) Ka Gomi Kacho [Chief] [Division] [Section Chief] [Illegible]

Japan Victor Co., Ltd.

No. 83-2004 (12)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

Petitioners,

—v.—

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 22.6

IRA M. MILLSTEIN
A. PAUL VICTOR
WEIL GOTSHAL & MANGES
New York, New York
Counsel for the Matsushita Petitioners

CARL W. SCHWARZ
METZGER, SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.
Counsel for the MELCO Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, New York
Counsel for the Mitsubishi Petitioners

DONALD J. ZOELLER
Counsel of Record
MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7000
Counsel for the Toshiba Petitioners

PETER J. GARTLAND
WENDER MURASE & WHITE
New York, New York
Counsel for the Sharp Petitioners

JAMES S. MORRIS
WHITMAN & RANSOM
New York, New York
Counsel for the Sanyo Petitioners

January 23, 1985

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,

Petitioners,

—v.—

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 22.6

On January 4, 1985, the United States, pursuant to this Court's request for its views, filed a brief amicus curiae in support of the petition. That brief calls to the Court's attention vital considerations of antitrust and foreign trade policy which warrant the granting of certiorari in this case. On January 14, 1985, respondents submitted a supplemental brief in response to the Government's brief. Respondents' supplemental brief so mischaracterizes and misrepresents the views of the United States that petitioners are compelled to file their own response to the Government's brief, pursuant to Rule 22.6 of the Rules of this Court.

1. The brief for the United States plainly states that, among other things, the Court of Appeals' decision: (i) "has significant practical implications for both antitrust policy and the conduct of our nation's foreign trade policy" (U.S. Gov. Br. 6); (ii) "may tend to discourage foreign companies from engaging in vigorous price competition in the United States" (*id.*); (iii) "is likely to discourage district courts from resolving complex antitrust claims on motions for summary judgment in appropriate cases" (*id.*); (iv) "threatens to affect adversely the foreign policy of the United States" (*id.*); and (v) was wrongly decided. (*id.* at 6-7). Respondents' assertion that "[t]he Government essentially admits that this litigation is *sui generis*," and that "the Court of Appeals' decision has no important implications for either antitrust policy or foreign trade policy" (Resp. Supp. Br. 3.), is therefore demonstrably false.

2. The brief for the United States informs this Court that the United States Government, as well as seven foreign sovereigns, believe that the Court of Appeals' decision "threatens to do serious damage to the foreign trade relations of the United States." (U.S. Gov. Br. 18). In reply, respondents assert that the views of the United States on this issue are "bogus" (Resp. Supp. Br. 8), and that the official diplomatic protests of the Court of Appeals' decision by seven major trading partners of the United States are "trumped-up" and "orchestrated." (Resp. Supp. Br. 2.). Respondents have thus attempted to substitute rhetorical excesses and name calling for substantive analysis of the foreign policy implications of the Court of Appeals' decision, a subject on which the views of the Executive Branch should be accepted as authoritative. These ad hominem attacks upon the Government of the United States, and seven of its most important allies, are but another example of the implausible accusations which have been the core of respondents' conspiracy claims from the very beginning of this lawsuit. They should be rejected out of hand.

3. The brief for the United States correctly recognizes that the "direct" evidence relied upon by the Court of Appeals as a basis for dispensing with the *Cities Service* inference standard

"was 'direct' *only* with respect to agreements concerning resale prices in Japan and use of check prices (*i.e.*, minimum prices) and the five-company rule for exports to the United States." (U.S. Gov. Br. 9-10) (emphasis added). As the United States pointed out, such "agreements": (a) "did not have any necessary tendency to prove the alleged agreement to charge low, predatory prices in the United States, which the court of appeals found that respondents were required to prove in order to establish antitrust injury;" (b) at best, would constitute "circumstantial evidence" of this alleged conspiracy; and (c) thus "[do] not obviate the need for the central inquiry required by *Cities Service*"—whether the conduct alleged "was more reasonably viewed as the result of independent business decisions by petitioners than as the result of collusion." (*id.* at 10).[1]

There is thus no truth to respondents' contention that "the Government concedes there is *direct* evidence of petitioners' conspiracy" and that therefore the *Cities Service* inference standard should not be applied. (Resp. Supp. Br. 1, 5-6). Indeed, the so-called "direct" evidence relied upon by the Court of Appeals was not even circumstantial evidence of the "low price" export conspiracy that was alleged: the minimum check prices and five-company rule necessarily could have led only to higher export prices, while the two years of alleged "high" price stabilization in Japan was never shown to have *any* connection to the alleged agreement to charge predatory export prices to the United States. (U.S. Gov. Br. 10 and n.10; Pet. 14).

Respondents' repeated assertion that this analysis improperly "dismembers" their alleged unitary conspiracy theory

---

1 Respondents contend that their "direct" evidence of conduct in Japan related not just to resale prices, but also to Japanese "ex-factory prices". (Resp. Supp. Br. 6 n.9). Even if such allegations were true, such behavior could, as the Court of Appeals recognized, at best serve *only* as "circumstantial evidence of [the alleged] broader conspiracy" to fix artificially low export prices to the United States. (Pet. App. 165a).

(Resp. Supp. Br. 6) is a non-sequitur. The conspiracy that the Court of Appeals held actionable by respondents under the United States antitrust laws is the alleged conspiracy to fix, not just high prices in Japan (which would not be actionable in the *United States*), nor *minimum* export prices (which would not be actionable by competitors like respondents), but predatory and artificially low export prices. There being no "direct" evidence of this, the only actionable aspect of the alleged unitary conspiracy, the *Cities Service* inference standard must be applied. (U.S. Gov. Br. 10-13).

4. The brief for the United States correctly points out that the petition raises pure questions of law which require this Court "to decide only whether the court of appeals failed to apply the proper legal standard in evaluating the evidence of conspiracy." (U.S. Gov. Br. 13 n.16). There is no truth to respondents' contention that review by this Court of the Court of Appeals' decision "necessarily" would entail examination of the "substantial factual record" below. (Resp. Supp. Br. 4).

5. The brief for the United States correctly notes that the Government of Japan has stated that it compelled two of the critical features relied upon by the Court of Appeals as a basis for its holding that a trier of fact can infer an actionable antitrust conspiracy (*i.e.*, the minimum price arrangements and five-company rule). (U.S. Gov. Br. 5, 14-20). Thus, contrary to respondents' contention (Resp. Supp. Br. 8), the Court of Appeals' failure to afford dispositive effect to these Japanese Government representations amounts to a holding that governmentally-compelled export controls can be a possible "predicate for liability" under United States antitrust law. (U.S. Gov. Br. 14-20).

6. Although the United States does not take an official position on respondents' Antidumping Act claims (U.S. Gov. Br. 11 n.12), it implicitly recognizes that the Court of Appeals' erroneous conspiracy analysis was the only basis for its finding of a genuine issue of specific predatory intent under the Antidumping Act (U.S. Gov. Br. 7 n.7)—a fact that renders

the Court of Appeals' Antidumping Act decision completely dependent upon its antitrust judgment. There is thus no truth to respondents' assertion that "the Government acknowledges . . . that respondents' claims under the Antidumping Act of 1916 . . . must proceed to trial *in any event*. . . ." (Resp. Supp. Br. 2 n.1) (emphasis added). To the contrary, the language from the Government's amicus brief quoted by respondents—that guidance by this Court on the conspiracy issue "would assist on remand in dealing further with the issue of specific intent in connection with the antidumping claims" (U.S. Gov. Br. 7 n.7)—refers only to a possible remand to the Court of Appeals *after a reversal* of its judgments by this Court (as is made clear from the text of the Government's brief to which this language is a footnote).[2]

7. The brief for the United States correctly rejects respondents' contention that "[r]eview by this Court limited to the first two questions of the petition could not alter the Court of Appeals' separate antitrust judgment below" because the "expert opinion evidence of conspiracy sufficed by itself to defeat petitioners' summary judgment motions." (Resp. Supp. Br. 10). Thus, the United States expressed the view that if, as it is urging, this Court should reverse the Court of Appeals' failure to apply the *Cities Service* inference standard, it "would be proper . . . to conclude that the district court's grant of summary judgment in favor of petitioners on the antitrust claims should be affirmed." (U.S. Gov. Br. 7). Respondents' contrary assertion, that expert testimony "that petitioners conspired" can by itself defeat summary judgment, even if

---

2 Moreover, as the District Court has pointed out, respondents have not claimed, or attempted to prove, injury or damages from any alleged *individual*, non-conspiratorial conduct by petitioners, whether in violation of the 1916 Antidumping Act or otherwise. (Pet. App. 653a-654a n.396). Indeed, Zenith's Chairman, John Nevin, expressly testified that Zenith was not claiming any such damages in this case and not pursuing any individual dumping claims. (*id.*). Accordingly, contrary to the contention of respondents' counsel, no individual Antidumping Act claims remain to be tried if the antitrust judgment of the Court of Appeals is reversed.

respondents' conspiracy evidence fails to satisfy the *Cities Service* inference standard (Resp. Supp. Br. 10), would, if accepted, nullify all of this Court's well-established limitations on the inference drawing process. This Court should grant certiorari on Question 3 of the petition to affirm that this is not the law. *See United States* v. *Various Slot Machines*, 658 F.2d 697, 700-01 (9th Cir. 1981); *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977).[3]

8. Federal trial courts must not be deprived of the case management tools necessary to terminate the type of baseless litigation that this fourteen year old case represents. This Court should grant certiorari in order to: (i) affirm that antitrust plaintiffs seeking to infer a conspiracy may not evade this Court's *Cities Service* inference standard, especially as it applies to the type of implausible conspiracy allegations advanced by respondents in this case; (ii) apply the sovereign compulsion and act of state doctrines to prevent the serious encroachment upon United States foreign trade relations that has been attested to by the United States Government and seven of its major trading partners; and (iii) affirm that expert testimony based upon false and unsupported assumptions is not sufficient to defeat summary judgment in an appropriate case.

---

3 While each of the Questions presented by the petition provide an independent basis for granting certiorari and reversing the judgments of the Court of Appeals, it is respectfully submitted that this Court should grant certiorari on all of the Questions presented by the petition, despite the neutral position of the United States with respect to granting certiorari on Question 3. (U.S. Gov. Br. 6 n.6). Question 3 raises issues of substantial concern to the administration of justice, and to the ability of federal trial courts to use summary judgment as a case management tool in appropriate cases involving expert testimony, which in and of themselves warrant granting certiorari on this point.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: January 23, 1985

Respectfully submitted,

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
KENNETH STEINTHAL
MARTIN S. HYMAN
MINDY J. SPECTOR
ELIZABETH A. JAFFE

WEIL GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
Tel.: (212) 310-8000

RAYMOND T. CULLEN

MORGAN LEWIS & BOCKIUS
120 South Broad Street
Philadelphia, Pa. 19109
Tel.: (215) 481-9500

Attorneys for Matsushita Electric Industrial Co., Ltd.; Matsushita Electric Corporation of America; Matsushita Electric Trading Co.; and Matsushita Electronics Corporation

DONALD J. ZOELLER
Counsel of Record

JOHN L. ALTIERI, JR.
ROBERT A. CANTOR
HAROLD G. LEVISON
ROBERT A. JAFFE
SHELLEY B. O'NEILL

MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
Tel.: (212) 510-7000

PATRICK T. RYAN

DRINKER BIDDLE & REATH
1100 Phila. Nat. Bank Bldg.
Philadelphia, Pa. 19107
Tel.: (215) 925-2700

Attorneys for Toshiba Corporation and Toshiba America, Inc.

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
STEPHEN P. MURPHY
PAUL J. PANTANO, JR.

METZGER SHADYAC & SCHWARZ
1275 K Street, N.W.
Washington, D.C. 20005
Tel.: (202) 289-4520

H. WILLIAM TANAKA
LAWRENCE R. WALDERS
B. JENKINS MIDDLETON

TANAKA WALDERS & RITGER
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Tel.: (202) 223-1670

CHARLES J. BLOOM

CONRAD KERR BLOOM
HITCHNER & O'BRIEN, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Hitachi, Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; and Hitachi Sales Corporation of America

JIRO MURASE
PETER J. GARTLAND
GENE Y. MATSUO
PETER A. DANKIN
LANCE GOTTHOFFER

WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022
Tel.: (212) 832-3333

MATTHEW J. BRODERICK

DECHERT PRICE & RHOADS
1500 Market Street
Philadelphia, Pa. 19102
Tel.: (215) 972-3400

Attorneys for Sharp Corporation and Sharp Electronics Corporation

HOKEN S. SEKI
GEORGE E. JARVIS
DAVID A. DOPSOVIC

SEKI & JARVIS
520 Madison Avenue
New York, N.Y. 10022
Tel.: (212) 759-2303

HENRY T. REATH
FRANK A. LUCHAK

DUANE MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, Pa. 19102
Tel.: (215) 544-6300

JOHN T. DOLAN
ARNOLD B. CALMANN

CRUMMY, DEL DEO, DOLAN & PURCELL
Gateway One
Newark, N.J. 07102
Tel.: (201) 522-2235

DONALD F. TURNER

WILMER CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 872-6000

Attorneys for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

CHARLES F. SCHIRMEISTER
PETER C. WILLIAMS

REID & PRIEST
40 West 57th Street
New York, N.Y. 10019
Tel.: (212) 603-2000

STEPHEN W. ARMSTRONG

MONTGOMERY MCCRAKEN WALKER & RHOADS
Three Parkway
Philadelphia, Pa. 19102
Tel.: (215) 563-0650

Attorneys for Mitsubishi Corporation and Mitsubishi International Corporation

PATRICK H. SULLIVAN
JAMES S. MORRIS
KEVIN R. KEATING
MICHAEL S. PRESS

WHITMAN & RANSOM
522 Fifth Avenue
New York, N.Y. 10036
Tel.: (212) 575-5800

CHARLES J. BLOOM

CONRAD KERR BLOOM
HITCHNER & O'BRIEN, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Sanyo Electric Co., Ltd.; Sanyo Electric Trading Co., Ltd.; Sanyo Electric, Inc.; and Sanyo Manufacturing Corporation

65

(14)

No. 83-2004

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,
v.
ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
WEIL GOTSHAL & MANGES
New York, New York
Counsel for the Matsushita Petitioners

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
METZGER SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.

HENRY T. REATH
DUANE MORRIS & HECKSCHER
Philadelphia, Pennsylvania
Counsel for the MELCO Petitioners

DONALD J. ZOELLER
Counsel of Record
JOHN L. ALTIERI, JR.
HAROLD G. LEVISON
MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7000
Counsel for the Toshiba Petitioners

PETER J. GARTLAND
WENDER MURASE & WHITE
New York, New York
Counsel for the Sharp Petitioners

JAMES S. MORRIS
KEVIN R. KEATING
WHITMAN & RANSOM
New York, New York
Counsel for the Sanyo Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, New York
Counsel for the Mitsubishi Petitioners

June 14, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

65 pp

QUESTIONS PRESENTED

1. Whether, in an antitrust conspiracy case based upon alleged "parallel" acts and other circumstantial evidence, summary judgment for the defendants may be reversed when the district court found that there could be no rational motive for the economically implausible conspiracy alleged and that all of the evidence was entirely consistent with the independent economic self-interest of each defendant, and the court of appeals never considered whether defendants' actions were more consistent with an inference of conspiracy than with an inference of independent action.

2. Whether a court of the United States may: (i) disregard the duly issued statement of a friendly foreign government attesting that certain export controls entered into by its nationals were compelled by that government; (ii) permit a trier of fact to adjudicate the veracity of such an official government statement; or (iii) hold such government-mandated conduct to constitute or be a "feature" of a conspiracy in violation of the antitrust laws of the United States.

PARTIES TO THE PROCEEDING

Petitioners-defendants are Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., Matsushita Electronics Corporation, Toshiba Corporation, Toshiba America, Inc., Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, Hitachi Sales Corporation of America, Mitsubishi Electric Corporation, Mitsubishi Electric Sales America, Inc., Mitsubishi Corporation, Mitsubishi International Corporation, Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., Sanyo Manufacturing Corporation, Sharp Corporation, and Sharp Electronics Corporation.*

Respondents-plaintiffs are Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE").**

---

* The defendants in the district court were: seven Japanese manufacturers of television receivers; four Japanese trading companies; one Japanese component manufacturer; ten American subsidiaries of the Japanese defendants; a former American television manufacturer (Motorola); and an American retailer which purchased Japanese television receivers for resale (Sears).

References to the Petition Appendix are cited as "Pet. App. —a." References to the 45 volume appendix before the court of appeals, which has been transferred to this Court in lieu of the record below, are cited as "Rec. —a, vol. ——."

The statements required by Rule 28.1 of this Court are contained in the Appendix to the Petition. (Pet. App. 1a-5a). Amendments to petitioners' Rule 28.1 statements are attached hereto.

** The court of appeals affirmed summary judgments in favor of defendants Sony Corporation, Sony Corporation of America, Motorola, Inc. and Sears, Roebuck & Co. (Pet. App. 180a-185a; 196a; 223a). These companies are designated as respondents pursuant to Rule 19.6 of this Court. However, references to "respondents" do not include these former defendants.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals are reported at 723 F.2d 238 (Pet. App. 34a-197a) and 723 F.2d 319. (Pet. App. 198a-223a). The opinions of the district court granting summary judgment are reported at 494 F. Supp. 1190 (Pet. App. 1111a-1214a) and 513 F. Supp. 1100. (Pet. App. 236a-667a). The district court's evidentiary opinions are reported at 505 F. Supp. 1125, 505 F. Supp. 1190 and 505 F. Supp. 1313. (Pet. App. 668a-776a; 777a-987a; 988a-1110a).

JURISDICTION

The judgments of the court of appeals were entered on December 5, 1983. (Pet. App. 224a-228a; 229a-233a). Timely petitions for rehearing and rehearing in banc were denied on March 9, 1984. (Pet. App. 234a; 235a). The petition for a writ of certiorari was filed on June 7, 1984 and granted on April 1, 1985. This Court has jurisdiction to review the judgments of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents' complaints allege violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, section 73 of the Wilson Tariff Act, 15 U.S.C. § 8, the Revenue (Antidumping) Act of 1916, 15 U.S.C. § 72, section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and section 7 of the Clayton Act, 15 U.S.C. § 18. (Pet. App. 27a-32a).

STATEMENT OF THE CASE

A. The Alleged Conspiracy

Respondent Zenith manufactures and sells consumer electronic products ("CEPs") and is America's most successful television manufacturer. Together with RCA, Zenith has dominated the U.S. television industry for more than thirty years, jointly accounting for over forty percent of U.S. color television sales throughout the relevant period. (Rec. 2575a-2576a, vol. 6). Respondent NUE, the successor to the Emerson Radio Corp., once manufactured and sold television receivers under the Emerson label, but ceased such sales in the early 1970's. (Pet. App. 246a-247a & n.5).

In their complaints, respondents alleged that, from the mid-1950's to at least 1977, seven Japanese television manufacturers and seventeen other named defendants participated in a "low price" export conspiracy to destroy their competitors and take over the U.S. market for television receivers and certain other CEPs. (Pet. App. 45a-46a).[1] Respondents also claimed that more than seventy co-conspirators participated in this scheme, including such major American companies as General Electric, Teledyne Packard Bell, J.C. Penney, W.T. Grant, Montgomery Ward, Magnavox, Singer, and Westinghouse. (Rec. 748a-751a, vol. 3).

[1] In its complaint, NUE alleged a conspiracy related to television sets only. Four years later, Zenith alleged that the conspiracy also included radios, tape recorders, audio equipment and components. (Pet. App. 247a & n.7). As the district court noted, however, television receivers were the "heart and soul of Zenith's complaint." (Pet. App. 622a).

Respondents alleged that the predatory scheme consisted of two parts which together formed a "unitary" conspiracy. First, petitioners allegedly agreed to fix artificially "high prices" for television receivers sold in Japan.[2] Second, petitioners allegedly agreed to use purported excess profits generated by this "high price" conspiracy in the Japanese domestic market to fund an agreement to fix "low," predatory export prices to the United States (which allegedly were lower than the prices they charged for comparable products in Japan). The purported objective of this unitary conspiracy was to destroy the U.S. television receiver industry so that petitioners ultimately would be able to charge monopoly prices in the United States. (Pet. App. 45a-46a; 246a-250a; 257a-259a; 483a-484a).

Respondents did not allege an agreement to fix any particular "low price" or price level in the United States. Rather, as the district court pointed out, respondents consistently alleged an agreement to sell at "whatever price was necessary to make the sale." (Pet. App. 301a; 478a-479a & n.204). Indeed, it is undisputed that petitioners sold television receivers in the United States at every conceivable price, "ranging from the lowest to the highest." (Pet. App. 476a, n.202).

As critical elements of the alleged "low price" conspiracy, respondents pointed to petitioners' participation in export control arrangements which established *minimum* prices for certain exports to the United States (the so-called "check prices") and which prescribed the number of direct U.S. export customers (the so-called

[2] In support of this allegation, respondents principally relied upon various documents generated in connection with certain proceedings of the Japanese Fair Trade Commission which purportedly showed activities by the television manufacturer petitioners to stabilize prices in the Japanese domestic market. (Pet. App. 172a-174a). For purposes of their summary judgment motions, petitioners assumed that respondents could raise a genuine issue of fact concerning this alleged price stabilization in Japan.

"five-company rule").[3] Despite the fact that these export control arrangements were compelled by the Japanese Government pursuant to its foreign trade policy (see Point II, *infra*), and would naturally tend only to *raise* (not lower) export prices, respondents contended that these arrangements were central features of the "low price" export conspiracy alleged. (Pet. App. 258a; 323a-328a; 378a-379a). Further, respondents contended that additional evidence of the alleged export conspiracy was provided by the purportedly parallel "low prices" and "secret rebates" granted by petitioners in order to "get the business" in the United States. (Pet. App. 258a-259a; 484a-485a).

In sum, respondents alleged that it would be reasonable for a fact finder to infer that, from the mid-1950's to at least 1977, petitioners, who were new entrants, participated in a "low price," loss-generating, predatory export conspiracy for the purpose of trying to drive all of their competitors out of business in the hope that they would someday be able to recoup their losses by charging monopoly prices in the U.S. television market. (Pet. App. 484a).

B. The District Court Proceedings

The original complaint in this action was filed almost fifteen years ago. Following more than eight years of

[3] The Government of Japan, through its Ministry of International Trade and Industry, required and supervised the establishment and implementation of these export controls in the form of: (a) written agreements among Japanese manufacturers of television sets destined for export to the United States (the "manufacturers' agreements") (Pet. App. 379a-380a); and (b) written regulations of the Japan Machinery Exporters Association which governed Japanese exporters of television sets to the United States (the "JMEA regulations"). (Pet. App. 381a). The manufacturers' agreements and the JMEA regulations, which were in effect from 1963 to early 1973, established, among other things, the minimum prices at which certain screen sizes and types of television receivers could be sold for export to the United States. (Pet. App. 381a). The JMEA regulations also contained a provision requiring the registration of export customers and, beginning in 1967, limiting the number of such registrations to five. (Pet. App. 382a-383a).

extensive discovery, then District (now Circuit) Judge Edward R. Becker (the seventh judge to preside over the consolidated cases) implemented a series of case management procedures, pursuant to which the court: (a) required respondents to file a preclusive Final Pretrial Statement ("FPS") setting forth *all* of the evidence they intended to rely upon at trial; and (b) conducted evidentiary hearings to determine the admissibility of portions of respondents' proffered evidence. (Pet. App. 268a-273a; 278a-285a).

Respondents' 17,500 page FPS, which cited approximately 250,000 pages of documents (Pet. App. 268a), revealed that respondents intended to prove the alleged conspiracy solely from the materials referenced in the FPS, without any fact testimony as to what occurred at any alleged conspiratorial meetings. (Pet. App. 403a-405a; 605a). Respondents' entire case was thus set forth with *preclusive* effect in their FPS, providing the best possible record—"something cognate to a trial record"—for summary judgment consideration. (Pet. App. 270a; 294a & n.56).

Petitioners filed summary judgment motions on the ground that respondents had not adduced sufficient proof of the alleged "low price" export conspiracy to raise a genuine issue of material fact for trial. With respondents' exhaustive FPS before it, and following seven days of argument and the submission of thousands of pages of briefs by each side, the district court addressed these motions. (Pet. App. 244a-245a & n.2). Since "[i]t [was] plain (and essentially conceded by [respondents]) that their case [was] a circumstantial one" (Pet. App. 259a-260a), the district court applied this Court's controlling standard for determining whether an antitrust conspiracy may permissibly be inferred. *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). Under that standard, the district court held that "if the inferences of rational independent choice and concerted action are equally drawable, the proof is insufficient." (Pet. App. 353a-354a).

Although respondents had attempted to portray a "unitary" conspiracy consisting of agreements to restrain competition in both Japan and in the United States, the district court recognized that the only *actionable* restraint alleged was the purported agreement to fix "low," predatory export prices to the United States. Thus, the determinative question on summary judgment was whether respondents had come forward with "any significant probative evidence that the [petitioners] entered into an agreement or acted in concert with respect to exports to the United States in any manner which could in any way have injured [respondents]." (Pet. App. 244a).

After an "intensive examination of the enormous record in this case" (Pet. App. 244a), the district court concluded that the evidence did not lead to a permissible inference of, or indeed suggest in any way, the alleged "low price" export conspiracy.[4] To the contrary, as set forth below, the district court found respondents' evidence to be fundamentally inconsistent with such a predatory scheme.

First, from a review of "the entire record," whether deemed admissible or not (Pet. App. 422a), the district court determined that there was no evidence (other than the Japanese Government-compelled export control arrangements discussed below) "which refers or relates to the setting or coordination of export prices, the exchange of export price information relative to the claimed conspiracy, the impermissible dissemination of other export-related economic data, or any other aspect of the

[4] The district court's conclusion that there was no evidence from which a fact finder might find or infer this alleged conspiracy was *not* dependent upon its opinions concerning the admissibility of respondents' evidence. Instead, the district court reached its summary judgment decision only after it either assumed the admissibility of respondents' proffered evidence or assumed the key factual propositions which respondents were attempting to prove from that evidence. (Pet. App. 418a; 436a, n.167; 438a, n.168; 442a-443a; 447a; 453a; 456a, n.188; 473a-474a; 483a; 488a-489a & n.211; 496a & n.221; 523a-524a; 605a-608a).

'export' component of the 'unitary' conspiracy claimed by [respondents]." (Pet. App. 421a-422a).

Second, the district court concluded that petitioners' participation in the Japanese Government-compelled export control arrangements (*i.e.*, the "check prices" and "five-company rule") provided no probative support for the "low price" conspiracy alleged, and was actually contrary thereto. (Pet. App. 378a-385a).[5] Since these arrangements set only *minimum* export prices and a *maximum* number of direct export customers, the district court concluded that these arrangements would have naturally tended to *raise* export prices, and thus could not constitute evidence of a conspiracy to *lower* them. Further, the district court pointed out that respondents' own evidence demonstrated that the "five-company rule" did not have the effect of allocating U.S. customers among the petitioners. (Pet. App. 383a-385a).

Third, as to purported "secret rebating" by petitioners to various mass merchants (Pet. App. 264a-265a; 485a), the district court concluded that such alleged rebating would sound "more in competition than in antitrust conspiracy." (Pet. App. 496a). The district court pointed out that: (i) the methods and amounts of the alleged rebating varied greatly among petitioners (Pet. App. 490a); (ii) there was no evidence that the petitioners discussed their alleged rebating with each other and, indeed, the evidence indicated that each petitioner tried to keep it secret from the others (Pet. App. 495a-496a); and (iii) there was "widespread evidence" of efforts by U.S. customers "to 'whipsaw' or induce [petitioners], competing

[5] Because of this ruling, and because respondents as competing manufacturers lacked standing to complain of any increase in export prices that might have been caused by the export control arrangements, the district court found it unnecessary to reach the sovereign compulsion and act of state issues discussed at pp. 36-46, *infra*. It did, however, note its receipt of an official pronouncement of the Government of Japan (Pet. App. 6a-14a) attesting that petitioners' participation in such export controls was *compelled* as an integral part of Japan's foreign trade policy. (Pet. App. 387a-390a).

among themselves, to give better discounts, rebates, allowances, etc. in order to get the business." (Pet. App. 502a).

Fourth, although it recognized that the record showed that petitioners' prices for television receivers in the United States ranged "from the lowest to the highest" (Pet. App. 476a, n.202), the district court nevertheless assumed for purposes of its analysis that respondents could somehow establish that petitioners engaged in the "parallel" act of charging "low prices" in the United States "necessary to get the sale," and that those prices were lower than those charged by petitioners for comparable products in Japan. (Pet. App. 476a). The district court concluded that such "parallel" "low prices" would have been far more consistent with vigorous competition than with any inference of conspiracy. (Pet. App. 478a-479a). Specifically, it observed that "[a] parallel price reduction ordinarily reflects a series of market-compelled individual responses, not agreement" (Pet. App. 478a), and that "companies do not need to conspire to sell at prices 'necessary to get the sale,'" because that is precisely the individual motivation and result one would expect from free and unfettered competition *without any agreement*. (Pet. App. 479a). Moreover, the district court concluded that the evidence purporting to show "sales at losses" was also consistent with the individual interests of petitioners, who were seeking to become established in a new market, and thus was indicative of nothing but "legitimate independent competitive activity." (Pet. App. 482a-483a).

Fifth, the district court found no evidence to support an inference that petitioners had fixed high prices or secured high profits in the Japanese domestic market in order to create a "war-chest" to subsidize "low," predatory export prices to the United States. (Pet. App. 420a-421a). Instead, it found that there was, at most, some evidence of a limited effort to stabilize rapidly declining prices and "plummeting profits" in the Japanese domestic market for a two-year recessionary period during

1964-1966. (Pet. App. 412a-421a). Further, the court expressly found that there was no evidence of any "connection" between such price stabilization efforts in the Japanese domestic market and petitioners' exports to the United States. (Pet. App. 421a-463a).

Finally, the district court found that the alleged predatory export conspiracy made no economic sense. (Pet. App. 483a-484a). The court concluded that, in the face of a United States television market without high barriers to entry, and with competition from Europe, the Far East and the United States (including from such dominant, entrenched competitors as Zenith and RCA), it would have been irrational for petitioners to have conspired to charge predatory export prices when there was no hope that they could ever have acquired and maintained the monopoly power necessary to recoup the "losses" which they would have incurred from such a scheme. (Pet. App. 484a; 611a).

Applying the *Cities Service* conspiracy inference standard, the district court held that there was no basis for a fact finder to conclude that petitioners' pricing activities in the United States were more consistent with the alleged conspiracy than with independent action. Accordingly, it granted summary judgment in favor of petitioners on respondents' antitrust claims. As summarized by the district court:

> "[D]espite years of discovery, the [respondents] have failed to uncover any significant probative evidence that the [petitioners] entered into an agreement or acted in concert with respect to exports to the United States in any manner which could in any way have injured the [respondents]." (Pet. App. 244a).[6]

This same conclusion had been independently reached by the Antitrust Division of the Department of Justice,

[6] The district court also granted summary judgment dismissing respondents' claims under the 1916 Antidumping Act. (Pet. App. 1111a-1214a; 632a, n.372).

which, at respondents' request, had spent six months reviewing respondents' "best evidence," including approximately 35,000 pages of documents, only to find that there was "no evidence of concerted predatory conduct [by petitioners] intended to destroy and supplant the U.S. color TV industry, either at an earlier period or at the present time." [7]

C. The Court Of Appeals Proceedings

The court of appeals agreed with the district court that the only actionable conspiracy alleged was the purported agreement to fix "low," predatory export prices and that such an agreement would have to be proven by *inference* from petitioners' export pricing activities and other circumstantial evidence. (Pet. App. 165a-166a). The court of appeals also relied upon the same factual predicates as the district court in determining whether an inference of such a conspiracy was permissible. Nevertheless, the court of appeals reached a different conclusion as to the permissible inferences that could be drawn from those facts and reversed the grant of summary judgment in favor of petitioners. (Pet. App. 163a-197a).[8]

The court of appeals premised its decision upon a newly created exception to the *Cities Service* conspiracy inference standard.[9] In particular, the court of appeals held that the normal "limitations of the inference drawing process" do not apply to this case because it:

---

[7] Statement by John H. Shenefield, Assistant Attorney General, Antitrust Division, before the Senate Judiciary Committee, 3-4 (April 12, 1978). (Pet. App. 21a-24a, at 23a).

[8] Most of the court of appeals' lengthy opinion (Pet. App. 64a-162a) related to evidentiary matters immaterial to the questions presented here. See p. 6 n.4, *supra*.

[9] Although the court of appeals did not cite *Cities Service* by name, it expressly declined to follow the line of Third Circuit authority which has applied the *Cities Service* standard. (Pet. App. 164a).

> "presents a record in which there is both direct evidence of certain kinds of concert of action [*i.e.*, alleged price stabilization in Japan and the Japanese Government-mandated export controls] and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred. Thus none of [the decisions applying the *Cities Service* inference standard] can be dispositive on the propriety of summary judgment in this case." (Pet. App. 165a).

On the basis of this new exception, the court of appeals held that the alleged "low price" export conspiracy could be inferred. The court did not reject (or even review) the express findings of the district court that this alleged conspiracy was so economically implausible that petitioners would not have had any rational motive to enter into it and that petitioners' alleged export pricing activities would have been more consistent with independent action and competition than with conspiracy.

The court of appeals also rejected petitioners' argument that, under the sovereign compulsion and act of state doctrines, the export control arrangements could not support respondents' claims. (Pet. App. 188a-189a). In doing so, it disregarded an official pronouncement of the Japanese Government (the "1975 Japanese Government Statement," Pet. App. 6a-14a), which established that petitioners' participation in those arrangements was compelled by the Government of Japan acting within its sovereignty. While "assum[ing], without deciding, that a government mandated export cartel arrangement . . . would be outside the ambit of section 1 of the Sherman Act" (Pet. App. 188a), the court of appeals held, without mentioning the 1975 Japanese Government Statement, that: (i) "it cannot be said with any degree of certainty that the [check prices] . . . were in fact determined by the Japanese Government"; and (ii) "there is no record evidence suggesting that the five-company

rule originated with the Japanese Government." (Pet. App. 188a-189a). Accordingly, the court of appeals held that a fact finder could treat petitioners' participation in those export control arrangements as a central "feature" of the alleged conspiracy in violation of U.S. law. (Pet. App. 166a-168a; 177a-179a; 188a-189a).

Finally, in a separate opinion, the court of appeals reversed the district court's dismissal of respondents' claims under the 1916 Antidumping Act. First, it held that the district court misapplied the standard of product comparability under the 1916 Act (Pet. App. 213a-214a)—a holding not challenged by the petition. Second, as to the showing of specific predatory intent required by the 1916 Act, the court of appeals based its determination that there was sufficient evidence to create a genuine issue of material fact upon the identical inference of a predatory export conspiracy which it found to be permissible in its antitrust decision (Pet. App. 218a-223a)—a holding directly challenged by the petition.

SUMMARY OF ARGUMENT

1. *The court of appeals applied an erroneous standard for permitting an inference of conspiracy.* In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), this Court held that an antitrust conspiracy may not be inferred from "parallel" acts and other circumstantial evidence unless the defendants' conduct is shown to be more consistent with an inference of the alleged conspiracy than with an inference of independent action—*i.e.*, unless the evidence shows: (i) a rational motive by defendants to enter into the alleged conspiracy; and (ii) conduct against the independent economic self-interest of each of the defendants. The court of appeals disregarded the district court's finding that the *Cities Service* inference standard had not been met in this case. Instead, it carved out an exception to the *Cities Service* standard and held that it should not be applied because

respondents' mix of circumstantial evidence included "direct evidence of certain kinds of concert of action" (although not of the "low price" export conspiracy held to be actionable).

The court of appeals' exception to the *Cities Service* standard is unwarranted and dangerous. That standard is a necessary safeguard against speculative inference drawing in antitrust conspiracy cases, and there is no basis for departing from it in any case in which the actionable conspiracy alleged can only be established by *inference*. Direct evidence of non-actionable forms of concert of action in no way eliminates the danger that an inference of the actionable conspiracy alleged will be based upon speculation. Nor does the mere allegation of a two-part "unitary conspiracy" to raise domestic prices and to lower export prices remove the necessity of inquiring whether direct evidence of the former warrants a nonspeculative inference of the latter.

Departing from the *Cities Service* inference standard is especially unwise in a "low price" conspiracy case such as this. "Low pricing" is the paradigm of the vigorous competition that is the primary goal of the antitrust laws. Protecting such behavior from being penalized or deterred is one of the basic objectives of this Court's conspiracy inference standards. *See Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S. Ct. 1464, 1470 (1984). As the Solicitor General has emphasized, rather than presenting an appropriate case for relaxing the *Cities Service* safeguards, respondents' attempt to infer an antitrust conspiracy from such pro-competitive behavior as the charging of "low" export prices by new entrants significantly heightens the need to apply the *Cities Service* standard "in order to avoid imposing penalties on independent unilateral conduct that has the effect of reducing prices, increasing competition and thereby directly benefitting consumers." (U.S. Gov. Cert. Br. 8-9).

2. *Applying the Cities Service inference standard to the factual predicates assumed by both the district court and the court of appeals, summary judgment was clearly warranted.* First, there could have been no rational motive for the alleged predatory conspiracy to destroy competition and monopolize the U.S. market because such a conspiracy would have made no economic sense. Unlike high price conspiracies, which confer immediate benefits on the participants, a low price conspiracy would impose immediate and continuing costs which could only be recovered in the event that collective monopoly power could be acquired and sustained. As the district court concluded, and the court of appeals did not dispute, petitioners, as new entrants, could not rationally have expected to obtain and maintain monopoly power in a market characterized by the absence of barriers to entry, the presence of strong domestic competitors such as Zenith and RCA, increasing competition from European and other Far Eastern companies, and political and legislative barriers to monopolization of United States markets by imports.

Second, none of the factual predicates relied upon by the court of appeals shows conduct against the independent economic self-interest of any petitioner or any other basis for a nonspeculative inference of the alleged export conspiracy. Petitioners' alleged export pricing activities—secret rebating, charging "low prices," and incurring initial losses—are characteristic features of individual pro-competitive conduct by companies seeking to establish themselves in a market. And it would be sheer speculation to infer from an alleged agreement to stabilize prices in Japan that the parties also agreed to engage in a "low price" conspiracy to monopolize the United States market.

Under *Cities Service*, these two failings provide independent grounds for granting summary judgment against respondents' antitrust conspiracy claims. Respondents' attempt to have a fact finder infer that normal competitive conduct by new entrants was really the product of a hopeless and irrational predatory export scheme presents precisely the type of situation in which it is most important to apply the *Cities Service* safeguards.

3. *The court of appeals erred in relying upon export control arrangements compelled by the Japanese Government.* Another ground for reversal is provided by the court of appeals' holding that a fact finder may treat petitioners' participation in the export control arrangements (*i.e.*, the "check prices" and the "five-company rule") as a central "feature" of the alleged antitrust conspiracy. The court of appeals improperly disregarded an official statement of the Government of Japan attesting that petitioners' participation in these export control arrangements was compelled by the Japanese Government acting within its sovereign powers pursuant to established regulatory laws. Such an official declaration by a friendly foreign government attesting to its own laws, actions and policies is entitled to be given conclusive effect by United States courts. *See United States v. Pink*, 315 U.S. 203, 218-21 (1942).

Once the 1975 Japanese Government Statement is given its proper conclusive effect, it is clear that the sovereign compulsion and act of state doctrines prevent a U.S. court from holding petitioners' participation in the export control arrangements to constitute a basis for antitrust liability. As the Solicitor General has attested, and diplomatic notes by the Japanese Government and six other foreign governments have demonstrated, the court of appeals' improper treatment of these arrangements "threatens to do serious damage" to trade relations between the United States and its major trading partners. (U.S. Gov. Cert. Br. 6, 18). The court of appeals' failure to apply the sovereign compulsion and act of state doctrines to prevent this unwarranted judicial disruption of U.S. foreign trade policy provides an independent ground for reversal.

4. *The Antidumping Act claims also fail.* Because the court of appeals premised its finding of a genuine issue of specific predatory intent under the 1916 Antidumping Act upon the same erroneous rulings and inference of conspiracy which it relied upon in its antitrust decision, reversal of the court of appeals' 1916 Act judgment is also required.

5. *Principles of sound judicial administration warrant reinstatement of summary judgment by this Court.* The district court and the court of appeals did not disagree as to the factual predicates of this case, but disagreed only as to the permissible inferences which could be drawn from those facts and the legal standards to be applied in drawing such inferences. Accordingly, once this Court rules on the correct legal standards to be applied, it can determine from the opinions below that summary judgment should be reinstated. *See Kleppe v. Sierra Club*, 427 U.S. 390, 414-15 (1976).

Reinstatement would forcefully demonstrate: (i) to the lower courts, that appropriate safeguards against inferring an antitrust conspiracy from speculation must be applied and that summary judgment continues to be an important tool for managing large and complicated antitrust conspiracy cases; (ii) to other competitors, that they may not misuse United States courts and the antitrust laws to suppress import competition; and (iii) to United States trading partners, that cooperation with our Government in establishing export control arrangements will not expose their nationals to the burden of endless judicial proceedings. After almost fifteen years of litigation, this Court should reaffirm the availability of summary judgment in appropriate antitrust conspiracy cases by bringing this case to an end.

ARGUMENT

I. SUMMARY JUDGMENT FOR PETITIONERS WAS APPROPRIATE UNDER THIS COURT'S ANTITRUST CONSPIRACY INFERENCE STANDARD

A. The Court Of Appeals Erred By Failing To Apply The *Cities Service* Conspiracy Inference Standard

1. *An Antitrust Conspiracy Cannot Be Inferred in the Absence of a Rational Motive to Conspire and Conduct Against Independent Economic Self-Interest*

In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), this Court established a fundamental safeguard against meritless antitrust conspiracy claims by holding that a fact finder may not infer an antitrust conspiracy from parallel acts and other circumstantial evidence unless the plaintiff can demonstrate that the challenged conduct is more consistent with an inference of the alleged conspiracy than with an inference of independent action. The plaintiff in that case had alleged that Cities Service entered into a conspiracy with other oil companies to refuse to deal with the plaintiff in order to prevent it from selling Iranian oil. This Court affirmed summary judgment in favor of Cities Service because a rational motive to enter into the alleged conspiracy could not reasonably be inferred from the facts, *id.* at 286-87, and because Cities Service's refusal to deal, although parallel to the refusals of the other alleged co-conspirators, was consistent with its independent business interests. *Id.* at 278-80. Accordingly, this Court concluded that:

> "the inference that Cities' failure to deal was the product of factors other than conspiracy [was] at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence . . . ." *Id.* at 280.

To satisfy the *Cities Service* inference standard, an antitrust plaintiff must adduce "sufficient evidence from which the jury could conclude, on the basis of reasonable

inferences and *not mere speculation*," that the defendants' activities were "the product of concerted action." *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1312 (3d Cir. 1975) (emphasis added). Two tests must be satisfied: first, there must be a satisfactory demonstration of a rational motivation to enter into the alleged conspiracy; and second, there must be a showing of acts by the alleged co-conspirators which would be contrary to their individual economic self-interests but consistent with the alleged collusion. *See, e.g., Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.12 (D.C. Cir. 1984); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 884-85 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *Venzie*, 521 F.2d at 1314. Absent such evidence, an inference of conspiracy "does not logically follow." *Cities Service*, 391 U.S. at 287.

Just last Term, the principle that a fact finder may not infer an antitrust conspiracy from marketplace behavior without sufficient evidence to render the requested inference of collusion more compelling than independent action was affirmed by this Court, in the context of a vertical conspiracy claim, in *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S. Ct. 1464 (1984). In that case, the Court explained that permitting such an inference, in the absence of evidence "that tends to exclude the possibility of independent action," could penalize and deter "perfectly legitimate conduct." *Id.* at 1470-73.

2. *The Court of Appeals' Exception to the Cities Service Standard is Contrary to Law, Dangerous to Competition Policy and a Threat to Sound Judicial Administration*

Although the court of appeals recognized that the alleged "low price" export conspiracy could only be found by *inference* (Pet. App. 165a-166a; 179a), it refused to apply the *Cities Service* standard because respondents' mix of circumstantial evidence consisted of "both direct evidence of certain kinds of concert of action" (although not of the actionable conspiracy alleged) and "circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." (Pet. App. 165a). In such a case, the court of appeals held, the normal "limitations of the inference-drawing process" (*i.e.*, the *Cities Service* safeguards against speculative inferences of conspiracy) do not apply. (Pet. App. 165a).

The court of appeals' failure to apply *Cities Service* is contrary to both logic and law. The issue in this case is whether there is a rational basis for inferring that petitioners violated the U.S. antitrust laws by participating in a conspiracy to charge "low," predatory export prices. "Direct evidence" that petitioners engaged in *other* kinds of concert of action would not obviate the need to determine whether a *non-speculative* inference could be drawn that petitioners participated in the *actionable* conspiracy alleged.

The other kinds of concert of action alleged in this case—agreements concerning price stabilization in Japan, establishment of "check prices" (*i.e.*, minimum prices) and the "five-company rule" for exports to the United States —"did not have any necessary tendency to prove the alleged agreement to charge low, predatory prices in the United States, which the court of appeals found that respondents were required to prove in order to establish antitrust injury." (U.S. Gov. Cert. Br. 10). In fact, as discussed below (pp. 31-35, *infra*), those other kinds of concert of action were either inconsistent with or irrelevant to the "low price" export conspiracy alleged. They clearly did "not obviate the need for the central inquiry required by *Cities Service*." (U.S. Gov. Cert. Br. 10).[10]

[10] The absence of any "direct evidence" of the alleged "low price" export conspiracy is further demonstrated by the court of appeals' affirmance of summary judgment in favor of the Sony defendants. The court of appeals held that the very same categories of "direct evidence of certain kinds of concert of action" that it found applicable to petitioners (*i.e.*, alleged price stabilization in Japan

Nor is there any merit to respondents' attempt to distinguish *Cities Service* and its progeny on the ground that those cases did not involve any "direct evidence." (Opp. Br. 15-17). Direct evidence of certain kinds of concert of action—*but not of the conspiracy alleged*—was also present in *Cities Service* and many of the lower court cases applying its inference standard. For example, in *Cities Service* itself, this Court affirmed summary judgment on a record containing a mix of not only "parallel" acts, but also of "other evidence" which, in the court of appeals' lexicon, could be classified as "direct evidence of certain kinds of concert of action" (*e.g.*, an agreement between Cities Service and one of its alleged co-conspirators relating to Kuwait oil, proof of negotiations between Cities Service and other alleged co-conspirators to join an oil consortium, etc.). 391 U.S. at 263-64, 276-77, 280-81, 283-84.[11]

The error in the court of appeals' conspiracy inference analysis was made strikingly clear by this Court's recent decision in *Monsanto*. In that case, this Court considered

---

and Japanese Government-compelled export control arrangements) were also applicable to the Sony defendants (Pet. App. 183a-184a), but nevertheless affirmed summary judgment in their favor—a result which would not have been possible had the "direct evidence of certain kinds of concert of action" constituted "direct evidence" of the actionable "low price" export conspiracy alleged. (Pet. App. 185a).

[11] *See also Weit v. Continental Illinois Nat'l Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (affirming summary judgment despite proof not only of parallel interest rates, but also of opportunities to conspire, periodic discussions of rates, and an agreement among the alleged conspirators establishing a compatible credit card system, where collusion was not the "compelling . . . rational inference"); *Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 334 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982) (affirming summary judgment where, despite claims of "direct evidence" of collusion, including meetings and communications among the defendants, the challenged parallel acts were found to be "in the economic self-interest of each of the individual [defendants]").

a distributor's antitrust claim that it had been terminated pursuant to a two-pronged conspiracy to: (1) maintain resale prices; and (2) terminate non-complying distributors. Notwithstanding "substantial *direct* evidence" of the first prong of the alleged conspiracy (which would not, in and of itself, have been actionable by the terminated plaintiff), this Court ruled that an inference of the actionable second prong of the alleged scheme could only be drawn on the basis of evidence that "tends to exclude the possibility of independent action." 104 S. Ct. at 1471, 1473. Similarly, in the present case, "direct evidence" of certain non-actionable portions of the alleged conspiracy does not dispense with the need to apply this Court's antitrust conspiracy inference standards to the only actionable restraint alleged—*i.e.*, the purported agreement to fix "low," predatory export prices on sales to the United States.

Rather than providing a basis for relaxing this Court's safeguards against speculative inferences of conspiracy, respondents' "low price" conspiracy claims present the quintessential case for application of the *Cities Service* standard. The antitrust conspiracy inference standards of this Court are grounded in the concern that the Congressional policy of promoting competition and consumer interests may suffer a grievous blow if normal competitive activities are mischaracterized as conspiratorial. *See Monsanto*, 104 S. Ct. at 1470-71. This danger is particularly great in the present case, in which respondents seek to have the alleged conspiracy inferred from such pro-competitive behavior as the charging of "low prices" and the granting of "secret rebates." The chilling effect of such a "predatory" pricing claim can be severe. As the Second Circuit has cautioned:

> "Predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote." *Northeastern Telephone Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

Dispensing with the *Cities Service* standard and "inadvertently condemning" aggressive competition would encourage the filing of vexatious lawsuits by protectionist-minded competitors seeking to insulate themselves from foreign competition. The likely result will be to "discourage foreign companies from engaging in vigorous price competition in the United States." (U.S. Gov. Cert. Br. 6, 13).[12]

Finally, rejection of the court of appeals' exception to the *Cities Service* standard is necessary to preserve summary judgment as a meaningful tool in appropriate antitrust conspiracy cases. (U.S. Gov. Cert. Br. 6).[13] As this Court explained in *Cities Service*:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." 391 U.S. at 290.

Without an appropriate standard for summary judgment, the burdens and risks of prolonged antitrust lawsuits would all too frequently induce windfall settlements of even baseless claims. Moreover, summary judgment is necessary to prevent unwarranted antitrust trials—such as this one estimated to take a year to complete (Pet.

---

[12] *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (Courts must "be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition."); *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition.").

[13] *Cf.* Statement of the American College of Trial Lawyers, 90 F.R.D. 207, 226-31 (1981); Report of the National Commission for Review of Antitrust Law and Procedures, 80 F.R.D. 509, 565-67 (1979); Rogers, *Summary Judgments in Antitrust Conspiracy Litigation*, 10 Loy. U. Chi. L.J. 667, 689 (1979); 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 316 (1978).

App. 666a)—which would impose an onerous burden on the already strained federal courts. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("[Antitrust litigation] need not result in administrative chaos . . . or 'windfall' settlements if the district courts exercise sound discretion and use the tools available.").[14] Indeed, "the very nature of antitrust litigation would encourage summary disposition of such cases when permissible. . . . The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way." *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).[15] Expansive exceptions to the *Cities Service* inference standard, such as that created by the court of appeals, would substantially curtail the availability of summary judgment to dispose of baseless antitrust conspiracy claims prior trial.

In sum, because the court of appeals failed to apply the correct legal standard, its judgments should be reversed.

B. Application Of The *Cities Service* Conspiracy Inference Standard Demonstrates That Summary Judgment Was Appropriate

Respondents' conspiracy claims cannot survive scrutiny under *Cities Service* for two reasons. First, the undisputed facts show that the alleged "low price," predatory export conspiracy would have been so economically implausible that petitioners would not have had any rational motive to enter into it. Second, respondents have

---

[14] *See also Weit*, 641 F.2d at 464; *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 668-69 (D.C. Cir. 1977); *Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 109-10 (2d Cir. 1975).

[15] *See also Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service*, 701 F.2d 1276, 1281 (9th Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 88 (1983) ("[A]ntitrust litigation, if made immune from summary judgment, could become an anti-competitive activity itself.").

failed to show conduct against any petitioner's independent economic self-interest or any other evidence suggestive of the actionable export conspiracy alleged.

1. *There Could Be No Rational Motive for the Economically Illogical Conspiracy Alleged*

As pointed out by the Solicitor General, "the court of appeals' failure to apply the *Cities Service* standard" to this case "led it to disregard the economic logic of respondents' allegations." (U.S. Gov. Cert. Br. 11). This failure was fatal to the court of appeals' decision because petitioners would not have had any rational motive to enter into the economically illogical conspiracy alleged. *See Cities Service*, 391 U.S. at 287.[16]

Putative "predatory" pricing schemes, unlike price-elevating schemes (which confer direct and immediate benefits upon sellers), impose substantial costs upon sellers, provide few incentives and thus are rarely likely to exist. For such predatory schemes to make sense, it is essential that the predators have some reasonable expectation that they can recoup their losses by driving their competitors out of business, achieving and sustaining a monopoly, and collecting "supranormal returns" in the "not-too-distant future." *Northeastern Telephone*, 651 F.2d at 88-89. Such economic circumstances are exceedingly rare. *Id.*[17]

---

[16] It was because a rational motive to enter into the conspiracy alleged was present in both *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) and in *Poller v. CBS, Inc.*, 368 U.S. 464 (1962), but not in *Cities Service*, that a permissible inference of conspiracy was found in the former cases, but not in the latter. 391 U.S. at 284-87.

[17] Courts and commentators have consistently recognized that predatory pricing, *even by a single firm with a leading market position*, let alone by a group of new entrants with no market power, is extremely rare. *See, e.g., Northeastern Telephone*, 651 F.2d at 88 ("There is considerable evidence, derived from historical sources . . . that predation is rare. . . . Indeed, nowhere

In the present case, as found by the district court (and not questioned by the court of appeals), there was "no evidence" that petitioners "ever raised their prices to recoup their [alleged] losses, or earned monopoly profits," even after the conspiracy had allegedly been in effect for some twenty years. (Pet. App. 484a). Indeed, "the notion that this might happen made no sense" because the undisputed facts demonstrated that:

> "the defendants, as new entrants with relatively small market shares, could not rationally have hoped to recoup sustained losses in the United States in view of both the dominant market positions already held by RCA and Zenith (maintained, according to the record, to this day) and the ability of European manufacturers, other Far East companies, and major American firms swiftly to increase their United States CEP sales if higher 'monopoly' prices were ever charged. We also note in this regard that there is no evidence of high entry costs or barriers in the U.S. CEP manufacturing and distribution industry." (Pet. App. 484a).

A predatory export conspiracy dependent upon recoupment of losses would have been an especially futile endeavor for foreign competitors, like petitioners, who could not have hoped to achieve, much less maintain, a monopoly in the U.S. television market in light of the political and legislative restraints and other barriers to imports that have been and can so readily be erected. Moreover, the economic impossibility of successful monopolization and recoupment has been underscored by the

---

in the recent outpouring of literature on the subject do commentators suggest that such pricing is either common or likely to increase."); R. Bork, *The Antitrust Paradox* 148-54 (1978) ("A firm contemplating predatory price warfare will perceive a series of obstacles that make the prospect of such a campaign exceedingly unattractive. . . . [P]redation by such techniques is very improbable."); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 711b (1978) ("The prospects of an adequate future payoff . . . will seldom be sufficient to motivate predation.").

conclusion of the court of appeals that Sony, the most successful of the Japanese television manufacturers in the United States market, could not be found to have participated in the alleged conspiracy. (Pet. App. 183a-185a). Sony's non-participation would have presented yet another insuperable obstacle to any predatory scheme.

The irrationality of any recoupment plan by petitioners was recently summarized by then Professor (now Circuit Judge) Frank H. Easterbrook as follows:

> "If the Japanese firms drive some United States firms out of business, they could not recoup. Fifteen years of [alleged] losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the [petitioners] should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from [petitioners] themselves. . . . The predation-recoupment story therefore does not make sense . . . ." F. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 27 (1984).

Finally, the implausibility of the alleged conspiracy is also demonstrated by respondents' failure to show any "administrative mechanism capable of effectively managing or policing the alleged joint strategy or of a means to share profits or recoup losses." (Pet. App. 483a). As the district court found, it would have made no sense for companies like Sanyo and Sharp (with comparatively large shares of the Japanese television exports to the United States and relatively small shares of the Japanese domestic television market) to have:

> "agreed to enter into a 'conspiracy' in which they were to incur sustained losses in the United States, while their coconspirators with proportionately fewer U.S. exports were receiving the greatest share of the 'high price' market in Japan, . . . at least in the absence of evidence of reciprocal arrangements." (Pet. App. 616a).

Respondents' experts agreed that the alleged conspiracy "would have included as one of its key elements" a mechanism to share profits and losses. (Pet. App. 483a). But respondents have not even described, much less produced evidence to show, any such sharing mechanism. (Pet. App. 483a).

Under these circumstances, petitioners would not have had a rational motive to enter into the economically illogical conspiracy alleged. Hence, under *Cities Service*, summary judgment was warranted on this ground alone.

2. *Respondents' Evidence Does Not Show Conduct Against Independent Economic Self-Interest or Provide Any Other Support for the Alleged "Low Price" Export Conspiracy*

Respondents' conspiracy claims fail, as a matter of law, for the additional independent reason that there is no evidence of conduct against the independent economic self-interest of any petitioner. Respondents pointed to a collection of circumstantial "features" from which it is claimed the alleged "low price" export conspiracy can be inferred. An analysis of these features shows that neither singly nor collectively do they satisfy the *Cities Service* standard or provide any other support for the conspiracy alleged.

(a) *Petitioners' export pricing was consistent with independent economic self-interest and vigorous competition.* Although the undisputed record shows that petitioners sold their television receivers in the United States at "prices ranging from the lowest to the highest" (Pet. App. 476a, n.202),[18] respondents assert that petitioners

[18] For example, a comparison of the lowest manufacturers' suggested list prices for various color television screen sizes sold in the U.S. during the five year period from 1973 to 1977 (taken from an industry trade publication, *Television Digest*), evidences both

were engaged in the purportedly "parallel" act of charging "low prices" in the United States and that this "parallel" behavior was suggestive of conspiracy. The contrary inference, however, is the only permissible one, since such behavior would have been far more probative of competition than collusion.

The charging of such "low prices" plainly would have been in each petitioner's independent economic self-interest. (U.S. Gov. Cert. Br. 10-11). The court of appeals failed to recognize the fundamental difference between parallel *high* prices and parallel *low* prices. While, in the absence of alternative explanations, a conspiracy might be suspected if a substantial number of competitors reacted to a price increase with matching price increases of their own, the parallel charging of "low" prices is simply "what a reasonable seller is likely to do to avoid a loss in sales." (Pet. App. 478a). As the district court explained, such "low" pricing "ordinarily reflects a series of market-compelled individual responses, not agreement"; and, under *Cities Service*, it provides no basis for inferring anything but independent action. (Pet. App. 478a).

Respondents do not even attempt to claim that petitioners agreed upon any particular "low" price level in the United States. (Pet. App. 475a-476a & n.202). Rather, respondents have alleged that petitioners conspired to sell in the United States at whatever "low prices" were "necessary to get the business." (Pet. App. 301a; 478a-479a & n.204). As explained by the district court, it is not rational to infer collusion from such competitive pricing behavior:

> "[C]ompanies do not need to conspire to sell at prices 'necessary to get the sale.' Indeed, when competitors make their investment, marketing, and pricing decisions, they necessarily assume that the competition 'will price to get the business.' While the result of such practices may be a depression of prices in the market, it is the kind of price depressing effect which flows from normal competitive pricing behavior and is precisely that which the Sherman Act is intended to secure, not condemn." (Pet. App. 479a).

the wide disparity in pricing among the petitioners, and the fact that, in most instances, one or more of the petitioners had *higher* suggested list prices than even those of Zenith. (Rec. 16338a-16343a, vol. 35).

The same principles apply to respondents' claim that petitioners charged lower prices in the U.S. than they did in Japan and that this was also "parallel" conduct suggestive of conspiracy. As pointed out by the district court, the charging of *different* prices in *different* markets on opposite sides of the world—each market having different supply, demand and other economic conditions—is precisely the result one would expect from competition, not conspiracy. (Pet. App. 480a). Indeed, since "[i]t is undisputed that the Japanese [petitioners were] well-established in Japan" at the same time that they "were new entrants in the U.S. market, with unknown brand names and with no goodwill or business reputations in the United States," they "could be expected *unilaterally* to adopt similar [low] pricing strategies to attract customers and gain consumer acceptance in this country." (Pet. App. 479a).

Nor can any support for respondents' conspiracy claims be derived from the expert study cited by the court of appeals as showing that petitioners' export sales "generally were at prices which produced losses." (Pet. App. 179a). That study only purports to show that, during the 1967 to 1970 period, four of the petitioners exported certain of their television receivers to the United States at prices below an undefined measure of their costs. (Pet. App. 114a; Rec. 1883a-1903a, vol. 5).[19] Such alleged "losses" by foreign companies seeking to break into and become

[19] Two of the six Japanese manufacturer petitioners (Toshiba and Sharp) were not subjects of the study at all; as to a third (Sanyo), there was no data for color television sales; while as to a fourth (Hitachi), the only color television data related to a single screen size in a single year. (Rec. 1901a, vol. 5).

established in the U.S. television market would not "indicate anything other than legitimate independent competitive activity." (Pet. App. 483a). As the district court explained:

> "[T]he mere fact that some of the [petitioners] lost money in the initial years of their entry into the U.S. market, or that they lost money on particular transactions, does not meet [the *Cities Service*] test. A company's long-range independent economic interests may require it to operate at a loss for several years in order to become established in a new market.[12] (Pet. App. 482a).

Moreover, as previously discussed (pp. 24-27, *supra*), sales at "losses" by petitioners could never support a rational inference of the predatory export conspiracy alleged in light of the undisputed facts which demonstrate that petitioners could not have had any hope of recouping such losses by acquiring and maintaining monopoly power.

There is also no merit to respondents' contention that the alleged granting of secret rebates to United States customers is evidence of conduct against independent economic self-interest. Secret price concessions have been recognized by this Court as an important means of price competition. *See, e.g., Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 457 (1978). As the district court explained, the granting of such hidden discounts or rebates by petitioners would have constituted "unilateral conduct which was . . . rational, independent, and pro-competitive." (Pet. App. 500a). By establishing *minimum* export prices, the Japanese Government-compelled export controls clearly hampered each petitioner's ability to compete for sales in this country. It would have been entirely consistent with each petitioner's independent economic self-interest secretly to have granted whatever rebates below those minimums were necessary to

meet the demands of its U.S. customers. (Pet. App. 501a-502a).[20]

The court of appeals' conclusion that a fact finder could determine "that at least some of the [petitioner] manufacturers knew that others were engaged in rebating" (Pet. App. 179a) cannot transform this unilateral and pro-competitive behavior into proof of conspiracy. There is no evidence that "knowledge" of alleged rebating by others "was gained through communications between or among the [petitioners]." (Pet. App. 502a). Further, as the district court pointed out:

> "It is commonplace for competitors to learn from customers or potential customers about 'deals' being offered by other manufacturers. This is precisely how customers induce price competition between one manufacturer and another. . . . [T]here is widespread evidence . . . that this was being done by the American purchasers of Japanese CEP's in an effort to 'whipsaw' or induce [petitioners], competing among themselves, to give better discounts, rebates, allowances, etc. in order to get the business." (Pet. App. 502a).

In sum, respondents' evidence shows that the alleged "low pricing" activities in the United States would have been entirely consistent with each petitioner's independent economic self-interest and with vigorous competition.

(b) *The other evidence relied upon by the court of appeals does not provide any support for the alleged "low price" export conspiracy.* The remainder of the evidence relied upon by the court of appeals related to: (i) alleged price stabilization in the Japanese domestic market (Pet.

---

[20] *Cf. United States v. Citizens & Southern National Bank*, 422 U.S. 86, 118-20 (1975); *Knuth v. Erie-Crawford Dairy Cooperative Ass'n*, 463 F.2d 470, 475-76 (3d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973) (conduct designed to circumvent government-imposed restraints of trade is pro-competitive and thus cannot give rise to an antitrust violation).

App. 172a-175a); (ii) economic conditions in the Japanese television manufacturing industry (Pet. App. 170a-172a); and (iii) the Japanese Government-compelled export control arrangements (Pet. App. 177a-180a). That evidence is either irrelevant to or inconsistent with the alleged "low price" export conspiracy and thus cannot satisfy the *Cities Service* standard.

(i) *Alleged price stabilization in Japan.* It is well established that evidence of participation in one agreement cannot be utilized to infer participation in another when there is no independent evidence of any connection between the two agreements.[21] No such "connection" has been, or can be, shown between respondents' purported evidence of alleged "high" price stabilization in the Japanese domestic market and the alleged twenty-year conspiracy to fix "low," predatory export prices to the United States.[22]

As the district court found, none of the documents (whether deemed admissible or not) offered by respondents to establish such a "connection" showed that petitioners' alleged price stabilization activities related to anything other than the Japanese domestic market. (Pet. App. 421a-463a). The court of appeals did not disagree with this finding, but nonetheless held that the existence of a "connection" with the export market could be inferred. (Pet. App. 176a-177a).

[21] *See, e.g., In re Fine Paper,* 685 F.2d 810, 822 (3d Cir. 1982), *cert. denied,* 459 U.S. 1156 (1983); *Golf City, Inc. v. Wilson Sporting Goods Co.,* 555 F.2d 426, 435 (5th Cir. 1977); *see also Dart Drug Corp. v. Parke, Davis & Co.,* 344 F.2d 173, 186 (D.C. Cir. 1965); *International Shoe Machine Corp. v. United Shoe Machinery Corp.,* 315 F.2d 449, 459 (1st Cir.), *cert. denied,* 375 U.S. 820 (1963).

[22] While the court of appeals held that a fact finder could infer that the alleged home market price stabilization continued for a longer period (Pet. App. 174a-175a), the only direct evidence in the record on the length of these activities is a specific finding by the Japanese Fair Trade Commission that they terminated no later than January, 1967. (Rec. 17841a, vol. 39; Pet. App. 397a, n.127; 407a-412a).

Such an inference makes no sense. Since the alleged price stabilization in the Japanese domestic market would have been economically beneficial to its participants without regard to export sales, it would not suggest the existence of any export conspiracy. Further, although the court of appeals held that a trier of fact could infer that "high" profits allegedly derived by petitioners in Japan would have provided them with the funds to launch a concerted predatory export raid on the United States, the court of appeals failed to explain why there would be any incentive to expend those funds in such a raid. (Pet. App. 175a; 177a). Rational business firms would not throw away money on a losing venture (*i.e.*, selling at predatory prices without any plausible hope of recoupment) merely because those firms had accumulated profits in another market (see discussion at pp. 24-26, *supra*).[23] In addition, as the district court found, respondents have conceded that there is no record evidence to show that petitioners' profits in the Japanese market were "exorbitant" (Pet. App. 413a & n.145; 420a-421a); and what evidence there is suggests that those profits actually *declined* during the relevant period. (Pet. App 410a-412a.) There is thus no basis upon which even to *speculate* that hypothetical "high" profits earned by petitioners from alleged price stabilization in Japan could have been used to "fund" any type of predatory export scheme.

(ii) *Economic conditions in Japan.* Similarly, there is no merit to the court of appeals' suggestion that the competitive situation of the Japanese television manufacturing industry (*i.e.*, the alleged high fixed costs, excess capacity and "protected" home market) tends to support the alleged "low price" export conspiracy. (Pet. App. 169a-172a; 176a-177a). While such alleged economic conditions might have provided Japanese television manufacturers with an incentive *unilaterally* to export

[23] *See also Northeastern Telephone,* 651 F.2d at 89; D. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 Harv. L. Rev. 1313, 1341-42 (1965).

to the United States at "low prices," there is no explanation in the court of appeals' decision as to why such economic conditions would have induced petitioners to *conspire* to achieve that same objective. Indeed, evidence of such economic circumstances would only underscore the conclusion that "low" export pricing by petitioners, even if "parallel," would have been consistent with independent action.[24]

(iii) *Japanese government export controls.* Finally, petitioners' participation in the Japanese Government-compelled export control arrangements lends no support to an inference of the alleged "low price" conspiracy. Apart from being government-compelled and hence precluded from being held a "feature" of the alleged conspiracy (see Point II, *infra*), those export controls on their face set only *minimum* export prices and *limited* the number of petitioners' direct export customers. (Pet. App. 177a-178a). As the district court found, such export controls would have naturally led to *higher* export prices and thus cannot logically be considered evidence of a "low price" conspiracy. (Pet. App. 324a-329a).

Moreover, the court of appeals' conclusion that the "five-company rule" could have served as an integral "feature" of the alleged "low price" conspiracy by protecting petitioners from competition among themselves in the United States (Pet. App. 179a-180a) is conclusively refuted by respondents' own evidence. As conceded by respondents (Pet. App. 383a-384a), found by the district court (Pet. App. 324a; 382a-385a), and acknowledged by the court of appeals (Pet. App. 180a), the "five-company

[24] *See Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963) (Because "[l]ike businesses are generally conducted alike" in response to common economic conditions, "similarity in operations lacks probative significance unless present 'under circumstances which logically suggest joint agreement, as distinguished from individual action.' ").

rule" did not prevent different petitioners from selling to the same U.S. customers. Respondents' own evidence shows that major mass merchant retailers in the United States (including Sears, J.C. Penney, W.T. Grant, Montgomery Ward and Western Auto) were all supplied by two or more of the petitioners (Pet. App. 383a), and the court of appeals recognized that petitioners Sanyo and Toshiba were both selling to Sears, and that petitioners Sharp and Toshiba were both selling to Motorola. (Pet. App. 181a-182a). In addition, it is undisputed that the "five-company rule" did not limit the number of U.S. customers to whom petitioners' products could be resold, and that most of the petitioners sold to hundreds of other customers in the United States through their American sales subsidiaries who were registered as one of their five direct export customers. (Pet. App. 384a-385a). The court of appeals' unexplained conclusion that these undisputed facts are not "sufficient to exclude as a matter of law" the inference that the "five-company rule" allocated U.S. customers as part of a "low price" conspiracy (Pet. App. 180a) is precisely the type of unsupported speculation barred by *Cities Service*.

* * * *

In sum, because none of respondents' evidence, whether viewed separately or together, demonstrated conduct against independent economic self-interest or any other facts supportive of the alleged "low price" export conspiracy, summary judgment was warranted on this ground as well.[25]

[25] Both the district court and the court of appeals recognized that respondents' claims under sections 1 and 2 of the Sherman Act, the Wilson Tariff Act, the Robinson-Patman Act and section 7 of the Clayton Act were all premised upon the same conspiracy allegations. (Pet. App. 621a-622a; 642a; 656a-657a; 662a; 190a; 191a; 193a; 195a). Application of the *Cities Service* conspiracy inference standard would thus require dismissal of all of those claims.

II. PETITIONERS' PARTICIPATION IN EXPORT CONTROLS WHICH THE GOVERNMENT OF JAPAN HAS ATTESTED THAT IT COMPELLED CANNOT CONSTITUTE A FEATURE OF AN ANTITRUST VIOLATION

The court of appeals relied upon both the "five-company rule" and the "check price" arrangements as central "features" of the alleged "low price" export conspiracy. (Pet. App. 167a-168a; 177a-179a). The court of appeals' erroneous holding that petitioners' participation in those Japanese Government-compelled export control arrangements could constitute the basis of an antitrust violation is thus another ground for reversing the judgments below.

A. The Official Representations Of The Government Of Japan Should Have Been Given Conclusive Effect

Petitioners relied upon an official statement submitted by the Government of Japan to the district court in 1975 (the "1975 Japanese Government Statement," Pet. App. 6a-14a) to demonstrate that the participation in the export control arrangements challenged by respondents was compelled by the Japanese Government. (Pet. App. 387a-388a). This pronouncement, which was forwarded to the district court by the U.S. Department of State, explained the origin and purpose of those export control arrangements. The 1975 Japanese Government Statement established that:

1. The Ministry of International Trade and Industry ("MITI") is the "government organ empowered and responsible for" the formulation and execution of Japanese trade policy, a fundamental purpose of which is to ensure that Japanese exports do not cause "unnecessary disruptions in the national economies of Japan's trading partners." (Pet. App. 8a);

2. In 1962, the Japanese Government recognized the need to apply this "orderly exportation" policy to television exports to the United States "to avoid the

possibility of trade conflicts." Thus, between 1963 and 1973, the Japanese Government, through MITI: "directed Japanese television manufacturers including the present Japanese [petitioners] to enter into an agreement under Article 5-3 of the Export and Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States . . . . MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected." (Pet. App. 11a);

3. "[The minimum price] agreements entered into among the Japanese [petitioners], as well as certain regulations of the Japan Machinery Exporters Association [which included the five-company rule] . . . have come into existence pursuant to the direction of MITI." (Pet. App. 8a); and

4. "[T]he Japanese television manufacturers and exporters had no alternative but to establish the agreement[s] and regulation[s] in compliance with the said direction." (Pet. App. 12a). The Japanese Government's direction had a "compulsory power equivalent to law." (Pet. App. 10a). Thus, "[h]ad the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers [under Japanese law] to unilaterally control television sales for export to the United States and carry out its established trade policy." (Pet. App. 11a).

As summarized in a Note Verbale delivered to the U.S. Department of State by the Japanese Government in response to the court of appeals' decision:

> "[B]y entering into minimum price agreements with respect to export of television receivers and by adopting the JMEA regulations (including the so-called 'five-company rule,' which, among other things, served to control the quality of exported products), *the Japanese corporations in question were acting*

pursuant to specific mandatory directions of the Government of Japan . . . ."

(Gov. of Japan Merits Br. App. 2a) (emphasis added).[26]

In total disregard of the 1975 Japanese Government Statement, the court of appeals held that a fact finder could conclude that: (i) the export control arrangements had only been sponsored or "encouraged" by the Government of Japan, rather than compelled (Pet. App. 177a-178a); (ii) there is some doubt "that the minimum prices [contained in the manufacturers' agreements and referred to in the JMEA regulations] . . . were in fact determined by the Japanese Government" (Pet. App. 188a-189a); (iii) "the [G]overnment [of Japan] merely provided an umbrella under which [petitioners] . . . fixed their own export prices" (Pet. App. 189a); and (iv) the "five-company rule was the result of nongovernmental action." (Pet. App. 178a).

These holdings were wrong. As the Solicitor General has explained, the court of appeals should have given "dispositive" effect to the "explicit and detailed" statement of the Japanese Government. (U.S. Gov. Cert. Br. 17). The court of appeals' failure to do so is contrary to the long-established rule that an official pronouncement of a foreign sovereign attesting to its governmental activities must be accepted by United States courts as conclusive proof of the representations of governmental actions, laws and policies contained therein.

For example, in *United States v. Pink*, 315 U.S. 203, 218-21 (1942), this Court considered whether nationalization decrees of the Russian Government had extraterritorial effect over property located in the State of New York. The Soviet Commissariat for Justice had issued an official statement explaining that the nationalization decrees

[26] Over the years, the Japanese Government has directed Japanese manufacturers and exporters to comply with similar agreements and regulations governing the export of a wide variety of products. (Gov. of Japan Merits Br. 3).

at issue were intended to have such an impact. This Court he... that these official representations of the Russian Government were entitled to be given "*conclusive*" effect. *Id.* at 220 (emphasis added).[27]

The policy behind this rule of conclusivity can be found in the act of state doctrine, which prohibits U.S. courts from inquiring into the validity of acts or policies of a foreign government acting within its sovereignty.[28] The rationale of that doctrine—leaving the conduct of foreign affairs to the Executive and Legislative Branches—would be frustrated if courts were permitted to adjudicate the veracity of an official statement of a foreign government attesting to its own laws and actions. Thus, in *Banco de Espana*, 114 F.2d at 443-44, a case decided before *Pink*, the Second Circuit gave conclusive effect to a statement of the Spanish Ambassador representing that actions taken by the Spanish government in acquiring title to certain property were "governmental acts." Relying upon, among other authorities, this Court's act of state decision in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Second Circuit reasoned that "[i]t would seem to follow [from the act of state doctrine] that the statement that such [governmental] acts had taken place,

[27] *See also Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438, 443-44 (2d Cir. 1940); *The Claveresk*, 264 F. 276, 279-80 (2d Cir. 1920); *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919); *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280, 1283-85 (D. Del. 1976), *aff'd per curiam*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Occidental Petroleum Corp. v. Buttes Gas & Oil Company*, 331 F. Supp. 92, 103-04 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *United States v. Melekh*, 190 F. Supp. 67, 87 (S.D.N.Y. 1960); American Bar Association, Section of Antitrust Law, *Antitrust Law Developments (Second)* 562, n.272 (1984).

[28] *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 (1976); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762-63 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

made to our courts officially on behalf of [a] friendly foreign government by its accredited representative, must be accepted as proof of that fact . . . ." 114 F.2d at 443.[29]

The 1975 Japanese Government Statement, like the statement of the Commissariat for Justice in *Pink*, is an official declaration of a foreign sovereign attesting to its own governmental laws, actions and policies. Accordingly, that Statement is entitled to conclusive effect. Indeed, as a detailed declaration from a friendly foreign government attesting to export controls implemented pursuant to that nation's pre-existing laws as a vital part of its foreign trade policies, the 1975 Japanese Government Statement presents the strongest possible case for applying the conclusivity doctrine. Both the Department of Justice and the State Department agree that, in these circumstances, the representations of the Government of Japan should have been given dispositive effect. (U.S. Gov. Cert. Br. 17).

By failing to do so, the court of appeals has sanctioned the very result that *Pink* and the act of state doctrine are designed to prevent—a full-scale judicial inquiry into the veracity of a friendly foreign government's attestations of sovereign conduct, including possible depositions of and court appearances by foreign government officials. Such wide-ranging inquiry into sensitive matters of state would significantly intrude upon

[29] *See also The Claveresk*, 264 F. at 280 (official pronouncement of a foreign government "describing a certain act and avowing it as governmental, is to be taken as verity"); *D'Angelo*, 422 F. Supp. at 1284 (relying on *Pink* in giving conclusive effect to an opinion of the Attorney General of Mexico concerning the scope and effect of a Mexican expropriation decree); *Occidental Petroleum Corp.*, 331 F. Supp. at 110 (barring an inquiry into the authenticity, validity, and motivations behind a decree of a foreign government because such an inquiry would involve "the very sources of diplomatic friction and complication that the act of state doctrine aims to avert").

foreign sovereignty, encroach upon the conduct of foreign relations by the Executive Branch, and invite foreign governments and courts to take reciprocal action against the United States. For all of these reasons, the representations in the 1975 Japanese Government Statement should be accorded conclusive effect.

B. Petitioners' Participation In Export Controls Compelled By The Government Of Japan Cannot Form A Basis For Antitrust Liability

Despite the conclusive representations of the Japanese Government that it had compelled petitioners' participation in the export control arrangements, the court of appeals held that those arrangements could be found to constitute central "features" of the alleged antitrust conspiracy in violation of U.S. law. (Pet. App. 179a-180a; 188a-189a). This ruling is contrary to both the sovereign compulsion and act of state doctrines.

1. Petitioners' Participation in the Japanese Government's Export Controls is Protected by the Sovereign Compulsion and Act of State Doctrines

As noted above, the act of state doctrine prevents U.S. courts from entertaining any claim that requires inquiry into the validity of the actions or policies of a foreign government acting within its sovereignty.[30] "A corollary to the act of state doctrine in the foreign trade antitrust field is the often-recognized principle that corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself." *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976).[31] The court of appeals' conclusion that petitioners' participation in the

[30] *See* authorities cited at p. 39 n.28, *supra*.

[31] *See also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (conspiracy involving foreign government purchasing subject to antitrust scrutiny absent a showing that such conduct was compelled by the foreign government); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1296-99 (D. Del. 1970) (concerted boycott of U.S. firm compelled by regulatory authorities in Venezuela held

Japanese Government's export control arrangements can constitute a "feature" of an unlawful conspiracy violates these two doctrines.

The Solicitor General (U.S. Gov. Cert. Br. 14) and the Third Circuit have both recognized the sovereign compulsion doctrine.[32] Indeed, in this very case, the court of appeals "assume[d], without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act." (Pet. App. 188a). It erred, however, by failing to apply the sovereign compulsion doctrine to petitioners' participation in the export control arrangements.

As previously discussed, the conclusive representations of the Government of Japan establish that such participation was both *compelled* and *supervised* by the Japanese Government. The 1975 Japanese Government Statement makes it clear that petitioners entered into the export control arrangements "under the direction of [the Japanese Government]"; that the Japanese Government's directive had a "compulsory power equivalent to law"; and that petitioners had "no alternative but to establish the agreement[s] and regulation[s] in compliance with the said direction." (Pet. App. 10a; 12a). Further, the Japanese Government continuously "supervised" the export control arrangements to be certain that its "intention was correctly reflected." (Pet. App. 11a). Under these circumstances, principles of fundamental fairness and respect for foreign sovereignty, which underlie the sovereign compulsion doctrine, require that petitioners not be penalized for complying with the directives of their government.[33]

---

protected by the sovereign compulsion doctrine); J. Atwood & K. Brewster, *Antitrust and American Business Abroad* §§ 8.14, 8.17-8.22 (2d ed. 1981).

[32] *See Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979).

[33] Recently, in *Southern Motor Carriers Rate Conference, Inc. v. United States*, —— U.S. ——, 105 S. Ct. 1721, 1729-31 (1985), this

Similarly, by permitting a trier of fact to treat petitioners' government-compelled participation in the export control arrangements as a "feature" of an antitrust violation, the court of appeals has authorized precisely the type of private legal attack upon sensitive foreign governmental policies that the act of state doctrine is designed to prevent. As explained by this Court in *Sabbatino*, the act of state doctrine mandates that challenges to foreign governmental conduct or policies be addressed by our political branches of government, rather than by the judiciary. 376 U.S. at 423 (the act of state doctrine "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations"). Thus, courts must consider whether judicial action will "touch . . . sharply on the national nerves" of a foreign government and embarrass the Executive Branch in its conduct of foreign relations. 376 U.S. at 428. Antitrust actions which raise such concerns have been prohibited under the act of state doctrine even when the claims are asserted against private parties.[34]

As the 1975 Japanese Government Statement establishes, in carrying out the Government of Japan's directives, petitioners were acting as instrumentalities of the Japanese Government, whose export control arrangements were "no less than the implementation of [its] foreign trade policy." (Pet. App. 11a). If respondents are permitted to challenge petitioners' participation in such

---

Court held that the analogous state action doctrine applies to private conduct undertaken pursuant to a "clearly articulated state policy" and subjected to "active state supervision"—without any need to show "compulsion." In the present case, the 1975 Japanese Government Statement establishes even more: a "clearly articulated" government policy; "active supervision" by the government involved; *and* actual "compulsion."

[34] *See, e.g., American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 76-77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Occidental Petroleum Corp.*, 331 F. Supp. at 111.

arrangements as the basis for an antitrust violation, the foreign trade policy of Japan itself will be placed on trial. The Government of Japan's Note Verbale confirms that few judicial decisions could intrude more sharply upon the Japanese Government's "national nerves." (Gov. of Japan Merits Br. App. 1a-4a).

In sum, under both the sovereign compulsion and act of state doctrines, petitioners' participation in the Japanese Government's export control arrangements cannot form the basis of an antitrust violation.

2. *United States Foreign Policy Requires Application of the Sovereign Compulsion and Act of State Doctrines*

That the sovereign compulsion and act of state doctrines should apply to petitioners' participation in the Japanese Government-compelled export controls is further demonstrated by the official representations of the Executive Branch and various foreign governments in this case. (U.S. Gov. Cert. Br. 14-20; Gov. of Japan Merits Br. 9-10). As the Solicitor General has explained: "The court's rejection of petitioners' sovereign compulsion defense has caused deep concern to the Government of Japan and to the governments of other countries that are significant trading partners of the United States and *threatens to affect adversely the foreign policy of the United States.*" (U.S. Gov. Cert. Br. 6) (emphasis added).

The United States and its major trading partners often engage in negotiations designed to balance their competing international trade interests, and this bargaining frequently results in government-imposed controls on exports by private citizens.[35] In order for these trade negotiations to be successful, foreign sovereigns must be assured that by requiring their nationals to comply with government-compelled export controls, they will not be subjecting them to private antitrust liability in the United States. (U.S. Gov. Cert. Br. 19).

The United States Government has assured the Japanese Government that when, acting within its jurisdiction, it compels its own nationals to enter into export control arrangements, such compelled conduct "[will] not give rise to violations of the United States antitrust laws."[36] Moreover, the then Assistant Attorney General in charge of the Antitrust Division took the same position with respect to the very export control arrangements at issue in this case.[37]

The Solicitor General has called this Court's attention to the serious concerns expressed by the United States' major trading partners as a result of the court of appeals' holding that petitioners' participation in the Japanese Government-compelled export control arrangements may constitute a basis for U.S. antitrust liability. (U.S. Gov. Cert. Br. 19). The Governments of Australia, Canada, France, Japan, Korea, Spain and the United Kingdom all have filed diplomatic notes with the Department of State which emphasize that the court of appeals' decision will have an adverse effect upon trade relations between the United States and its principal trading partners.[38] It is the considered opinion of the United States Government that, as a result of the court of appeals' decision:

> "these and other foreign governments understandably may be reluctant to accommodate proposals by

[35] As the Solicitor General has pointed out, the United States has requested that our trading partners enter into such voluntary restraint arrangements which limit their exports to this country. (U.S. Gov. Cert. Br. 18). *See also* Presidential Memorandum for the United States Trade Representative, 49 Fed. Reg. 36,813 (1984).

[36] Letter of Attorney General William French Smith to Ambassador Yoshio Okawara, dated May 7, 1981. (Pet. App. 26a). *Accord* Letter of Assistant Attorney General J. Paul McGrath to Mr. Kenneth McDonald, Charge d'Affaires a.i., Embassy of Australia (Jan. 18, 1985) (a copy of which has been lodged with the Clerk of this Court).

[37] *See* Letter of Assistant Attorney General Donald I. Baker to Senator Edward M. Kennedy, dated February 16, 1977. (Pet. App. 15a-20a, at 18a).

[38] Copies of these diplomatic notes have been lodged by the Solicitor General with the Clerk of this Court.

the United States to resolve trade controversies by the imposition of voluntary restraint agreements on their own manufacturers. Such a response could deprive the United States of a tool that has proved valuable in the resolution of difficult international trade disputes." (U.S. Gov. Cert. Br. 19) (footnote deleted).

For all of the foregoing reasons, this Court should reverse the court of appeals' decision and hold that petitioners' government-compelled participation in the export control arrangements cannot constitute or be a "feature" of a United States antitrust law violation.

III. THE COURT OF APPEALS' 1916 ANTIDUMPING ACT JUDGMENT SHOULD ALSO BE REVERSED BECAUSE IT IS CONTINGENT UPON THAT COURT'S ERRONEOUS ANTITRUST RULINGS

The court of appeals' erroneous antitrust rulings also necessitate a reversal of its judgment under the 1916 Antidumping Act. That statute requires proof of a specific predatory intent to destroy or injure an industry in the United States. (Pet. App. 29a; 218a). As its decision on the 1916 Act demonstrates, in order to find a genuine issue of material fact regarding such specific predatory intent, the court of appeals relied upon the same erroneous inference of a predatory export conspiracy that it found to be permissible in its antitrust decision.

With respect to respondents' *conspiracy* claims under the 1916 Act, the court of appeals relied upon the same "evidence supporting [respondents'] theory that [petitioners] entered into the alleged [predatory Sherman Act] conspiracy" as the basis for its conclusion that there exists a genuine issue of material fact as to whether "[petitioners] agreed to dump CEPs on the United States market with the specific intent to destroy or injure an industry in the United States." (Pet. App. 219a). Similarly, with respect to respondents' *individual* Antidumping Act claims, the court of appeals once again relied upon this same "evidence offered to tie each [petitioner]

to [the Sherman Act] conspiracy" as the sole basis for its holding that there exists a genuine issue of material fact as to each petitioner's *individual* predatory intent. (Pet. App. 221a). Indeed, it was precisely because its finding regarding specific predatory intent was contingent upon its conclusion that an inference of the alleged predatory export conspiracy could be drawn, that the court of appeals affirmed the dismissal of the 1916 Act claims (both individual and conspiratorial) against those defendants (*i.e.*, Sony, Sears and Motorola) whose summary judgments against respondents' antitrust conspiracy claims were affirmed. (Pet. App. 221a-223a).

The same conclusion must apply to respondents' 1916 Act claims against the petitioners. In the absence of the court of appeals' erroneous conclusion that an inference of the alleged predatory export conspiracy could be drawn, all that would be left in the record on the issue of petitioners' "intent" in the U.S. market would be the *unreversed* findings of the district court that respondents have failed to come forward with any probative evidence of an anticompetitive or predatory intent. (Pet. App. 463a-473a). Summary judgment is thus also warranted against respondents' 1916 Act claims.

IV. PRINCIPLES OF SOUND JUDICIAL ADMINISTRATION WARRANT REINSTATEMENT OF SUMMARY JUDGMENT BY THIS COURT

Petitioners respectfully submit that this Court should reinstate the summary judgments now.[39] Reinstatement in this fifteen-year old case would send a strong signal to federal trial judges that summary judgment is a meaningful tool for managing large and complicated antitrust cases. As Chief Justice Burger recently cautioned, "[i]f

[39] This Court has previously reinstated district court judgments in appropriate cases. *See, e.g.*, *Board of Education v. Pico*, 457 U.S. 853, 862-63 (1982); *Kleppe v. Sierra Club*, 427 U.S. 390, 415 (1976); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 65 (1975).

the courts are to retain public confidence, we cannot let disputes wait two, three or five years to be disposed of" when efficient tools of judicial administration can avoid that result.[49]

Because, as demonstrated in Points I-III above, it is clear that respondents' claims are unsupportable and that the district court's summary judgments should have been affirmed, sound judicial administration requires that this Court reinstate those judgments. Remanding this case to the court of appeals would only add another needless chapter to this seemingly endless proceeding which has already embroiled the parties and an overburdened judiciary in years of time-consuming and enormously expensive litigation. *See Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 169-70 (1967) ("effective judicial administration" requires this Court to finally dispose of issues where reasonably possible, rather than remand them to the court of appeals).

Indeed, since the court of appeals and the district court both relied upon the same factual predicates, and disagreed only as to the permissible inferences which could be drawn from those facts and the legal standards to be applied in drawing such inferences, this Court can determine from the opinions below that reinstatement is appropriate. The procedural posture of this case is thus similar to that which existed in *Kleppe v. Sierra Club*, 427 U.S. at 395-96. In *Kleppe*, the court of appeals did not upset the key findings by the district court as to what the record showed, but instead drew erroneous inferences from those uncontested findings and misconstrued the governing law. *Id.* at 401, 403. Inasmuch as there was no dispute between the two lower courts with respect to the facts distilled from the record, *id.*, this Court not only reversed the incorrect legal standard applied by the court of

---

[49] Honorable Warren E. Burger, Speech at 1982 ABA Annual Meeting, 68 A.B.A.J. 276 (March 1982).

appeals, but also ordered reinstatement of summary judgment. *Id.* at 414-15.

There are particularly compelling public policy reasons for this Court to reinstate the summary judgments in this case. Reinstatement would help prevent this massive litigation—in which two domestic manufacturers, including the industry leader, have used burdensome judicial proceedings to wage "economic war" against their foreign competitors (Pet. App. 665a)—from providing encouragement to others who may try to misuse the antitrust laws to achieve protectionist objectives. Reinstatement would also assure our major trading partners that cooperating with the United States Government to establish export control arrangements will not subject their nationals to endless private litigation.

Finally, reinstatement would encourage district court judges to devote the time and resources necessary to give proper consideration to summary judgment motions in appropriate antitrust conspiracy cases. As previously discussed (pp. 21-23, *supra*), without summary judgment, antitrust conspiracy claims grounded in speculation would penalize and deter the very pro-competitive behavior which the antitrust laws are intended to encourage. The district court in this case did precisely what trial courts should do when confronted with a massive record in support of an antitrust conspiracy claim. It "spent months and months in the tedious process of reading in chambers the significant . . . portions of [respondents'] [final pretrial statement], reviewing the sources cited for the various allegations contained therein, . . . and studying the voluminous memoranda addressing the evidence and arguing about its significance." (Pet. App. 255a). It then meticulously examined respondents' evidence and contentions under this Court's *Cities Service* inference standard and, properly applying that standard, concluded that respondents did not show any "significant probative evidence" of the conspiracy alleged. (Pet. App. 621a).

This Court should reaffirm the proper use of summary judgment in antitrust conspiracy cases by reinstating the district court's judgments and bringing this fifteen-year-old proceeding to an end.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court reverse the judgments of the court of appeals and order reinstatement of the judgments of the district court.

June 14, 1985

Respectfully submitted,

IRA M. MILLSTEIN
A. PAUL VICTOR
JOEL B. HARRIS
KEVIN P. HUGHES
JEFFREY L. KESSLER
MARTIN S. HYMAN
MINDY J. SPECTOR
ELIZABETH A. JAFFE
JEFFREY P. BIALOS

WEIL GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
Tel.: (212) 310-8000

RAYMOND T. CULLEN

MORGAN LEWIS & BOCKIUS
120 South Broad Street
Philadelphia, Pa. 19109
Tel.: (215) 481-9500

Attorneys for Matsushita Electric Industrial Co., Ltd.; Matsushita Electric Corporation of America; Matsushita Electric Trading Co.; and Matsushita Electronics Corporation

DONALD J. ZOELLER
Counsel of Record

JOHN L. ALTIERI, JR.
HAROLD G. LEVISON
ROBERT A. JAFFE
ADRIAN H. VON HASSELL

MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
Tel.: (212) 510-7000

PATRICK T. RYAN

DRINKER BIDDLE & REATH
1100 Phila. Nat. Bank Bldg.
Philadelphia, Pa. 19107
Tel.: (215) 988-2700

Attorneys for Toshiba Corporation and Toshiba America, Inc.

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
STEPHEN P. MURPHY
PAUL J. PANTANO, JR.

METZGER SHADYAC & SCHWARZ
1275 K Street, N.W.
Washington, D.C. 20005
Tel.: (202) 289-4520

H. WILLIAM TANAKA
LAWRENCE R. WALDERS
B. JENKINS MIDDLETON

TANAKA WALDERS & RITGER
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Tel.: (202) 223-1670

CHARLES J. BLOOM

KLEINBARD, BELL & BRECKER
1550 United Engineers Bldg.
30 South 17th Street
Philadelphia, PA 19103
Tel.: (215) 568-2000

Attorneys for Hitachi, Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; and Hitachi Sales Corporation of America

JIRO MURASE
PETER J. GARTLAND
GENE Y. MATSUO
PETER A. DANKIN
LANCE GOTTHOFFER

WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022
Tel.: (212) 832-3333

MATTHEW J. BRODERICK

DECHERT PRICE & RHOADS
1500 Market Street
Philadelphia, Pa. 19102
Tel.: (215) 972-3400

Attorneys for Sharp Corporation and Sharp Electronics Corporation

Hoken S. Seki
David A. Dopsovic

Seki & Jarvis
520 Madison Avenue
New York, N.Y. 10022
Tel.: (212) 759-2303

Henry T. Reath
Frank A. Luchak
Judith N. Renzulli

Duane Morris & Heckscher
1500 One Franklin Plaza
Philadelphia, Pa. 19102
Tel.: (215) 854-6300

John T. Dolan
Arnold B. Calmann

Crummy, Del Deo, Dolan, Griffinger & Vecchione
Gateway One
Newark, N.J. 07102
Tel.: (201) 622-2235

Donald F. Turner

Wilmer Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 872-6000

Attorneys for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

Charles F. Schirmeister
Peter C. Williams

Reid & Priest
40 West 57th Street
New York, N.Y. 10019
Tel.: (212) 603-2000

Stephen W. Armstrong

Montgomery McCracken Walker & Rhoads
Three Parkway
Philadelphia, Pa. 19102
Tel.: (215) 563-0650

Attorneys for Mitsubishi Corporation and Mitsubishi International Corporation

James S. Morris
Kevin R. Keating
Michael S. Press

Whitman & Ransom
522 Fifth Avenue
New York, N.Y. 10036
Tel.: (212) 575-5800

Charles J. Bloom

Kleinbard, Bell & Brecker
1550 United Engineers Bldg.
30 South 17th Street
Philadelphia, PA 19103
Tel.: (215) 568-2000

Attorneys for Sanyo Electric Co., Ltd.; Sanyo Electric Trading Co., Ltd.; Sanyo Electric, Inc.; and Sanyo Manufacturing Corporation

AMENDMENTS TO RULE 28.1 STATEMENTS

Amendents To Rule 28.1 Statement Of Petitioners Toshiba Corporation And Toshiba America Inc.

Petitioners Toshiba Corporation and Toshiba America Inc. submit the following amendments to their Rule 28.1 statement contained in the Appendix to the Petition: Delete Pars Tousheh Holding Co., Ltd. (Iran); change Toshiba (Malaysia) Bhd. (Malaysia) to Toshbar Corporation Bhd. (Malaysia).

Amendments To Rule 28.1 Statement Of Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, And Hitachi Sales Corporation Of America

Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America submit the following amendment to their Rule 28.1 statement contained in the Appendix to the Petition: Delete Hatsuco, Ltd.

Amendments To Rule 28.1 Statement Of Petitioners Mitsubishi Electric Corporation (MELCO) And Mitsubishi Electric Sales America, Inc.

Petitioners Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc. submit the following amendments to their Rule 28.1 statement contained in the Appendix to the Petition: Delete Kansai Mitsubishi Electric Products Sales (Inc.); Mecom Okitac Systems (Inc.); Toyo Machinery Industry Works (Inc.); and Daito Industry (Inc.). Change Tyoden Industrial Machinery; Service Engineering (Inc.) to Ryoden Industrial Machinery Engineering (Inc.). Change Mitsubishi Industrial Software (Inc.) to Mitsubishi Electric Industrial Software (Inc.). Add Ryoden Kasei (Inc.) and Melcom Service (Inc.).

Amendments To
Rule 28.1 Statement Of Petitioners Mitsubishi Corporation And Mitsubishi International Corporation

Petitioners Mitsubishi Corporation and Mitsubishi International Corporation submit the following amendments to their Rule 28.1 statement contained in the Appendix to the Petition: Delete El Vic Farm Corporation; Sunstar Rubber Industries Corporation; MCF Footwear Corporation; and MC Minerals Corporation. Add Coilplus, Inc.; Hi-Tech Stamping, Inc.; Mitsubishi Foods (MC), Inc.; Hishi Plastics U.S.A., Inc.; and Evergreen Investment Corporation.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

Writ of Certiorari to The United States Court of
Appeals for the Third Circuit

TABLE OF CONTENTS

TABLE OF CONTENTS—*(Continued)*

TABLE OF AUTHORITIES

No. 83-2004

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

JURISDICTION.

The Court of Appeals for the Third Circuit entered two separate judgments in this litigation on December 5, 1983, one relating to the antitrust segment of the litigation (Nos. 81-2331/2332/2333 in the Court below), and one relating to the antidumping segment of the litigation (No. 80-2080 in the Court below). Since Question Nos. 1 and 2 presented in the petition and accepted for review are limited to the judgment in the antitrust segment of the case, respondents submit that the Court does not have before it for review the separate judgment in the antidumping segment of the case. *Infra*, Part III.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions invoked in the complaints are reproduced in the Appendix to the Petition at 27A-32A;[1] however, the Questions Presented in the Petition involve only Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. Certain pertinent Japanese statutes and Japanese Government statements concerning Japanese export cartel pricing and a provision of the General Agreement on Tariffs and Trade ("GATT") are also reproduced in the Addendum to this brief.

COUNTER-STATEMENT OF THE CASE.

In the antitrust segment of these two consolidated cases, two American television manufacturers, respondents Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE"), challenge an unlawful combination and conspiracy among twenty named defendants comprising the principal Japanese consumer electronic products manufacturers

1. Because of the volume of the evidentiary materials, the Court has directed that this matter be heard on nine copies of the Appendices in the Court of Appeals, dispensing with the requirement of a separate printed appendix in this Court. The opinions of the lower courts are contained in the two-volume Appendix to the Petition for Writ of Certiorari filed June 7, 1984. A separate appendix was prepared in the Court of Appeals for each of the two separate appeals before the Court of Appeals, No. 80-2080 (Antidumping Act of 1916) and Nos. 81-2331/2332/2333 (Antitrust).

References herein to the Appendix to the Petition for Writ of Certiorari are denoted by the page number followed by 'A'. References herein to the appendix in the Court of Appeals in Nos. 81-2331/2332/2333 are denoted by the page number followed by 'a'. References to the volume number of the volume of the Appendix in Nos. 81-2331/2332/2333 in which the referenced pages are found are abbreviated "App. Vol.". References to respondents' complaints and other documents contained in the appendix in the Court of Appeals at No. 80-2080 are denoted by the page number followed by 'b'. References to the Addendum to this brief are abbreviated as 'ad'.

References to the Brief of Petitioners are abbreviated as 'P.Br.'; to the Brief of the United States as *amicus curiae* as 'G.Br.'; to the Brief of Japan as *amicus curiae* as 'J.Br.'. Respondents' Rule 28.1 designation of corporate relationships appears in their Brief in Opposition to Petition for Writ of Certiorari.

doing business in the United States, their Japanese trading companies and their United States marketing subsidiaries, and others,[2] to restrain and monopolize trade and commerce in television receivers and other consumer electronic products in the United States.[3] In the antidumping segment, which is not before the Court, respondents charged that the Japanese companies violated the Antidumping Act of 1916 by individually importing or assisting in importing consumer electronic products, in violation of the Act, as well as by conspiring to do so.

A. *Procedural History.*

NUE filed its complaint in the District of New Jersey in Newark, on December 21, 1970, six months after it was forced to close its Jersey City, New Jersey, television plant and related facilities and discontinue its television manufacturing business, and several weeks after the U.S. Treasury Department had ruled that Japanese television receivers were being dumped in the United States. Three Japanese manufacturers, Hitachi, Sanyo, Mitsubishi, and their three controlled or affiliated trading companies, disputed *in personam* jurisdiction and venue, and refused to provide discovery on the merits until their jurisdictional motions were decided, forcing NUE to take discovery, in Japan and in the United States, to establish jurisdiction and venue before proceeding with discovery on the merits from these companies.[4] On February 8, 1971, seven defendants filed statute of limitations motions and motions to strike paragraphs of NUE's complaint. On July 23, 1971, nine defendants filed preliminary

2. Certain other Japanese manufacturers, including among others Nippon Electric Co. Ltd. ("NEC") and The General Corporation ("General") are identified co-conspirators, but were not named as defendants. In addition, certain of the facts herein specifically relate to Victor Company of Japan ("Japan Victor"), a subsidiary of the Matsushita interests.

3. Zenith and NUE seek treble damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C §§15 and 26, for petitioners' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, Section 7 of the Clayton Act, 15 U.S.C. §18, Section 2(a) of the Clayton Act, 15 U.S.C §13(a), and Section 73 of the Wilson Tariff Act, 15 U.S.C. §8.

4. After NUE had completed discovery on this issue, Mitsubishi Corporation and Hitachi Ltd. abandoned their jurisdictional defenses.

motions contending that the Antidumping Act of 1916, 15 U.S.C. §72, was "unconstitutionally vague." Petitioners blocked discovery of their pricing data in convenient format by objecting to producing their previous submissions in the Treasury Department's proceedings under the Antidumping Act of 1921, which contained such television pricing information for both the Japanese and United States markets.[5]

Most of defendants' preliminary motions were briefed and argued in 1971 and 1972 before Judge Robert Shaw, who died in July 1972, before deciding them. In October 1972, the *NUE* case was reassigned to Judge John J. Kitchen in Camden, New Jersey, and in June 1973, NUE moved for determination of the jurisdictional defenses. Hitachi, Sanyo and Mitsubishi objected to the admissibility of NUE's evidence and declined to brief the jurisdiction and venue issues until the Court ruled on their evidentiary objections. In September 1973, before reargument of the other pending motions or rulings on petitioners' evidentiary objections, Judge Kitchen died. The NUE case was assigned in January 1974, to Judge Herbert J. Stern, who on petitioners' request recused himself. In February 1974, the *NUE* case was reassigned to the Honorable Vincent P. Biunno.

By September 20, 1974, when Zenith filed its complaint in the Eastern District of Pennsylvania, petitioners were still blocking discovery on the merits and continuing to withhold their Treasury Department submissions on the ground that none of petitioners' motions in the *NUE* case had yet been decided. When the *Zenith* case was assigned to District Judge A. Leon Higginbotham, Jr., petitioners immediately moved the Judicial Panel on Multidistrict Litigation, under 28 U.S.C. §1407, to transfer the *Zenith* case to Judge Biunno in New Jersey. Because of the protracted delays in the *NUE* case, Zenith opposed transfer. The Judicial Panel not only denied petitioners' motion to transfer the *Zenith* case but, *sua sponte*, ordered that the *NUE*

5. The Treasury Department's antidumping proceedings, which had begun in 1968, resulted in a finding in early 1971 that Japanese television receivers were being dumped in the United States, *i.e.*, sold at prices in the United States that were substantially below Japanese market prices for the same goods and that the United States television manufacturing industry was being injured by this conduct. App.Vol. 11 (4200a).

case be "transferred to the Eastern District of Pennsylvania and, with the consent of that court, assigned to the Honorable A. Leon Higginbotham, Jr." *In re Japanese Electronic Products Antitrust Litigation*, 388 F.Supp. 565, 567 (J.P.M.L. 1975).[6]

Petitioners filed a new round of motions in January 1975, disputing jurisdiction and venue in Pennsylvania, attacking the constitutionality of 28 U.S.C. §1391(d) (the alien venue provision) as violative of the Fifth Amendment Equal Protection component, attacking the constitutionality of the 1916 Antidumping Act on the grounds of alleged "vagueness," seeking to strike certain allegations in and challenging other counts of Zenith's complaint. Matsushita and Sharp, which had not challenged jurisdiction and venue in the *NUE* case, now joined the other defendants in raising these grounds.

Judge Higginbotham promptly established a briefing schedule on every outstanding motion in the *NUE* and *Zenith* cases, conducted expedited discovery on the jurisdiction and venue fact issues in the *Zenith* case, issuing his own interrogatories from the bench, ruled on petitioners' objections to NUE's jurisdiction and venue evidence (Sanyo and Hitachi withdrew their objections), and, in a series of evidentiary hearings and written decisions filed between January and May 1975, disposed of all of petitioners' preliminary motions in both cases. The District Court (a) upheld the constitutionality of the Antidumping Act of 1916, 402 F.Supp. 251 (E.D. Pa. 1975), (b) denied all of the jurisdiction and venue motions, 402 F.Supp. 262 (E.D. Pa. 1975), (c) directed defendants to produce their submissions to the Treasury Department, (Pretrial Order No. 9, February 19, 1975), and (d) denied petitioners' motions seeking an interlocutory appeal under 28 U.S.C. §1292(b) of the jurisdiction and venue rulings. The court dismissed international Robinson-Patman Act counts relating to dumping, and limited Zenith's Robinson-Patman claims to interstate commerce, 402 F.Supp. 244 (E.D. Pa. 1975). The Third Circuit denied a petition for writ of mandamus filed by

6. The panel noted that "[t]he fact that several motions remain undecided in the *NUE* action is understandable in light of the unfortunate series of occurrences that have affected it," but predicted that "transfer will result in the expeditious and efficient resolution of common factual and legal questions under the firm guidance of the transferee judge." 388 F.Supp. at 567.

Mitsubishi Electric Corporation relating to the jurisdiction and venue issue. 521 F.2d 1399 (3d Cir. 1975).

After NUE and Zenith were permitted to begin coordinated merits discovery in mid-1975, NUE moved to transfer its case to Philadelphia for all purposes pursuant to 28 U.S.C.§1404(a). Sanyo opposed transfer, on the asserted ground that, although the court had upheld jurisdiction in Pennsylvania in *1974*, the Pennsylvania court lacked *in personam* jurisdiction over Sanyo in *1970* when NUE had filed suit. On August 18, 1976, after discovery and hearing on this new objection, Judge Higginbotham dismissed Sanyo's opposition to transfer as baseless.[7]

In late 1976, nearly two years after they filed answers to the complaint, petitioners filed belated, multi-million dollar counterclaims against Zenith, which are still pending. In 1977, when Judge Higginbotham was appointed to the Court of Appeals, the cases were reassigned to District Judge Edward R. Becker. To further delay discovery in the main actions, petitioners thereafter launched an harassing nationwide deposition program directed at Zenith's wholesale customers, assigning to the task nine teams of attorneys from their battery of twenty law firms. In the next three years, petitioners deposed 49 persons from 32 companies, including Zenith's major independent wholesale customers, and generated 10,093 pages of transcripts, 2,851 pages of exhibits, and hundreds of thousands of other documents that petitioners subpoenaed from Zenith's independent distributors and others.

In an effort to bring the cases to trial, respondents abridged their discovery efforts, which had been thwarted by petitioners' procedural maneuvers, and filed their Final Pretrial Statement ("FPS") in 1979, pursuant to District Judge Becker's extraordinary "Case Management Order," Pretrial Order No. 154, App.

7. Overruling Sanyo's objection, Judge Higginbotham commented: "It is astonishing to the Court that, at this advanced stage of these proceedings, it should be required to review contentions by the Sanyo defendants which, upon examination, prove to be patently frivolous. Counsel for the Sanyo defendants should be aware that at a subsequent point in this litigation the Court will be prepared to entertain an application by NUE to recover the costs of prosecuting the instant motion." (Pretrial Order No. 66 dated August 18, 1976.)

Vol. 2 (661a), 478 F.Supp. at 946-960, which required respondents to set forth with preclusive effect, as that Order required, "each fact" and "all subsidiary and supporting facts" (668a) on which they might rely at trial, the mode of proof at trial of each fact and subsidiary fact, their technical and economic experts' reports and other materials required by Judge Becker's order.

The Case Management Order also required petitioners to file a Final Pretrial Statement, their experts' reports, if any, and other materials. Rather than comply, petitioners filed a further group of dilatory summary judgment motions, a new round of *in limine* motions raising a plethora of evidentiary issues, and other motions, including: (1) a motion disputing subject matter jurisdiction of the court, *denied* at 494 F.Supp. 1161 (E.D.Pa. 1980); (2) motions disputing Zenith's standing to sue, (relying on *Illinois Brick Co. v. Illinois*, 432 U.S. 720 (1977)), *denied* at 494 F.Supp. 1246 (E.D.Pa. 1980); (3) motions disputing NUE's standing to sue (relying on *Bangor Punta Operations, Inc.* v. *Bangor Aroostook R.R.*, 417 U.S. 703 (1974)), *denied* at 498 F.Supp. 991 (E.D.Pa. 1980); (4) a motion attacking the Antidumping Act of 1916 on grounds of alleged repugnance to the United States-Japan Treaty of Friendship, Commerce and Navigation, *denied* at 494 F.Supp. 1263 (E.D.Pa. 1980), *aff'd.*, 723 F.2d 319 (3d Cir. 1983) (208A-11A); (5) motions for partial summary judgment on the 1916 Antidumping Act claims based on certain insignificant technical differences between television receivers adjusted for sale in the Japanese market and those adjusted for sale in the United States market, *granted in part* at 494 F.Supp. 1190 (E.D.Pa. 1980), *rev'd*, 723 F.2d 319 (3d Cir. 1983) (198A-223A); (6) multiple summary judgment motions under §1 of the Sherman Act, §2 of the Sherman Act, §2(a) of the Clayton Act, as amended, §7 of the Clayton Act, and §73 of the Wilson Tariff Act, App.Vol. 3 (753a-1104a); and (7) a further group of *in limine* motions raising a series of evidentiary objections under Rules 104, 403, 702-704, 801-805, and 901-902 of the Federal Rules of Evidence relating to scores of documents identified in respondents' Final Pretrial Statement for possible trial use. The Court of Appeals later held nearly every one of such objections to be meritless, and remanded the remaining objections for reconsideration by the district court. (64A-162A).

Although the Case Management Order imposed on petitioners a reciprocal obligation to file responsive Final Pretrial Statements, the district court relieved petitioners of their obligation to do so. Briefing, protracted hearings before the court and the court's decision on petitioners' numerous evidentiary objections and summary judgment motions consumed much of 1980. (Between January 1, 1980, and October 1, 1980, the parties filed 114 briefs, which totalled some 7500 pages). The district court granted partial summary judgment in favor of petitioners on respondents' antidumping claims and certified the order for interlocutory appeal. The district court then ruled much of respondents' evidence inadmissible, and granted summary judgment on the antitrust claims. Petitioners requested the Court of Appeals to defer argument in the interlocutory appeal until argument in the antitrust segment of the cases.

The Court of Appeals heard two days of oral argument relating to both the antitrust appeal and the antidumping appeal on October 21-22, 1982. On December 5, 1983, in the antitrust segment at Nos. 81-2331/2332/2333, the panel (Chief Judge Collins J. Seitz and Circuit Judge John J. Gibbons, of the Third Circuit, and Circuit Judge Thomas J. Meskill, of the Second Circuit, sitting by designation) unanimously vacated the summary judgments against Zenith and NUE, in an opinion authored by Circuit Judge Gibbons, and remanded the cases for trial. The Court reversed most of the district court's rulings which excluded evidence from the pretrial record, and remanded the remaining evidentiary issues for further consideration. (34A-197A). The Court of Appeals redefined the record of admissible evidence for summary judgment purposes, and held that plaintiffs' admissible direct and circumstantial evidence of conspiracy was sufficient to create a genuine issue of fact as to conspiracy, precluding summary judgment under F.R.Civ.P. 56, and also to withstand a potential directed verdict motion under the F.R.Civ.P. 50(a) standard (60A-64A), and remanded the cases for trial. The summary judgment record which the Third Circuit examined to determine the sufficiency of plaintiffs' evidence differed significantly from the limited record which the district

court considered.[8] (Because of the evidentiary issues remanded for further consideration by the district court, the complete record of admissible evidence still has not been finally defined). The Court of Appeals held that the portions of respondents' conspiracy evidence which it had held admissible were sufficient to create a genuine issue of fact as to conspiracy and to preclude summary judgment, regardless of the outcome on the remaining evidentiary issues remanded to the district court.

In a second opinion, which Chief Judge Seitz authored, relating to the interlocutory antidumping appeal at No. 80-2080, the same panel unanimously reversed the district court's construction of the Antidumping Act of 1916, 15 U.S.C. §72, rejected petitioners' Due Process Clause challenge to the Act on the ground of alleged "vagueness," dismissed the contention that application of the Act would infringe the United States-Japanese Treaty of Friendship, Commerce and Navigation, and upheld the sufficiency of respondents' evidence in the antidumping segment of the litigation. (198A-223A). In the "Questions Presented" in their petition for writ of certiorari filed June 7, 1984, petitioners raised no issue relating to the Court of Appeals' separate judgment in the antidumping segment of the litigation.

---

8. Petitioners' assertion (P.Br. at 6 n.4) that the district court assumed the admissibility of all the evidence it excluded for purposes of considering petitioners' summary judgment motions is incorrect. The district court refused to consider a number of executives' diaries and other evidence (which it had incorrectly held were inadmissible) for the broader purposes for which they were offered and ruled inadmissible key portions of respondents' economic expert witnesses' opinion evidence as set forth in their verified reports. The Third Circuit vacated those rulings and held the economic expert opinion evidence admissible, and this evidence constituted an important part of the foundation of the Third Circuit's decision upholding the sufficiency of respondents' conspiracy evidence.

Although the petition challenged the admissibility of respondents' expert economic opinion evidence, the Court limited the grant of certiorari to Questions 1 and 2 and did not grant certiorari with respect to the evidentiary question relating to the admissibility of the expert opinion evidence. The Court of Appeals' determination that the experts' opinions are admissible is therefore final for purposes of these proceedings.

B. *The Petitioners.*

Petitioners, defendants below, Matsushita, Hitachi, Toshiba (formerly Tokyo Shibaura), Sanyo, Sharp (formerly Hayakawa) and Mitsubishi, are six of the largest Japanese manufacturers of television receivers and other consumer electronic products. Their combined annual sales exceed $67 billion and their assets $65 billion, and they employ more than 500,000 persons.[9] Toshiba, Hitachi and Mitsubishi manufacture heavy electrical equipment, computers, semiconductors, electronic components, as well as consumer electronic products. Matsushita, whose Osaka-based industrial complex produces all of the electronic components it uses in the manufacture of its "Panasonic" products, is the largest television manufacturer in the world, accounting for more than 20% of all television sales in the non-Communist world. Matsushita Electronics Corporation, a related electronic components manufacturer based in Japan, is jointly owned and operated by Matsushita and its partner, the Dutch electronics firm N.V. Philips Gloeilampenfabrieken. App. Vol. 25 (10575a-618a). Its sales exceed $2.4 billion and it employs some 15,000 employees.

The petitioners also include the closely affiliated or controlled Japanese "trading companies," responsible for sales in Japan, in foreign markets or both, and the United States sales subsidiaries of these Japanese manufacturers and trading companies. One of them, Mitsubishi Corporation (a Japanese trading company affiliated with the Japanese industrial complex known as the "Mitsubishi Group" — formerly the Mitsubishi *zaibatsu*), by itself has annual sales of $66.9 billion. All of the Japanese manufacturers have United States subsidiaries and extensive distribution systems here, as well as patent-licensing tie-ups and other United States operations. Two of their subsidiaries, Matsushita Electric Corporation of America and Sanyo Manufacturing Corporation, now own major United States assembly and distribution facilities formerly owned by Motorola, Inc., and Warwick Electronics Inc., American manufacturers that were

9. *Fortune*, August 15, 1985 at 183-201. Less current data is found in the record at App. Vol. 11 (4121a-2a).

forced out of the consumer electronics business.[10] All the Japanese manufacturers are doing business in the United States by reason of their own extensive commercial activities here and the activities of their United States subsidiaries. 402 F.Supp. 262 (E.D. Pa. 1975).

C. *The Respondents.*

Founded in 1923, Zenith is a mid-West manufacturer of consumer electronic products, computers, and other electronic equipment and had been a leading American manufacturer of radios.[11] Regarding Zenith's television products, one petitioner said: "*Nobody* else has such a combination of quality engineering . . . features." App. Vol. 19 (8232a) (emphasis in original). NUE, whose Emerson Division formerly manufactured and sold television receivers and other consumer electronic products under the Emerson and Dumont tradenames, was forced to shut down its Jersey City, New Jersey, television plant and abandon the manufacture of television receivers in June 1970.

D. *The Japanese Electronic Products Cartel.*

Petitioners have scrupulously avoided coming to grips with the evidence, preferring instead to debate general legal issues

10. Sears, Roebuck & Co. ("Sears"), the largest private-label importer in the United States of Japanese television receivers, and Motorola, Inc. ("Motorola"), which, prior to selling its television manufacturing and distribution business to the Matsushita interests, had been a major domestic television manufacturer, were also named defendants in the *Zenith* case. Summary judgments in their favor were affirmed below. (180A-83A). The Court of Appeals, however, reversed summary judgment in favor of Matsushita on Zenith's Clayton Act §7 claims challenging Matsushita's acquisition of the former Motorola television plants and distribution system as well as Sanyo's acquisition of Warwick. Sony and Sony Corporation of America settled with Zenith, and the Court of Appeals later affirmed summary judgment in their favor on NUE's claims against them. (183A-85A).

11. Zenith's name has recently been changed to Zenith Electronics Corporation. Zenith, like many other domestic radio manufacturers, was driven out of the radio business by the same cartel pricing practices employed in the television business, and no longer manufactures radios. No radios for consumer use are made in the United States.

not presented.[12] Petitioners' three-page summary of the case (P.Br. at 2-4) is so incomplete and so mischaracterizes both the conspiracy allegations and the evidence of conspiracy, that respondents believe it necessary to summarize the facts at somewhat greater length than is customary.[13]

Summary. The antitrust segments of respondents' complaints (13b-63b) allege a conspiracy among the petitioners to restrain and monopolize United States trade and commerce in television receivers, radios, and related products. In furtherance of this conspiracy, petitioners conspired to drive down price levels for television receivers and other products in the United States market, and as part of the same conspiratorial scheme, simultaneously established and stabilized artificially high prices for consumer electronic products in the Japanese market, a market that remained closed to competition from non-Japanese manufacturers of these products. Petitioners' conspiracy was designed to affect petitioners' prices in both the closed Japanese market and the United States market, and had the purpose of establishing sharp differentials between them. Petitioners used the financial advantages resulting from their price collusion in the closed Japanese home market to help subsidize and sustain their concerted depressed pricing in the United States market. Principal features of the conspiracy and its economic import, as reflected in the evidence, are described and analyzed in respondents' economic expert witnesses' verified reports (reproduced in Appendix Volumes 5-7).

Petitioners' conspiracy involved collusive "dumping",[14] a

12. Petitioners sought leave, over respondents' objection, to dispense with printing the record, on the asserted ground that only legal issues are presented. The Court directed that nine copies of the entire appendix in the Court of Appeals be filed.

13. The Court granted respondents leave to exceed the normal page limits of Rule 33.3 by Order dated August 7, 1985.

14. The subject of dumping was examined at an early date in Viner, *Dumping: A Problem in International Trade* 12-20 (1927). The Antidumping Act of 1916, 15 U.S.C. §72, which imposes criminal sanctions and confers a private treble-damage remedy, was the first American antidumping measure. During the entire period of the Japanese consumer electronic products conspiracy, dumping, if it resulted in injury to a United States industry, was also proscribed by United States law and subjected importers to potential assessment of a dumping duty under the Antidumping Act of 1921, 19 U.S.C. §160

form of international, unfair competition which is analogous to classic geographic price discrimination, involving the sale of goods in one country at prices that are lower than the prices at which they are sold in the country of production. Dumping has long been illegal in most industrially developed nations including Japan. Article VI of the General Agreement on Tariffs and Trade ("GATT") (62 Stat. 3682), to which Japan is a signatory, states that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." (19ad).

Petitioners' conspiracy began in the late 1950s with radios, and then continued successively with black-and-white television receivers and with color television receivers. *See*, App. Vol. 6 (2330a-2400a; 2414a-2458a). The conspiracy has been remarkably successful. App. Vol. 11 (4201a-4530a). Radios for consumer use and black-and-white television receivers are no longer manufactured in the United States. American manufacturers, such as Admiral, Motorola, Philco, Westinghouse, and respondent Emerson (NUE) itself, have been driven out of the business, and during 1963-1977, petitioners and their co-conspirators succeeded in capturing no less than 50 percent of the largest portion of the United States television business — the table model and portable segment. App. Vol. 11 (4134a).

Japan's antitrust laws prohibit horizontal price-fixing. But in 1963, when Japanese television receiver imports accounted for less than five percent of United States sales, petitioners organized a formal export cartel under a Japanese antitrust exemption permitting Japanese companies to coordinate their pricing and divide their customers, ostensibly for certain benign purposes. App. Vol. 14 (5764a-6237a). Similar arrangements were established in the radio field. App. Vol. 14 (6259a-77a). The Japanese Export and Import Trading Act (Act No. 299, 5 August 1952) carves out a conditional exemption from Japanese antitrust law for two types of export cartels, provided that the Japanese

et seq. (1970) (4ad-9ad), now codified and amended at 19 U.S.C. §1673 *et seq.*, a provision then administered by the Department of Treasury and now administered by the Commerce Department.

Ministry of International Trade and Industry ("MITI") first approves the formation and organizational details of such cartels, and provided further that cartel members do not engage in "unfair business practices". (30ad). Under Part III, Section 5-bis of the Export and Import Trading Act (25ad-26ad), MITI has the power to approve such export cartels only if, *inter alia*, (a) "[t]here is no fear of violating treaties and other arrangements concluded with foreign governments or the international agencies," such as GATT, (b) "[t]he interests of importers or enterprises concerned at the destination is not injured and there is no fear of gravely injuring international confidence in Japanese exporters," and (c) "participation in or the withdrawal from the agreement is not unjustly restricted."

The ostensible purpose of petitioners' formal cartel arrangements, as the "Rationales" accompanying the written cartel agreements recited, was to prevent Japanese consumer electronic product imports from disrupting the United States market and injuring United States manufacturers.[15] Petitioners filed with MITI a series of "Applications for Authorization For Concluding the Agreement of Manufacturers" under this Japanese statute, seeking MITI's approval for the cartel. *See e.g.*, App. Vol. 14 (5775a, 5872a). Petitioners' application falsely represented that the cartel would observe the statutory requirements. Although they received MITI approval, on the basis of these misleading applications, acting secretly and with mutual knowledge and understanding of their undisclosed common purposes, petitioners jointly and systematically transformed the character of the cartel. Petitioners commonly used the United States prices they jointly set under the cartel agreements — the so-called "check prices" — as reference price levels, simultaneously setting their actual prices at levels below those "check prices" and using the same pricing system to circumvent United States customs and antidumping laws by declaring those "check prices" as their "actual" prices at United States Customs, and later by

15. App. Vol. 14 (6089a-93a); *see also*, (5785a-87a; 5814a-16a; 5823a-24a; 5841a-42a; 5850a-51a; 5860a-61a; 6062a-3a; 6112a-30a; 6132a-3a; 6146a-7a; 6160a-1a).

lying to the Treasury Department in its antidumping investigation, thus concealing their true, lower import prices from United States customs authorities. App. Vols. 23 and 24; App. Vol. 10 (3817a-66a); App. Vol. 15 (6289a; 6293a; 6295a-6a; 6301a-3a).

Both the United States and Japanese Governments challenged aspects of petitioners' overall scheme. On December 4, 1970, the United States Treasury Department issued a "Determination of Sales at Less Than Fair Value," finding that "television receiving sets . . . from Japan [were] being . . . sold at less than fair value," within the meaning of the Antidumping Act of 1921. App. Vol. 11 (4190a).[16] In March 1971, the United States Tariff Commission unanimously concluded that "an industry in the United States is being injured by reason of" dumping of imported Japanese television receivers. (4198a). The Treasury Department issued a formal dumping finding (4200a), and petitioners and other importers ultimately settled the Government's dumping case in 1978 by agreeing to pay approximately $77 million in duties and fraud penalties, an amount far less than the duties and penalties actually due to the United States. (55ad-6ad).

Between 1956-1970, the Japanese Fair Trade Commission ("JFTC") twice charged petitioners with horizontal price-fixing in the Japanese market. The first case, "*Case No. 5, 1957 Against Home Electric Appliance Market Stabilization Council*," resulted in petitioners' admission of price-fixing activities. App. Vol. 11 (4685a-4720a). In the second case, *Case No. 6, 1966 Against Sanyo Electric Co., Ltd. and Five Other Companies*, the JFTC again charged petitioners with horizontal price-fixing involving television receivers. In the Court of Appeals below, and here (P. Br. at 3 n.2), petitioners have conceded the price-fixing activities involved in the second case, and their activities are otherwise extensively documented. App. Vols. 12-13 (4913a-5574a). Within the closed Japanese market, petitioners eliminated competition among themselves by agreeing to stabilize and maintain high prices. App. Vol. 5 (1678a-1917a); App.

16. This finding was made on the basis of the higher "check prices" which the Japanese manufacturers falsely reported in that proceeding and not detected as false by the Government. See *infra* at 29 and 44-45 n.57.

Vol. 6 (2255a-2474a); App. Vols. 12-13 (4913a-5752a). These activities enhanced petitioners' conspiratorial control over their United States-Japan dumping margin, *i.e.*, the difference between their Japanese market prices and their much lower United States prices. These concerted activities furthered the objects of the conspiracy by (a) giving them joint control over their prices in the closed Japanese market, (b) aggravating the dumping margin on sales in the United States, (c) stabilizing the Japanese price component of the margin at artificially high prices, and (d) enhancing petitioners' ability to achieve their common objectives by improving return on sales in the Japanese market, and permitting them to maintain a satisfactory return overall, thus enabling them to deepen the dumping margin on the United States side and continue the conspiracy over a longer period of time. App. Vols. 5 and 6.

In furtherance of their conspiracy, petitioners artificially depressed their prices on massive quantities of products sold to United States customers, and drove down and held down prevailing United States television price levels. App. Vol. 5 (1762a-1816a); App. Vol. 6 (2417a-59a); App. Vol. 7 (2749a-2824a); App. Vol. 11 (4269a-4530a). The resulting depressed price levels in the United States reduced or eliminated United States manufacturers' profits, brought many United States manufacturers to the brink of financial collapse, and inflicted serious injury on the few United States manufacturers that have survived petitioners' concerted assault. App. Vol. 11 (4201a-4530a).

1. *Petitioners' Conspiratorial Activities to Set the Japanese Price Component of Their United States-Japan Dumping Margin.*

During the relevant time period, members of the cartel completely controlled the highly concentrated Japanese market, App. Vol. 5 (1721a-23a) (172A) — a market that was closed to foreign competition by Japanese Government-imposed tariff and non-tariff barriers, as well as by petitioners' concerted efforts to exclude foreign competitors such as Zenith from access to the major Japanese channels of distribution and by petitioners'

keiretsu (or Japanese company group) control over those distribution channels.[17] In this closed, concentrated market, petitioners simultaneously built production capacity far in excess of Japanese market demand and targeted the United States conspiratorially as the market for their constantly increasing excess production. App. Vol. 5 (1679a-1720a). Petitioners also concede that they fixed Japanese market prices of these products, a concession noted by the Court of Appeals, which pointed to evidence that this continued longer than the two-year period to which petitioners admitted. (174A-175A).[18] These price-fixing activities in furtherance of the conspiracy were carried out through a number of secret conspiratorial groups. The activities of some of the principal groups are highlighted below.

a. *The Market Stabilization Council.*

In 1956, petitioners established the "Market Stabilization Council" to fix and stabilize price levels for television receivers,

---

17. App. Vols. 5, 6 and 7 (1904a-15a; 2297a-2323a; 2707a-17a; 2742a-8a; 2800a-01a; 2924a-37a); (170A; 371A-73A); App. Vol. 11 (4533a-42a). For example, as early as 1962, Zenith was advised by C. Itoh & Co. Ltd., a leading Japanese trading company, that "it seems to be difficult to deal with Zenith's products in the present condition," and that "MITI would not allocate the foreign currency, because Zenith products are exceedingly popular in the market here." App. Vol. 11 (4537a). In 1963, Nichimen Co., Inc. (a Japanese trading company) advised Zenith that its inability to market Zenith products in Japan was due to "[t]he Japanese Electronic Industries Association's pressure to the Government," the Japanese manufacturers' "pressure to the leading chain and department stores," and "[a]n attempt to pressure our company and persuade us by various means not to indulge too aggressively in the distribution of those products." (4539a-40a).

18. "Liaison counsel for the defendants candidly conceded at oral argument that there was a two-year period between 1964 and 1966 during which some discussions about bottom prices in Japan took place among some of the defendant companies. Transcript of argument, October 22, 1982, at 71. * * * We conclude . . . that the direct evidence of horizontal price-fixing in the periods referred to in the Japanese Fair Trade Commission proceedings, when coupled with the circumstantial evidence to which we have referred, would permit an inference that the conspiracy operated over a longer period." (174A-175A).

radios and certain other electric appliances in the Japanese market. App. Vols. 11, 12, 5, 6 and 7 (4685a-4720; 4805a-13a; 4881a-3a; 1727a-32a; 2345a-51a; 2751a). Through the Market Stabilization Council, petitioners aggressively policed their horizontal price agreements through a program of boycotts and repurchase of discounted merchandise. App. Vol. 5 (1727a-32a; 1741a); App. Vol. 6 (2264a-89a; 2334a-7a; 2345a-51a; 2417a-19a). The manufacturers also jointly fixed profit margins on sales of television receivers at 22% for retailers and 8% for wholesalers, App. Vol. 11 (4701a), and petitioners' Presidents met to discuss and agree upon production levels. App. Vol. 11 (4715a; 4699a); App. Vol. 12 (5041a; 5048a). The Japanese Fair Trade Commission ("JFTC") prosecuted petitioners and made findings regarding petitioners' conduct and attached some of the documentary evidence to its decision. App. Vol. 11 (4687a-4720a). Petitioners admitted the validity of the JFTC's findings. (95A).

b. *The Okura Group, The Palace Group, The Tenth Day Group, and Other Conspiratorial Groups.*

Notwithstanding the JFTC proceedings, the Japanese manufacturers secretly continued to fix television prices and agree on production volume, and organized as early as 1964 (a) regular meetings of their Chairmen and Presidents called the "Okura Group," which met monthly in Tokyo's Okura Hotel, (b) regular meetings of the next highest level of their managers called the "Palace Group," which met monthly at Tokyo's Palace Hotel, and (c) more frequent meetings of head officials of petitioners' television divisions, called the "Tenth Day Group" (because it first met on the tenth day of the month), which met at the petitioners' offices. App. Vols. 5-7 (1762a-1816a; 2417a-25a; 2749a-2802a).

The diaries of petitioners' high-ranking executives, their written statements, and their testimony in the JFTC's "*Case No. 6, 1966 against Sanyo Electric Co. Ltd. and Five Other Companies*," contain details of these secret, conspiratorial activities. App. Vols. 12-13 (4915a-5574a). Petitioners have admitted their membership in, and attendance at, the secret meetings of

these price-fixing groups. App. Vol. 12 (4815a-55a). These regular monthly meetings continued through at least 1977. App. Vol. 12 (4870a-1a; 4872a).

(i) *The Okura Group.*

The Presidents and Senior Managing Directors of Matsushita, Toshiba, Hitachi, Mitsubishi Electric, Sanyo and Sharp — the Okura Group — met on a monthly basis beginning as early as 1964 and continuing through at least February 1977. App. Vol. 12 (4870a-1a). Attendees at these meetings included: Messrs. K. Matsushita and M. Matsushita (Matsushita); K. Iue (Sanyo); K. Nishi (Hitachi); K. Okubo (Mitsubishi Electric); J. Hiraga (Toshiba); and A. Saeki (Sharp). Konosuke Matsushita, founder of the Matsushita complex, organized the Okura Group, App. Vol. 12 (5037a-39a; 4870a-1a; 4909a-12a), as the forum for petitioners' discussions at the highest levels of coordination of future demand and of their production, App. Vol. 12 (5038a-43a; 4946a-51a) and of price levels, App. Vol. 12 (5055a; 5058a; 5148a) for television receivers. *See also* App. Vol. 7 (2753a-4a); App. Vol. 5 (1742a-4a).

(ii) *The Palace Group.*

During 1964-1977, managing directors (the equivalent of senior vice presidents) of these six companies also attended the monthly Palace Hotel meetings, App. Vol. 12 (4872a-3a); App. Vol. 7 (2753a); App. Vol. 5 (1738a-42a), where they discussed "industry-wide production, sales, and inventory data," and agreed on "bottom prices for television receivers," or the minimum prices at which petitioners would sell television receivers in the Japanese market. App. Vol. 12 (4946a-51a; 4955a-6a; 4962a-3a; 5040a). As revealed in the Statements ("Protocols") which these executives later provided to the JFTC, in agendas, and in these executives' pocket diaries, the Palace Group agreed secretly to fix "bottom prices," wholesale and retail profit margins, and other terms of sale for television receivers sold in Japan. App. Vol. 12 (4978a-80a; 5040a-41a; 5063a-69a, 4974a-6a; 5011a-17a; 4948a-51a; 4955a; 4916a-43a). At Tenth Day meetings the Japanese manufacturers' television executives also discussed

television "bottom prices" and profit margins. App. Vol. 12 (4876a). Petitioners admit that "[c]ertain of these matters arose at the 'Palace Group' as a result of prior discussions at the 'Tenth Day Group.' " App. Vol. 12 (4873a; 5003a-7a; 5011a; 5015a). The lower-echelon Tenth Day Group executives reported to Palace Group members. When the Tenth Day Group could not agree, the same issue was referred to the Palace Group for agreement. App. Vol. 12 (4917a-21a; 4928-9a; 4955a-6a; 5002a-7a; 5015a). A "secretary company" was selected to coordinate discussion of these issues, and this function rotated. App. Vol. 12 (4983a-4a; 5022a; 5025a; 5049a).

(iii) *The Tenth Day Group.*

The Tenth Day Group was a regular, secret gathering of Matsushita, Toshiba, Hitachi, Sharp, Mitsubishi and Sanyo television department executives. App. Vol. 12 (4875a-76a); App. Vol. 5 (1733a-5a); App. Vol. 7 (2752a). Meetings lasting two to three hours were held as frequently as twice a month, normally in a conference room of the Group's "secretary company." App. Vols. 12-13 (4984a; 5449a-50a). The staff of the Tenth Day "secretary company" often attended meetings of the Palace Group. App. Vol. 12 (4966a). The Protocols of their executives, agenda, and pocket diaries confirm that the Tenth Day Group discussed and agreed on current and future television prices, price structures and profit margins at these meetings.[19]

The petitioners also exchanged information, and "voted", on such commercially sensitive topics as current and future production, shipment and inventories of television receivers, relating both to the Japanese domestic market and to television

19. *See* App. Vol. 12 (4916a-21a; 4926a-30a; 4931a-35a; 4941a-2a; 4947a-51a; 4957a-67a; 4954a-5a; 4970a-72a; 4974a-76a; 4983a-86a; 4989a-90a; 4995a-98a; 5014a-17a; 5021a-25a; 5031a-35a; 5051a-2a; 5064a; 5071a-85a; 5092a-5100a; 5106a-14a; 5117a-23a; 5133a-52a; 5159a-63a; 5192a-5206a; 5211a-18a; 5220a-5a; 5232a-4a; 5258a-80a); App. Vol. 13 (5282a-6a; 5295a-5300a; 5327a-8a; 5333a-6a; 5339a-42a; 5361a-4a; 5367a-8a; 5373a-4a; 5405a-10a; 5417a-24a;); *see also* , App. Vol. 7 (2749a-2801a); App. Vol. 5 (1780a-92a); App. Vol. 6 (2417-25a).

exports from Japan,[20] the bulk of which went to the United States.[21] App. Vols. 12-13 (5097a; 5112a; 5197a; 5365a; 5366a; 5368a). Tenth Day Group attendees reported orally and in writing to colleagues and superiors (including Palace Group members) concerning matters they had discussed and agreed upon[22] and implemented their agreements. App. Vol. 12 (4926a; 4962a; 4994a-98a; 5013a; 5028a-36a).

When they first learned that the JFTC suspected them of price-fixing, petitioners immediately devised "countermeasures for the Fair Trade Commission" to conceal their activities, but resolved to continue the meetings. App. Vol. 12 (5114a).[23] They constructed a joint "explanation" of the nature of these groups to be provided to the JFTC, agreeing to misrepresent to the JFTC that these price-fixing meetings were merely "social groups" or "clubs." App. Vol. 12 (5087a; 5173a-4a; 5179a).

The relationship between home market prices and export prices, and United States import prices, expressed in dollars in the notes, were also considered at the Tenth Day Group as early as 1966. App. Vol. 12 (5148a; 5216a-17a). Concerned then that the large differentials between the prices of their televisions sold in Japan and their much lower United States television prices

20. *See* App. Vol. 12 (4921a-22a; 4983a; 5021a; 5097a-8a; 5104a; 5112a; 5127a; 5137a; 5178a; 5223a; 5229a; 5236a-37a; 5259a-60a; 5267a; 5268a-9a; 5274a); App. Vol. 13 (5296a-7a; 5339a; 5365a-6a; 5367a-8a; 5430a-41a; 5504a-12a).

21. In 1966, exports to the United States of Japanese color television receivers comprised 95.3% of Japan's total exports of color television receivers. App. Vol. 5 (2079a). Exports of black-and-white receivers to the United States constituted 71.8% of Japan's total exports of those sets. App. Vol. 5 (2078a).

22. *See* App. Vol. 12 (4918a; 4920a; 4926a; 4933a; 4948a; 4950a; 4962a; 4966a; 4972a; 4989a-90a; 5002a; 5013a; 5016a; 5032a; 5081a-84a).

23. Under the heading "countermeasures," Toshiba's Tenth Day Group representative, S. Yajima, made the following entry in the notebook in which he recorded what transpired at these price-fixing meetings, App. Vol. 12 (5114a):

> To burn old documents.
> Will not take minutes. Burn all documents. Change the name of Palace Group. Also change the place of meetings. Report at the next meeting.

Name get together meeting concerning TV
(The Tenth Day Group)

might be noticed, petitioners secretly agreed in December 1966 to report false statistics to the Japanese Government to conceal the price differentials. App. Vol. 13 (5609a-10a).

(iv) *The "MD Group"*.

As early as 1969, petitioners also secretly organized the so-called "MD Group" to facilitate their exchange of detailed, current company data on their production for domestic and export purposes, their shipments and their inventories, both for domestic and export, of television receivers and other consumer electronic products. App. Vols. 12-13 (4846a-53a; 5747a-52a); App. Vols. 5 and 7 (1737a-38a; 2752a). Written minutes of the MD Group meetings and statistics exchanged were marked "secret". App. Vol. 13 (5685a; 5710a; 5731a; 5732a). The companies exchanged their individual current production, shipment and inventory data, and utilized a "voting" procedure to coordinate and harmonize their future production, shipment and inventories.[24] App. Vol. 5 (1763a-85a). The export statistics the Japanese manufacturers exchanged and "voted" on at the MD Group were primarily statistics on their exports to the United States, petitioners' principal export market by far. MD Group meetings continued to at least 1977. App. Vol. 12 (4846a-52a); App. Vol. 13 (5719a).

2. *The Japanese Manufacturers' Conspiracy As It Related to the United States Price Component.*

While petitioners' executives were meeting in the Okura, Palace, Tenth Day and MD Groups to stabilize Japanese market television prices at inflated levels in that closed market, petitioners' executives were also meeting to devise and implement a method for coordinating and concealing their United States pricing at levels much lower than their Japanese market prices. This machinery involved two main components: (a) a set of formal export cartel arrangements under the Japanese antitrust exemption described above, and (b) an informal, secret

24. *See* App. Vol. 13 (5654a; 5659a; 5663a; 5664a-5a; 5667a; 5670a; 5671a; 5675a; 5676a; 5678a; 5681a; 5684a; 5686a; 5692a; 5693a; 5696a; 5697a; 5700a; 5701a; 5703a; 5704a; 5706a; 5711a; 5712a; 5716a; 5719a; 5721a; 5727a; 5728a).

course of conduct in which petitioners engaged under the nominal facade of their formal cartel arrangements. App. Vol. 5-7 (1747a-61a; 1778a-9a; 1793a-1816a; 2425a-45a; 2802a-17a).

On their face, petitioners' formal export cartel agreements consisted of two integrated sets of provisions: (i) written cartel agreements (the "Manufacturers Agreements") App. Vol. 14 (5765a-6027a) in effect during the period 1963-1973, signed and administered by a group of petitioners' high-ranking executives — the "Television Export Council" — including among its members and founders executives who, as members of the Okura, Palace and Tenth Day Groups, were simultaneously involved in petitioners' price-fixing activities within the closed Japanese market, App. Vol. 5 (1741a-42a); and (ii) a set of "Rules" (the "JMEA Rules") that petitioners adopted by vote at their Japan Machinery Exporters Association ("JMEA"), which were administered by another group of petitioners' executives — the "Television Export Examination Committee." App. Vol. 14 (6049a-6236a).

a. *The Television Manufacturers' Agreements and the JMEA Rules.*

The Manufacturers' Agreements and the JMEA Rules contained explicit provisions relating to United States prices, known in their industry as "check prices." Similar arrangements had existed for radios. App. Vol. 14 (6257a-77a). Petitioners' informal, secret course of concerted conduct under the facade of their formal agreements, however, involved their common use of these ostensibly "minimum" prices known as "check prices," established by petitioners' TV Export Council and TV Export Examination Committee, merely as reference prices from which petitioners departed to arrive at their even lower actual United States import prices. To conceal this aspect of their conspiracy, petitioners agreed to lie by reporting to United States Customs the higher "check prices" instead of their true import prices. In this way, petitioners coordinated and concealed their actual United States prices at levels below their fixed prices in the closed Japanese market, thereby enabling them to evade United States antidumping laws and, acting as one body, to capture most

of the United States market by dumping and by continuing to coordinate their actual United States prices at these artificial, dumping price levels.

Petitioners' Television Export Council maintained its office at the Electronics Industries Association of Japan ("EIAJ") in Tokyo. App. Vol. 14 (5777a; 5809a; 5829a; 6008a). At meetings of the Television Export Council, petitioners' executives fixed "check prices" for television receivers to be imported into the United States. These prices were listed in schedules attached to the Manufacturers' Agreements.[25] The price provisions of the JMEA Rules interlocked with the price provisions in the Manufacturers' Agreements.[26]

These two sets of agreements were directed specifically and exclusively at United States trade and commerce, dealt specifically with United States import prices, and with customers located in the United States, and they expressly stated that they were intended to have effects in the United States.[27]

1. *Shipment Validation.* Petitioners agreed to submit to the Television Export Council and to the Television Export Examination Committee, prior to shipping television receivers to the United States, an "Application for Validation of Shipment," which would set forth the name of the manufacturer, the trading company (or Japanese exporter — in many instances the manufacturers' controlled trading companies), the United States importer or purchaser, trademark, quantity, type and model of television receiver, "customer registration number," and United States unit price.[28] Members agreed to obtain prior written approvals from the Council and the Committee which would certify that their shipments were consistent with the Agreements and

25. *See* App. Vol. 14 (5840a; 5849a; 5859a; 5889a; 5951a; 5961a; 5969a, 5977a; 5985a; 5993a; 6001a; 6014a; 6019a-27a).

26. *See* App. Vol. 14 (6055a-56a; 6062a; 6077a; 6092a; 6099a-6100a; 6137a-39a; 6152a-53a; 6165a-6a; 6168a; 6180a; 6182a; 6194a; 6196a; 6208a-09a; 6220a-21a; 6235a).

27. *See* App. Vol. 14 (5777a; 5847a; 5874a; 5957a; 5999a; 6007a; 6052a; 6073a; 6095a; 6115a-16a; 6135a-36a; 6149a-50a; 6163a-64a; 6177a-78a; 6191a-92a; 6205a-06a; 6219a-20a).

28. *See* App. Vol. 14 (5813a; 5887a-88a; 6059a-60a; 6087a-88a; 6110a-11a; 6130a-31a; 6144a-45a; 6171a-72a; 6187a-88a; 6201a-02a; 6214a-15a; 6233a-34a).

the Rules.[29] The Council and the Committee endorsed their approval on these Applications. Since the Council and Committee were comprised of petitioners' own executives, the Japanese manufacturers necessarily were each aware of certain price information on every shipment of covered Japanese television receivers sold in the United States during the crucial ten-year period 1963-1973.[30] Moreover, they had access to the other particulars of each other's business with United States customers, including the actual prices, when they differed from the "check price." *See*, Article 13, App. Vol. 14 (5780a-81a; 5877a-78a; 5959a; 6011a).

2. *Customer Registration.* The Agreements and Rules provided for the registration of United States customers, prohibited petitioners from changing customers during their effective period and prohibited transactions with unregistered customers without prior cartel permission.[31]

3. *Enforcement.* The Television Export Council and the Television Export Examination Committee, *i.e.* petitioners themselves, had the power to investigate each others' suspected violations of the Agreements. App. Vol. 14 (5780a-81a; 5877a-8a; 5959a; 6011a). Sales at United States prices below the "check prices" carried a penalty.[32] The Japanese government has taken the position in United States courts that sales below "check prices" constitute a violation of Japanese law. *See* Responses of the Japanese Government in the *Continental Forwarding* litigation (43ad-44ad; 50ad-51ad).

4. *The Five-Company Rule.* Certain of the Rules provided for an allocation of United States customers among the

29. *See* App. Vol. 14 (5780a; 5877a; 5958a-59a; 6011a; 6056a-57a; 6078a-79a; 6100a-01a; 6120a-21a; 6140a-41a; 6154a-55a; 6169a-70a; 6183a-84a; 6197a-98a; 6210a-11a; 6224a-25a).

30. *See* App. Vol. 14 (5813a; 5887-88a; 6059a-60a; 6087a-88a; 6110a-11a; 6130a-31a; 6144a-45a; 6171a-72a; 6187a-88a; 6201a-02a; 6214a-15a; 6233a-34a).

31. *See* App. Vol. 14 (5779a; 5876a-7a; 5957a-58a; 6010a; 6052a-53a; 6074a; 6096a; 6116a; 6136a-38a; 6150a-53a; 6164a-67a; 6178a-81a; 6192a-95a; 6206a-09a; 6221a-23a).

32. *See* App. Vol. 14 (5780a-81a; 5877a-78a; 5959a; 6011a; 6057a; 6079a; 6101a; 6121a; 6141a; 6155a; 6170a; 6184a-85a; 6198a-99a; 6211a-12a; 6226a-27a).

cartel members by prohibiting any Japanese exporter of television receivers from registering more than five United States customers (the "Five-Company Rule") without cartel permission. App. Vol. 14 (6136a-37a; 6150a-51a; 6164a-65a; 6178a-79a; 6192a-93a; 6206a-07a; 6222a). The character and effect of this provision would depend upon the relationship which the Japanese manufacturers established between their Japanese market prices and their *actual* United States prices. Whatever effects this provision might have had on United States commerce had petitioners set their United States prices at levels equal to or above their Japanese market prices, in reality their actual United States prices were aggravated *dumping prices*, and the Five-Company Rule, which divided major United States customers among the Japanese manufacturers, aimed the combined impact of the two aspects of petitioners' conspiracy — the dumping margin — exclusively at United States manufacturers competing for the same accounts, with pernicious anticompetitive results. App. Vol. 8 (3075a-83a) (179A). A "guideline" — not set forth in the formal cartel documents, but separately used by the Television Export Examination Committee — strengthened the Five-Company Rule by prohibiting more than one supplier from selling to the *same* United States importer or customer unless petitioners jointly approved such an overlap in registration. App. Vol. 14 (6230a).

5. *Right To Withdraw.* Under explicit withdrawal provisions, any petitioner could withdraw at any time from the Agreements simply by notifying the Television Export Council thirty days in advance of its intention to withdraw. App. Vol. 14 (5778a; 5875a; 6008a); App. Vol. 41 (18391a-456a). As noted above, MITI was powerless under Section 5-bis of the Export and Import Trading Law (25ad-26ad) to approve any export cartel that unduly restricted the right to withdraw. No petitioner was required to belong to the JMEA, and its "Rules" did not apply to nonmembers. App. Vol. 14 (6163a; 6177a; 6191a; 6205a).

6. *Price Provisions.* The "check prices" (sometimes abbreviated "C.P." or "C/P") which the Television Export Council established related to transactions between Japanese manufacturers and exporters of television receivers to be imported in the United States, and were claimed by petitioners to be "minimum prices." (P.Br. at 3). The "check price" of the JMEA Rules was a similar price based in turn upon the prices which the Television Export Council established and related to the price level at which Japanese suppliers sold to registered United States customers. Petitioners set the "check prices" by reference not to their own costs but to United States manufacturers' prices, App. Vol. 14 (6256a), and set them at levels far below the prices of United States manufacturers. (Affidavit of Dr. Horace J. DePodwin, App. Vol. 8 [3061a, 3073a-74a]; App. Vol. 5 (1866a-68a); App. Vol. 11 [4198a]).

In theory, the "check prices" were described as "minimum" prices. Petitioners were free under the Agreements and Rules to sell at any United States import prices which were *above* the "check prices," and were under no obligation to sell *at* the "check price." The "check price" provisions did not govern the price levels for goods petitioners sold in the Japanese market or the relationship between petitioners' Japanese market prices and their United States market prices. Absent collusion in the Japanese market, petitioners could have sold in Japan (a) at prices which were *above*, *below* or *equal* to the "check prices," and (b) at prices which were equal to or lower than their United States prices. The Agreements and Rules did not require petitioners to dump television receivers in the United States.

7. *Meetings of the Television Export Council.* Between 1963 and 1973, petitioners' representatives, as members, attended at least 120 monthly meetings of the Television Export Council, App. Vol. 12 (4857a-63a). At these meetings they discussed their United States prices, and agreed upon their United States pricing strategy. App. Vol. 12 and 14 (4886a; 6029a-30a; 6031a-32a; 6239a-45a; 6253a-56a); (449A).

8. *MITI Approval.* The Japanese manufacturers petitioned MITI for approval of the formal television export cartel under the Japanese statute which confers an exemption from Japanese antitrust laws, invoking these provisions in joint written applications and attaching their proposed Agreements and JMEA Rules. In these applications, petitioners misrepresented their true purposes. App. Vol. 14 (5771a-75a; 5868a-72a).

9. *The Rationales.* Each Agreement and set of Rules contained[33] a "Rationale" which purported to set forth petitioners' reasons for seeking the MITI approval and which recited their alleged intention of avoiding injury to United States manufacturers, as required by the statute. Petitioners represented to MITI that in the absence of such a cartel their United States prices might drop below the proposed "check price" levels, and that such prices would disrupt the United States market, injure United States producers, and trigger enforcement of the United States antidumping statutes. The Japanese manufacturers stated that their intent was to "prevent disturbance to the United States market caused by unfair prices" App. Vol. 14 (6091a), acknowledging therein that the massive shipments they contemplated could seriously disrupt the United States market and injure United States manufacturers. In ostensible compliance with the Japanese antitrust exemption law, petitioners also represented to MITI that their purpose was to ensure that no party sold at prices below the "check prices." Thereafter, however, they conspired to do precisely that, and jointly used the formal arrangements as a facade to conceal this course of conduct. Petitioners were determined to garner an ever-larger combined share of the United States market, as their 1963 JMEA Rationale states: "[T]he businessmen involved have decided that, *acting as one body*, they will strive to maintain export order and, furthermore, *to aim for steady expansion of exportation.*" App. Vol. 14 (6063a).[34]

b. *The Character of the Japanese Manufacturers' "Check Prices."*

For each six-month (or shorter) period between 1963 and 1973, the Japanese manufacturers' Television Export Council adopted a set of "check prices" applicable to the principal types and sizes of television receivers to be imported and sold in the

33. *See* App. Vol. 14 (5785a-87a; 5814a-16a; 5823a-24a; 5832a-33a; 5841a-42a; 5850a-51a; 5860a-61a; 5890a; 5952a; 5962a; 5978a; 6002a-03a; 6015a; 6061a-63a; 6089a-93a; 6112a-13a; 6132a-33a; 6146a-47a; 6160a-61a; 6174a-75a; 6189a-90a; 6203a-04a; 6216a-7a; 6235a-36a).

34. Emphasis added to all quotations unless otherwise noted.

United States.[35] Although these television receivers included hundreds of distinct models with different features, the manufacturers adopted during each period a maximum of only ten common prices, substituting an artificial, basic price structure for that which would have been forged by natural market forces in the United States.[36] Petitioners' executives set these "check prices" far below the prices they jointly and simultaneously fixed for the comparable products petitioners sold in the Japanese market. App. Vol. 5 (1817a-1882a; 2195a-2237a); App. Vol. 8 (3015a; 3056a-7a; 3073a-4a); App. Vol. 9 (3285a-3468a); App. Vol. 11 (4175a-4208a).

Although petitioners claim (P.Br. at 3) that the "check prices" were "minimum prices," in actuality, petitioners used the "check prices" only as the reference, as shown below, for arriving at the actual prices they agreed on with United States buyers, and, starting from the "check prices" petitioners set their *actual* import prices at still lower prices in order to divert business from United States manufacturers.[37] In furtherance of their conspiracy, simultaneously petitioners made joint use of the "check prices" to conceal their actual lower prices.

When compared with the Japanese manufacturers' fixed prices in the Japanese market, the "check prices" were themselves dumping prices, as the Court of Appeals held. (179A). This is established by the fact that, although petitioners lied and reported "check prices" as their actual prices to the Treasury Department in its Japanese television Antidumping Act of 1921 proceeding, App. Vol. 10 (3817a-66a); App. Vols. 23-24 (9519a-10574a), the Treasury Department still found the existence of dumping based on petitioners' "check prices." App. Vol. 11 (4188a-4200a). Further proof is provided by respondents' two

35. *See* App. Vol. 14 (6019a-27a; 5849a; 5859a; 5889a; 5951a; 5961a; 5969a; 5977a; 5985a; 5993a; 6001a; 6014a).

36. *See* App. Vol. 14 (5778a; 5784a; 5811a-12a; 5831a; 5840a; 5849a; 5859a; 5875a; 5889a; 5951a; 5961a; 5969a; 5977a; 5985a; 5993a; 6001a; 6009a; 6014a; 6019a-27a; 6030a; 6032a; 6035a; 6036a; 6047a-48a; 6055a-56a; 6077a; 6099a-6100a; 6119a; 6165a-66a; 6180a; 6182a; 6194a-95a; 6196a; 6208a-09a; 6220a-21a; 6253a-56a; 6262a-64a [radios]); App. Vol. 8 (3015a, at 3046a-3083a).

37. *See* App. Vol. 16 (6598a-6601a; 6670a-72a; 6679a-81a); App. Vol. 18 (7675a-76a; 7777a-7796a); App. Vol. 20 (8296a-8306a; 8458a-59a).

computer-generated, defendant-by-defendant, model-by-model price comparisons of technically comparable models, based on (a) price information the Japanese manufacturers themselves provided in interrogatory answers, and (b) the petitioners' Japanese market prices as established by their admissions against interest on their Japanese commodity tax returns (they would have no legitimate business reason to *overstate* their Japanese market prices in those tax returns and pay more tax than the law required), App. Vol. 9 (3285a-3468a) and App. Vol. 5 (1836a-1861a), and by respondents' accountants' analysis of petitioners' periodic average prices per screen-size data (by defendant) for both markets, App. Vol. 5 (1817a-1835a; 2205a-37a); App. Vol. 7 (2949a-62a); App. Vol. 8 (3107a; 3121a; 3123a; 3125a), all of which fully corroborate the Treasury Department's dumping finding.

c. *The Persistent Differentials Between Petitioners' Japanese Market Prices and their United States Import Price Levels.*

Petitioners' conspiracy to affect price levels in both Japan and the United States resulted in large, persistent and anticompetitive dumping margins between their high price levels in the Japanese market and their low United States import price levels for comparable television receivers imported and sold in the United States. The creation and maintenance of these international, geographic price differentials was a principal object of their conspiracy. App. Vol. 9 (3287a-3468a). Even calculating these dumping margins on the basis of the higher import prices which petitioners themselves falsely reported, respondents' model-by-model price comparisons disclose large mean percentage dumping margins between the Japanese market factory sales prices and the factory sales prices of their imported television receivers in the United States, averaging some 59% for color sets and more than 58% for black-and-white sets, as follows, App. Vol. 9 (3351a):

MEAN % MARGIN BETWEEN JAPANESE HOME MARKET FACTORY SALES PRICE AND EXPORT FACTORY SALES PRICE TO THE UNITED STATES

Defendant	Color (%)	BW (%)
Hitachi	58.42	43.36
Matsushita	74.02	55.16
		58.71
Mitsubishi	52.73	81.72
Sanyo	76.03	64.90
Sharp	61.80	66.72
Toshiba	32.34	38.78
Average	59.22	58.48

See also, App. Vol. 9 (3321a; 3430a; 3440a-3441a); App. Vol. 5 (1858a-59a). Since the Japanese manufacturers concealed their *actual* import prices, the true dumping margins are even substantially greater.[38]

d. *The Japanese Manufacturers' System For Coordinating and Concealing Their Actual United States Dumping Prices.*

To enable them all to continue to dump, it was essential that petitioners conspire successfully to conceal their actual United States import prices, and they did so by lying in their United States Customs declarations,[39] and by causing their United

38. Petitioners' price differentials between the Japanese market and the United States market are not explained by differences in the costs of distribution in the two markets. Significantly, products such as video cassette recorders (VCR), which only the Japanese manufacturers make, are sold through the same distribution channels in Japan as are television receivers. Petitioners' prices in Japan and in the United States were at the same levels for these products. App. Vol. 6 (2336a-37a; 2614a-2621a).

39. All imports of goods are subject to certain procedures to enter the United States Customs territory. Upon entry, a Special Customs Invoice, Form 5515, prepared by the exporter, must be presented by the importer for clearance of each shipment. 19 U.S.C. §§1481 and 1485. (10ad-15ad). The invoice provides the information as to the kind, quantity, composition, price and value upon which the applicable duty is determined. The invoice must show the purchase price of each item, in the currency of the purchase, and must disclose *all rebates, drawbacks, and bounties, separately itemized.* The obligation to

States customers to execute purchase orders at higher fictitious "prices", to pay for the goods initially by letters of credit at the falsely reported "prices", and to pay additional United States customs duty on the goods at the falsely reported "prices." By using their formal cartel arrangements, in furtherance of their conspiracy, as a facade for conduct having radically different purposes and effects, and by combining this price coordination with their simultaneous price-fixing in the closed Japanese market, petitioners made the Agreements and Rules merely a component of their conspiracy to produce large concealed dumping margins which they knew would injure their United States competitors and disrupt the market in the United States, but would escape detection under the United States antidumping laws. App. Vol. 17 (7444a-45a).[40]

NOTES *(Continued)*

furnish true and relevant information is formalized by the declaration that the consignee must execute when making entry. 19 U.S.C. §1485; 19 C.F.R. §141.19. False declarations on entry invoices are punishable by a penalty, or forfeiture, *in an amount up to the value of the merchandise*. 19 U.S.C. §1592. (16ad-17ad). The customs laws also require that the invoice prepared by the exporter be *certified before the consular officer of the United States for the consular district in which the merchandise was manufactured or purchased* or from which it was to be delivered pursuant to the contract. 19 U.S.C. §1482(a). The certification must include a verified declaration stating "*that there is no other invoice differing from the invoice so produced,*" as well as a declaration that all statements contained in the invoice are true and correct. 19 U.S.C. §1482(b).

Petitioners' flagrant practice of "double invoicing," *i.e.*, presenting to United States Customs an invoice different from the invoice utilized by the parties to the transactions, is an abuse of the customs laws specifically prohibited by 19 U.S.C. §1482(b).

40. GATT and various national antidumping laws reflect a world-wide condemnation of dumping as a vicious trade practice. The Antidumping Act of 1921, 19 U.S.C. §160, *et seq.*, (4ad-9ad), was intended to prevent the anticompetitive and destructive effect on domestic industries of importation into this country of foreign goods and merchandise at prices lower than the prices at which such goods are sold for consumption in the country of production. During the period involved in this case, dumping duties under the Antidumping Act of 1921, 19 U.S.C. §161 (1970), were calculated to equal the difference between the price of the product sold in the country of production (the "foreign market value") and the import price of the product as it is imported into the United States. (Section 161 was enacted as §736 of the Trade

Unrebutted evidence of the main features of this aspect of petitioners' conspiracy is described in detail in Plaintiffs' Final Pretrial Statement.[41] In summary, petitioners and the buyers for large United States mass merchandising chains and original equipment manufacturer ("OEM") customers, using the "check prices" as their "keystone", App. Vol. 20 (8296a-97a), systematically agreed on prices for imported television receivers that were below the "check prices."[42] Japanese suppliers prepared and falsely certified the standard Special Customs Invoice No. 5515 and shipping documents setting forth the "check price" (or occasionally a higher price) as a camouflage, instead of the true price, and falsely denying the existence of any rebates or drawback agreements, for presentation by the customer to United States Customs upon entry of the goods through Customs.[43] This conduct violated United States customs laws and criminal laws, as the participants were well aware. App. Vol. 16 (6684a); App. Vol. 21 (8737a-75a). *See*, 18 U.S.C. §§542 and 1001 (1ad; 3ad); 19

Agreements Act of 1979, 93 Stat. 172). Falsification of the true import price by reporting a higher price conceals the fact of dumping, and reduces the amount of the additional dumping duty that would be assessed and collected after a finding of dumping. The Act is enforced by imposition of an additional duty (the "antidumping duty") when, after an investigation, the Treasury Department has determined that imports of a product are at less than fair value and the United States Tariff Commission has determined that an industry in the United States has been injured by reason of dumped imports.

41. *See* App. Vol. 16 (6455a-6559a; 6871a-6904a); App. Vol. 17 (7007a-12a; 7063a-81a; 7257a-62a; 7339a-61a; 7529a-30a; 7541-48); App. Vol. 18 (7562a-7662a); App. Vol. 19 (7983a-97a); App. Vol. 23 (9517a-10109a); App. Vol. 24 (10111a-574a).

42. *See* App. Vol. 16 (6456a-6559a; 6599a-6600a; 6871a-6904a); App. Vol. 17 (7043a-44a; 7063a-81a; 7257a-62a; 7337a-61a; 7529a-30a; 7541a-48a); App. Vol. 18 (7861a); App. Vol. 19 (8084a-91a; 8155a-57a); App. Vol. 20 (8296a-97a; 8344a; 8440a-41a); App. Vol. 22 (9201a-06a; 9211a-14a; 9233a-38a; 9463a-64a); App. Vol. 23-24 (9517a-10574a).

43. *See* App. Vol. 23 (9531a; 9534a-35a; 9538a; 9540a-41a; 9544a; 9546a; 9551a; 9555a; 9557a; 9559a; 9561a; 9563a; 9565a; 9567a; 9577a; 9581a; 9590a-91a; 9603a-04a; 9612a-13a; 9619a-20a; 9622a-23a; 9634a-5a; 9637a; 9641a; 9645a-46a; 9655a-56a; 9658a-59a; 9662a-63a; 9672a-73a; 9685a-91a; 9711a; 9722a-25a; 9841a-42a; 9867a-71a; 9873a-74a; 9877a-78a; 9886a-87a; 9912a-13a; 9916a-17a; 9920a-21a; 9977a-78a; 9981a-82a; 9984a-85a; 10005a-06a; 10008a-09a; 10056a-57a; 10060a-61a; 10071a-72a); and other 5515 forms at App. Vol. 23-24 (10076a-574a).

U.S.C. §1592 (16ad-17ad). Petitioners and their co-conspirators made a systematic effort, as they said, *"to keep all agreed [actual] prices off [the] documents as a method of escaping the United States laws."* App. Vol. 19 (8149a). Apart from the wholesale violations of United States customs laws involved in this aspect of the conspiracy, such shipments from Japan at prices below the "check prices" constituted a violation of Japanese law (according to the position of the Japanese government in the *Continental Forwarding* litigation. *See* 43ad-46ad; 50ad-51ad).[44]

The seller's invoice also stated the "check price" (or a higher price), and the United States buyer cooperated by paying extra *ad valorem* import duty calculated at the "check price" — rather than a lower duty on the actual lower price — in order to conceal the actual price.[45] Petitioners supplied their Television Export Council and the Television Export Examination Committee with Shipment Validation forms showing the "check price" (or a higher price), although petitioners' executives, who comprised

44. The *Continental Forwarding* litigation involved the question whether United States Customs duties on goods imported from Japan should be calculated at the Japanese "check prices," if there is one, or at the lower price, if the importer paid less than the check price. The case history of the two *Continental Forwarding* v. *United States* cases may be found at 46 Customs Ct. Rep. 579 (1961); *rev'd*, 52 Customs Ct. Rep. 629 (1964); *aff'd*, 53 C.C.P.A. 105 (1966); 64 Cust. Ct. 838, A.R.D. 270, 311 F.Supp. 956 (2d Div. 1970), *aff'd*, 463 F.2d 1129 (C.C.P.A. 1972). The pertinent answers of the Japanese Ministry of International Trade and Industry to interrogatories of the United States government, as set forth in the Government's appendix to the Court of Customs and Patent Appeals in that case, are reproduced in the addendum to this brief. (33ad-51ad).

45. *See* App. Vol. 16 (6671a-2a; 6679a; 6683a); App. Vol. 17 (7044a; 7048a-7049a; 7083a-93a; 7098a-7100a; 7103a-33a; 7142a; 7162a; 7171a; 7174a; 7176a-77a; 7184a- 85a; 7260a; 7472a-77a; 7507a; 7542a-52a); App. Vol. 20 (8348a-51a); App. Vol. 22 (9263a-66a; 9299a); App. Vol. 23 (9532a-33a; 9536a-37a; 9539a; 9542a-43a; 9545a; 9552a; 9554a; 9556a; 9558a; 9560a; 9562a; 9564a; 9566a; 9568a; 9575a; 9582a-83a; 9585a; 9593a; 9605a; 9614a; 9621a; 9624a-25a; 9633a; 9636a; 9639a-40a; 9643a-44a; 9657a; 9661a; 9674a; 9712a;-13a; 9726a-29a; 9787a-92a; 9813a; 9843a; 9866a; 9869a; 9872a; 9875a-76a; 9888a; 9914a-15a; 9918a-19a; 9922a; 9980a; 9983; 9986a-93a); and other invoices at App. Vols. 23-24 (10007a-572a).

these groups and approved the completed forms and certified compliance with the "check price" provision, well knew that the true prices were lower than the "check prices."[46]

The United States buyer paid by letter of credit calculated at the "check price"; thus, an overpayment — equal to the difference between the "check price" and the "actual price" — resulted. App. Vol. 17 (7029a; 7044a); App. Vol. 22 (9203a; 9211a; 9417a-27a; 9441a-43a); App. Vol. 23 (9520a). Petitioners and their customers kept track of this "difference money," as it was known, in special accounts, and exchanged copies of these accounts for mutual verification.[47] In doing so, both petitioners and their United States customers all acted in the strictest secrecy. *See* App. Vol. 17 (7075a-76a; 7104a; 7109a; 7113a; 7123a; 7124a; 7129a; 7139a; 7141a; 7145a; 7146a-49a; 7151a; 7168a; 7418a-19a); App. Vol. 22 (9329a).[48] The true price — often many dollars below the fictitious "invoice price" or "check price" — resulted in a total of "difference money" which was very substantial.[49] The ongoing "difference money" balance — equal to the difference

46. *See* App. Vol. 23 ([Translation: 9522a] 9629a-32a; 9653a54a; 9669a-71a; 9679a-84a; 9697a; 9741a; 9759a; 9812a; 9827a; 9833a-40a; 9855a-65a; 9885a; 9895a-99a; 9908a; 9910a; 9935a-42a; 9961a-62a; 9972a; 9974a; 9976a; 10000a-04a; 10022a-27a; 10042a-43a; 10049a-50a);• App. Vol. 24 (10218a; 10319a; 10339a; 10343a; 10347a; 10353a-69a; 10378a-85a; 10480a-87a; 10514a-15a). (*See*, Translations: App. Vol. 14 [5813a; 5887a; 6059a; 6087a; 6110a; 6130a; 6145a; 6159a; 6172a; 6188a; 6202a; 6215a; 6234a]).

47. *See* App. Vol. 16 (6723a-6801a; 6921a-7001a); App. Vol. 17 (7049a-51a; 7072a-81a; 7083a-93a; 7098a-99a; 7103a; 7109a-16a; 7121a-22a; 7123a-42a; 7145a-53a; 7161a-90a; 7194a-7232a; 7237a-44a; 7283a-7307a; 7311a-20a; 7326a-35a; 7418a-19a; 7471a-90a); App. Vol. 18 (7899a-7901a; 7910a-57a); App. Vol. 21 (9095a-9147a); App. Vol. 22 (9257a; 9293a-99a; 9307a-21a; 9327a-35a; 9341a-51a; 9354a-79a).

48. As Sharp cautioned Midland, a United States buyer, App. Vol. 17 (7139a): "We can not allow you to reveal such a confidential document to outside of your company such as CPA, tax office as well as customs house, as you know well the reason for it. We strongly request you use it within your office. Upon receipt of your written confirmation we would like to cooperate with you in this matter." Midland responded: "Please be assured that Mr. Ryan and myself will continue to keep this document confidential per your request." App. Vol. 17 (7140a). *See also*, App. Vol. 18 (7887a; 7893a).

49. *See* App. Vol. 16 (6751a-55a; 6758a-59a; 6761a-63a; 6765a; 6768a; 6771a; 6774a-75a; 6777a-79a; 6781a-82a; 6784a-85a; 6787a-89a; 6791a-92a; 6794a-95a); App. Vol. 17 (7044a; 7435a-36a).

between the fictitious "invoice price" or "voluntary camouflaged price," App. Vol. 17 (7444a) and the "actual (FOB) price" or "contract price" — was also known as the "check price balance" or "c.p. balance."

For this aspect of the conspiracy to work, Japanese manufacturers had to secretly refund "difference money" to United States buyers, and they used identical means to do so. Several companies used the same Basle, Switzerland, branch of the same Swiss bank (Swiss Bank Corp.) to make these secret transfers. *See*, Sanyo's secret transfers to Sears, App. Vol. 16 (6779a; 6782a; 6785a; 6792a; 6795a; 6798a), and General's secret transfers to Midland, App. Vol. 17 (7374a; 7404a-10a; 7424a). The principal means of refunding "difference money" included: (a) checks that petitioners secretly drew on their Hong Kong, Japanese, and Swiss bank accounts and hand-delivered or mailed to United States buyers located at buying offices in Japan or in the United States;[50] (b) secret telegraphic fund transfers ("T/T") to the United States through petitioners' foreign bank accounts in Switzerland, Germany and other countries, App. Vol. 17 (7045a; 7050a; 7056a; 7404a-10a; 7415a; 7421a; 7466a; 7104a-05a; 7241a; 7247a; 7275a-76a); (c) "credits" disguised as offset credits on tooling costs the buyer ordinarily would have paid, App. Vol. 18 (7946a-57a); App. Vol. 19 (8203a); App. Vol. 20 (8372a-76a); App. Vol. 21 (9015a-35a), or credits for free spare parts or credits toward the purchase price of other products not subject to current dumping examination, including the "over-under" or "over-and-under-billing" technique, whereby the difference between the higher "invoice" price and the "actual" price is credited toward and deducted from the actual agreed purchase price of another product which the same buyer desired to purchase, thus reducing the agreed prices on other products to lower levels (and requiring further false declarations for those products and customs fraud on shipments of such other products, as well as on the

50. *See* App. Vol. 16 (6611a-13a; 6645a-47a; 6763a; 6779a; 6782a; 6785a; 6789a; 6792a; 6795a; 6798a; 6905a-07a); App. Vol. 17 (7030a; 7034a; 7045a; 7278a-79a; 7281a; 7322a; 7325a; 7421a; 7431a-32a; 7439a-42a; 7463a-64a; 7491a; 7493a-94a; 7496a-97a); App. Vol. 19 (8131a-47a); App. Vol. 22 (9417a-27a).

television product);[51] (d) "usuance" or "usuance interest" (a recognized form of "concealed dumping;" *See* Viner, ***Dumping: A Problem in International Trade*** 17, 266, 281), whereby petitioners allowed extended payment terms, permitted the buyer to retain accumulated interest on the letter of credit, and credited this sum against the "difference money" owed the buyer. App. Vol. 17 (7029a-30a; 7032a-33a; 7046a; 7052a-53a; 7059a); App. Vol. 18 (7898a; 7903a; 7905a-57a; 7979a); (e) deposits in the United States customers' yen bank accounts in Japan. App. Vol. 16 (6906a); App. Vol. 18 (7875a76a; 7883a-86a; 7977a-78a); and (f) travelers' checks which petitioners' employees while visiting the United States secretly hand-delivered to United States buyers. App. Vol. 17 (7377a; 7400a; 7414a). Whatever the method, the purpose and effect were the same, and Japanese manufacturers often copied the same technique.[52]

Petitioners also adopted identical accounting nomenclature to disguise the illicit payments in their books as legitimate payments, including, for example, (i) "***loyalty discounts***," App. Vol. 16 (6603a-08a; 6683a-85a; 6693a-95a; 6703a-51a; 6622a-23a); App. Vol. 19 (8151a-89a); (ii) charges by the buyer against the account of the Japanese supplier for "***excessive inspection***," "***100% inspection***," "***inspection***", or "***rework***" which was never performed, App. Vol. 10 (4107a-17a); App. Vol. 17 (7029a-30a; 7096a-97a; 7191a-93a; 7371a-73a; 7397a; 7399a); App. Vol. 20 (8373a-74a); App. Vol. 21 (8743a-44a; 8855a-73a); (iii) fictitious "***commissions***". App. Vol. 10 (4107a-17a); App. Vol. 17 (7029a-30a; 7094a-97a; 7143a-44a; 7155a-60a; 7264a; 7274a-76a; 7308a;

51. *See* App. Vol. 16 (6611a-12a; 6751a; 6755a; 6758a; 6761a; 6765a; 6768a; 6774a; 6905a-07a; 6921a-7001a); App. Vol. 17 (7029a-30a); App. Vol. 20 (8298a-8307a; 8373a-76a; 8537a-38a); App. Vol. 21 (9015a-29a).

52. Sharp employed the "*usuance*" method with Midland, App. Vol. 17 (7052a); General Corporation with Midland, App. Vol. 17 (7030a; 7046a); Nippon Electric Co., Ltd. ("NEC") with Midland App. Vol. 17 (7059a), and Matsushita with J. C. Penney, App. Vol. 18 (7895a-7957a; 7979a). Sharp and Montgomery Ward, App. Vol. 21 (9015a-35a; 9145a), Matsushita and J. C. Penney, App. Vol. 18 (7945a-58a), and Magnavox and its Japanese suppliers, App. Vol. 20 (8372a-76a) all used offsets on tooling charges. Mitsubishi used deposits in buyers' Japanese bank accounts with Gambles Import Corporation, App. Vol. 21 (8937a-8941a); as did Toshiba with J. C. Penney, App. Vol. 18 (7977a-78a); and Matsushita with J. C. Penney, App. Vol. 18 (7883a-86a).

7377a; 7382a-83a; 7393a; 7399a); App. Vol. 22 (9435a-51a); (iv) "*compensation*" for "*market research*" furnished by the buyer that both knew to be of no value to the Japanese supplier. *App. Vol. 19 (7985a-8068a).*

Fictitious "*commissions*" or "*sales commissions*" for services not rendered were credited by General to Midland, App. Vol. 17 (7373a), by Sharp to Midland, App. Vol. 17 (7094a-97a; 7143a-44a; 7155a-56a); by NEC to Arvin App. Vol. 22 (9435a-49a); and by NEC to Midland App. Vol. 17 (7264a; 7308a). Entries for "*excessive inspection*," "*excess inspection*" or "*rework*" were used to disguise payments of this nature by Sharp to Midland, App. Vol. 17 (7094a-97a), by General to Midland App. Vol. 17 (7399a); and by Matsushita to Magnavox. App. Vol. 21 (8855a73a). Sanyo used the so-called "*loyalty discount*" arrangement with Sears, App. Vol. 16 (6680a-87a; 6699a-6750a; 6781a-6801a); Magnavox, App. Vol. 21 (8813a), and General Electric Co., App. Vol. 19 (8098a-8101a; 8108a; 8151a-89a).

For merely several hundred instances revealed in discovery in this case alone, Japanese manufacturers retransferred $19,331,045 to their customers. App. Vol. 23 (9519a-20a). The average percentage difference between the reported "price" and the actual price was 11.73% for monochrome television receiver models, and 9.5% for color television receivers (9519a), on sampled transactions having a (falsely reported) dollar value of $271,733,706.[53]

In a letter to Sharp, Midland informed Sharp of the "commission" arrangements it had had with other Japanese manufacturers, App. Vol. 17 (7094a-95a):

> We have talked to you and other manufacturers about how we can receive the money that is owed to Midland because of the pricing of television sets. The manufacturers that we have talked to have proposed to us to rebate this money to us in the United States if we would sign the enclosed agreement. *We have signed this agreement with different manufacturers, and they have already started rebating money to us in the United States.*[54]

53. This compilation was merely a sampling of such transactions. Large amounts of so-called "difference money" refunded to United States customers were also camouflaged by other means such as falsely "underpricing" other products purchased at the same time. This "over-and-under billing" technique allowed purchasers not only to recover "difference money," but also defrauded the United States of a portion of the *ad valorem* duty that importers should have paid on the higher agreed prices for those other products. App. Vol. 20 (8296a-8302a; 8306a-07a; 8371a; 8376a).

A good example of how petitioners' "difference money" scheme worked is provided in a July 1, 1968 "*confidential*" letter to Sanyo from the Japanese trading company, C. Itoh & Co., the fourth largest corporation in the world outside the United States and a prominent participant in United States importation of Japanese consumer electronic products. App. Vol. 22 (9413a-15a). Over two years before the Treasury Department's dumping finding, Itoh (a member of the Japan Machinery Exporters Association, App. Vol. 12 [4888a]) warned Sanyo "to be extremely cautious" in issuing a purchase order for television sets destined for the United States "in view of *recent rumors* on the *dumping* question." Itoh also advised Sanyo how to falsify shipment validation forms, invoices, and purchase orders, and how to handle internal accounting for transactions involving "double invoicing." Itoh's recommended procedure involved misrepresenting prices to MITI by maintaining a secret account — the "book of adjustment of balance" — that would be shown only to the Japanese Ministry of Finance in the event of a tax audit, but never shown to MITI:

> . . . [T]hough the Ex-godown net, your delivery price, of [the television receiver] is actually $158.33 (¥57,000), you must list FOB Japan higher than $175 when filing the TV shipments and export validation form

54. Since these acts in furtherance of the conspiracy exposed the United States buyers to criminal and civil sanctions for customs fraud, in addition to dumping duties, some United States purchasers who were aware that the transactions were illegal would buy only "domesticated" sets, *i.e.*, television sets imported by the petitioners' United States sales subsidiaries and delivered to the United States purchaser after customs clearance. App. Vol. 19 (8155a-56a). However, in many cases United States buyers advanced money to those subsidiaries for *ad valorem* duties based on the "check price" stated on the invoice, and thus knowingly facilitated entry of the television receivers on false customs invoices, since they were aware that their actual prices were below the "check price." App. Vol. 17 (7551a-52a); App. Vol. 19 (8100a-01a).

with the TV Export Council and the Japan Machinery Export Association due to the existence of "Export control price."

Therefore, even if FOB Japan is set, let's say at as low as $175, the discrepancy between FOB Japan and actual Ex-go would be too large when you submit actual Ex-go price as corresponding to domestic shipment price. Moreover, we think that the maker's price itself will become an issue because it is too low.

Generally, it is understood that FOB Japan is 3% above FOR. If we follow this method of calculation, we consider it appropriate to price Ex-godown net at $170 and FOB Japan at $175.

In the event we set the official price as above, the accounting transactions with your company will be dealt with in the following manner.

1. Issue the purchase order setting Exgodown net at $170.00 (¥61,200).
2. The difference of ¥4,200 between actual Ex-go and the above figure will then be offset by separate accounts of your company and ours other than by the sales/purchase accounts.

That is:

A. Transactions at CI (Purchase)

Purchase at $170 and at the same time $11.67 (¥4,200) will be entered as DR. into the miscellaneous deposit accounts under the pretext of sales promotional subsidy. The payment of accounts payable is done simultaneously with the receipt of money as a sales promotional subsidy.

* * *

B. Transactions at your company (Sales).

Enter sales at $170. At the same time using a separate account (such as sales promotional subsidy A/C), $11.67 will

be entered as CR. The payment of a sales promotional subsidy is made simultaneously with the receipt of money into the accounts receivable.

* * *

By manipulating in the above fashion, externally the following will appear (1) *In dealing with MITI we can certify that a fair price is observed by us submitting only a purchase order and books of accounts receivables and payables. We will not show a separate book containing the adjustment of balance*. (2) In case of an investigation (audit) by the Tax Office, we will submit the books of accounts payables and receivables as well as the book of adjustment of balance, so as to prove that we are not manipulating profits. (*There will be no problem arising from this discrepancy because MITI and the Finance Ministry are under different jurisdictions*).

In 1966, two years before the Treasury Department had even commenced its Japanese television dumping investigation, the petitioners realized that the large differentials between their Japanese market prices and their United States prices were reflected even in the aggregate trade statistics compiled and published periodically by the Japanese government and agreed immediately to take steps to prevent detection of their dumping. At a December 27, 1966, meeting of the EIAJ "Statistics Committee" (to which all of them belonged, App. Vol. 12 [4747a-4756a; 4884a]), the manufacturers noted that "the domestic unit price is higher than the export unit price by a factor of 2.3 or more." They observed that this "might engender a suspicion overseas that Japan is engaged in dumping." App. Vol. 13 (5609a-10a). A contemporaneous "confidential" memorandum of that meeting addressed to the Chief of the Plant Accountants' Section of Japan Victor Co., Matsushita's subsidiary, discloses that petitioners agreed to alter the statistics they each reported to MITI to prevent discovery of their dumping (5609a):

Although no datum is presently available which shows the domestic shipment in value of color television sets, it can be obtained by subtracting the Customs Statistics of the

> Ministry of Finance from the Current Production Statistics of the Ministry of International Trade and Industry. According to this, the unit price will approximately amount to 150,000 yen, and *the export unit price in the Customs Statistics is 64,000 yen or thereabouts, so results will show that the domestic unit price is higher than the export unit price by a factor of 2.3 or more. This, in turn, may give rise to a misunderstanding that the domestic price is too high or may engender a suspicion overseas that Japan is engaged in dumping.* Therefore, it was agreed that when the report is to be filed with the MITI the amount obtained by subtracting the advertising expenses, the service expenses and the rebates from the domestic shipment in value be reported, thereby narrowing the price gap between the Current Production Statistics and the Customs Statistics.

Because a sudden change in the aggregate statistics might have aroused suspicion, petitioners agreed to make the change gradually, over a three-month period, and even agreed on a joint "explanation" to be provided to the authorities in the event they were detected by MITI and questioned.

e. *Detailed Coordination of Petitioners' Pricing Conspiracy.*

Petitioners successfully concealed their pricing conspiracy from United States Customs and the Treasury Department, but there is abundant evidence of petitioners' mutual knowledge of each others' adherence to the common plan. *See* App. Vols. 15-16 (6337a-51a; 6361a; 6373a-75a; 6668a; 6670a-72a; 6673a-76a; 6677a; 6679a; 6841a-42a); App. Vol. 17 (7094a-95a; 7443a-45a; 7450a-52a); App. Vol.18 (7979a); App. Vol. 19 (8155a-60a); App. Vol. 20 (8646a-47a; 8659a-61a); App. Vol. 21 (8771a-75a; 8813a; 9041a-50a; 9056a; 9073a-79a; 9083a-93a); App. Vol. 22 (9381a-82a; 9463a-65a; 9469a; 9507a-10a). Each petitioner knew of the others' identical acts and implemented the plan secure in the knowledge that the others were doing the same things, namely adhering to the secret pricing system with their registered United States customers, and for the same common purpose — one designed to achieve a mutually beneficial result that could

not be achieved and perpetuated without the continuous cooperation of them all.[55] Each knew that without substantially unanimous action in compliance with this plan, it would not work, that without full participation those who participated in the plan would be exposed to a serious risk of forfeiture of shipments and of criminal prosecution, but that general adherence to the conspiracy would make possible a continuing dumping campaign that would simultaneously displace and injure United States competitors and cause petitioners' joint share of the United States market continually to expand and afford a continuous opportunity to dispose of their excess production capacity at a satisfactory overall yield in both the United States and Japanese markets. Thus, there was the strongest of motives for participating in the conspiracy.

At crucial points, any failure to maintain close coordination would have exposed petitioners' United States pricing system and would have made it impossible for the conspiracy to continue. The risk of exposure was particularly acute during the Treasury Department's Antidumping Act of 1921 investigation and its aftermath, in the period 1968-1974, and then after the facade was dropped and petitioners' formal cartel arrangements were not officially renewed in 1973.

(i) *Petitioners' Conspiratorial Actions to Deflect Suspicion by the Treasury Department During the 1921 Antidumping Act Investigation.*

The Treasury Department's Antidumping Act of 1921 investigation began in 1968 and focused attention on petitioners' United States import prices by requiring them to set forth those prices. This presented petitioners with a serious dilemma. If they reported their true prices, a dumping finding and a large

55. As the Court of Appeals found, "[t]he evidence would permit a finding that efforts were made to conceal this activity both from MITI and from the United States Customs Service, and a finding that at least some of the manufacturers knew that others were engaged in rebating."(179A). The Court of Appeals held that of the Japanese manufacturers only Sony, which also did not belong to the Okura, Palace, or Tenth Day Groups, was not involved in this activity.

dumping-duty assessment were inevitable, and it would be impossible thereafter for petitioners (and unprofitable for their importers) to continue to dump. In addition, disclosure of actual prices which differed from the falsely reported "prices" reflected on their United States customers' Form 5515 customs entry declarations would have exposed their false customs declarations and subjected those prior shipments to forfeiture. App. Vol. 15 (6361a). If some manufacturers reported actual prices and others did not, petitioners feared that Customs would investigate the accuracy of all their submissions. App. Vol. 17 (7443a-45a). Since findings of dumping under the Antidumping Act of 1921 are country-wide findings, the one or two Japanese manufacturers who did not lie about their actual prices at this stage could have exposed the entire Japanese television industry to a dumping finding. For the conspiracy to survive the dumping case, therefore, all the petitioners had to answer the Treasury Department's questionnaire untruthfully, and since petitioners were obliged to file their responses to the Treasury Department's inquiries at approximately the same time, the lies had to be carefully coordinated. It was essential that each (a) lie about its prices, (b) continue to police compliance with the system by all, (c) prepare for Treasury Department questioning about the system that might be provoked by dangerous industry rumors of their "double invoicing" practices, and (d) attempt to divert Treasury from questioning the accuracy of their submissions.

The petitioners communicated with each other to assess what Treasury and Customs already knew or suspected, to balance the risks, App. Vol. 16 (6677a); App. Vol. 21 (9073a-93a), and systematically lied in their responses, in violation of 18 U.S.C. §1001.[56] Having lied in their responses, petitioners later attempted to block respondents' access to those submissions in discovery in these cases, and, after Judge Higginbotham directed petitioners to produce their submissions, lied about their true prices in their answers to respondents' interrogatories. App.

56. *See* App. Vol. 23 (9627a; 9647a-48a; 9651a; 9664a; 9677a; 9692a-93a; 9695a; 9698a; 9701a; 9714a; 9717a; 9730a; 9735a; 9742a; 9745a; 9760a-62a; 9797a; 9805a; 9814a-9815a; 9817a; 9828a; 9831a; 9845a; 9849a; 9851a; 9853a; 9879a-81a; 9883a; 9889a-90a; 9893a; 9900a-01a; 9905a; 9924a; 9927a; 9943a-45a); App. Vol. 24 (10171a; 10178a; 10183a; 10208a-09a).

Vol. 10 (3901-8a).[57] An internal Sears memorandum dating from this period shows Toshiba and Sanyo devising a strategy through their joint customer, Sears, for dealing with Customs in furtherance of petitioners' conspiracy, App. Vol. 16 (6677a):

> Phone call Tokyo [Handwritten]
>
> Iijima, Tokyo — Toshiba Murao says he heard *customs* was questioning *Sanyo* on double invoicing? *Sanyo top level says no* — not at present time.
>
> Sanyo feels we should wait on divulging system.
>
> > Trigger off new investigation last for years. Very dangerous — would re-open whole new case. Sanyo feels customs already knows of double invoicing and Sears would gain nothing — tell truth when asked.
>
> RE: Toshiba — will we have to divulge how we over and under bill with them — would we have to reveal system if asked by customs?

Repetition of these dangerous rumors to the Treasury Department about petitioners' "double-invoicing" practices also prompted anxious discussion among all the Japanese television producers at petitioners' Electronic Industries Association of Japan ("EIAJ"); some of the large United States customers were kept informed of these discussions. A contemporaneous document produced by one customer states, App. Vol. 21 (8771a):

> The Japanese exporters are extremely concerned about the conversations that are taking place within the E.I.A.

57. App. Vol. 23 *Compare*, (9627a with 9649a; 9651a with 9665a, 9677a with 9716a; 9717a with 9732a; 9735a with 9743a; 9745a with 9763a; 9765a with 9795a; 9797a with 9804a; 9805a with 9816a; 9817a with 9830a; 9831a with 9848a; 9849a with 9852a; 9853 with 9882a; 9883a with 9891a; 9893a with 9903a; 9905a with 9925a; 9927a with 9946a; 9947a with 9966a; 9967a with 9996a; 9997a with 10016a; 10017a with 10037a; 10039a with 10046a; 10047a with 10052a; 10053a with 10068a; 10069a with 10092a; 10093a with 10109a); App. Vol. 24 (10171a with 10181a; 10277a with 10295a; 10317a with 10322a; 10337a with 10340a; 10341a with 10344a; 10345a with 10348a; 10349a with 10374a; 10375a with 10389a; 10391a with 10406a; 10407a with 10414a; 10415a with 10424a; 10425a with 10456a; 10459a with 10475a; 10477a with 10504a; 10505a with 10543a; 10549a with 10574a).

[U.S.A.] committees in the United States. While dumping charges against Japan are being appraised, *there are also other conversations among American E.I.A. representatives implying illegal practices of pricing and kick backs between the Japanese exporter and the U.S. importer.* * * * The feeling of the lawyers representing Japan was that E.I.A. Japan should take a strong position to seek a truce, because if the charges were factual, *it could be most damaging*. * * * *The suggestion was made that E.I.A. Japan should prepare their case assuming that there had not been nor are there any secrets* between the Japanese supplier and the U.S. importer of the television sets.

Some Japanese manufacturers and United States purchasers considered destroying or changing incriminating records. App. Vol. 18 (7891a); App. Vol. 19 (8156a); App. Vol. 21 (8771a; 8844a). An internal memorandum of one United States purchaser states (8771a):

> N. E. C. was to give us dates of purchase orders from Magnavox which should be checked for pricing information. There may be inconsistency between F.O.B. Japan prices versus F.O.B. San Francisco. *Whether our files of correspondence and old purchase orders should be purged will have to be discussed with our legal people.*

Other companies instructed their personnel "not to keep any records in [their] office on the difference between actual price and check price." App. Vol. 18 (7887a). In an October 1970 letter, Tanaka, the Japanese companies' American customs lawyer, App. Vol. 15 (6429a-37a; 6417a-18a; 6447a-48a), alerted the director of the EIAJ's New York branch, the Japan Light Machinery Information Center, about these dangerous allegations and warned petitioners to "be prepared" for questions from Treasury, App. Vol. 21 (8773a-75a):

> More recently I have heard that Zenith has been giving currency to the story that *Magnavox has been a party to alleged double invoicing and other illegal practices* involving the importation of certain television receivers from Japan. * * * Let me say again that this is all hearsay and that I have no direct basis to evaluate such hearsay information. I am only passing this information on so that EIA-J members will be fully aware and *be prepared to meet any of these allegations should any of them be made during the forthcoming meeting before the Treasury Department or to the press.*

Tanaka also warned other conspirators. App. Vol. 15 (6345a-46a; 6373a); App. Vol. 16 (6673a-76a). C. Itoh (the trading company that advised Sanyo on accounting tricks to conceal double-invoicing) also reported the concerns which petitioners had voiced at a joint EIAJ-JMEA meeting, and in a September 1970 memorandum recorded petitioners' mutual awareness of each other's dilemma, App. Vol. 15 (6361a):

> In this case, although it is said that *invoice price* between head and branch offices will not be consulted, *customs invoice price is believed to be consulted to some extent in the process of calculation*. We believe it becomes a material for checking whether or not actual contract prices are reported. *If c/p [check price] is reported but actual [price] is not reported, in some cases one may be at loss to explain.* (*Some manufacturers in Japan are not reporting actual prices* and are worried that they might be exposed to false reporting).

Representatives of petitioners and their large United States customers held meetings in the United States during 1970 to formulate plans to deflect the antidumping investigation away from the dangerous question of petitioners' true import prices. App. Vol. 15 (6315a-36a); App. Vol. 21 (9041a-50a; 9056). At a meeting among them held on October 26, 1970 in New York, Ira M. Millstein, Esquire (one of Matsushita's lawyers) proposed filing a suit against the Treasury Department to challenge its price determinations on procedural due process grounds. He defended this idea on the ground that "*a litigation might provide protection against 'double pricing' exposure*", *i.e.*, the United States import-price component of the dumping margin (App. Vol. 21 [9073a]). He reasoned that "the government would be in *a poor position to press double pricing charges* because this would amount, to some extent, to a second attack on the same

prices after the first attack failed, opening possibilities of abuse of process or malicious prosecution were the government to fail the second time (or at least 'harrassment')." [58] The matter was the subject of discussion at high levels within the importers' organizations, App. Vol. 15 (6377a-95a); App. Vol. 21 (9077a-93a), and petitioners also considered the impact of their "double invoicing" on the dumping investigation at an EIAJ "Top Meeting." App. Vol. 15 (6351a). Petitioners were otherwise in regular communication concerning the problems posed by the dumping investigation. App. Vol. 14-15 (6239a-40a; 6241a-2a; 6246a-8a; 6351a; 6409a-15a).

(ii) *The Continuation of Petitioners' Conspiracy After Non-renewal of the Formal Check Price Arrangements.*

In 1973, the Agreements and Rules were not formally renewed and the nominal facade for petitioners' conspiratorial conduct was removed. Petitioners found themselves in another serious predicament which called for careful collaboration. After the Treasury Department's March 9, 1971 dumping finding, App. Vol. 11 (4200a), the next step in the administrative proceeding was assessment of dumping duties on current shipments. Although petitioners were unable to prevent a dumping finding, they had succeeded in concealing their true import prices, thereby minimizing the anticipated dumping duty assessments. Treasury's dumping duty assessment would be based only on the prices which petitioners reported in their questionnaire responses and would to that extent be understated.

When the Agreements and Rules were not formally renewed the absence of "check prices" posed a serious problem. Petitioners faced the dilemma of what fictitious prices should be set forth on Special Invoice Form 5515, and of how they could

58. The Matsushita interests and one of their United States customers did file such lawsuits. *See, J.C. Penney Co., Inc. v. U.S. Treasury Department*, 319 F.Supp. 1023 (S.D.N.Y. 1970), *aff'd*, 439 F.2d 63 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Matsushita Electric Industrial Co., Ltd. v. U.S. Treasury Department*, 67 Cust. Ct. 328, C.D. 4292, *aff'd*, 60 C.C.P.A. 85, C.A.D. 1086, *cert. denied*, 414 U.S. 821 (1973).

continue to make their fictitious prices appear to be uniform, and, therefore, plausible to Customs. Had petitioners suddenly begun to report actual prices — prices that were far below the "check prices" — Treasury and Customs (which had never seen petitioners' actual prices) might have interpreted this as a simultaneous, across-the-board *reduction* in Japanese television prices, warranting a renewed dumping investigation; it also might have aroused suspicion concerning the accuracy of the pricing information petitioners and importers had previously submitted. Similarly, if only some Japanese manufacturers and importers began to report true prices and others did not, petitioners feared that Treasury might notice the inexplicable gap between new actual prices and the old "check prices," and might suspect that companies reporting the higher prices had been engaged in "double-invoicing." Discovery of such "double-invoicing" might have led to reexamination of the prices on all petitioners' entries during the entire 1963-1973 period and to possible discovery of petitioners' pricing system, as later happened to some degree. *See* App. Vol. 15 (6295a). Treasury might then have reopened the dumping investigation to correct the import prices on which its dumping finding was based, and recalculated the dumping duties based on the true dumping margins. In addition, discovery of the conspiracy would expose petitioners to criminal liability and forfeiture of television shipments from the early 1960s through 1973.

Faced with these serious risks, petitioners could not afford to leave to chance how these new dangerous events might unfold. A "confidential" letter, dated February 19, 1973, from the General Corporation, a Japanese manufacturer, to the major United States buyer, Midland International Corp., provides a cinematographic view of the situation after petitioners did not formally renew the formal cartel arrangements, when Japanese suppliers continued to police the system and deemed it "better to keep voluntary camouflaged prices . . . making them at 10% higher than actual prices" to avoid suspicion of dumping, App. Vol. 17 (7443a-45a):

> It is understood to be as a [sic] very confidential news that check price will not be continued further on and after the

end of February this year, when the present agreement will terminate.

This should be a good news on your part being free from heavy overpayment and also from extended settlement minimizing your burden of interest to be involved.

This, we hope and trust, will solve the matter of exchange loss on your part, which please check.

However it might be better to keep voluntary camouflaged prices between us making them at 10% higher than actual prices, because this 10% can be easily refunded at the same time as shipment as you know. The U.S. authorities concerned were very much concerned to [sic] unit prices after evaluation of yen last time, which according to them, should reflect at once new dollar value to outcome from the revolution of yen. *Such being the case, if actural [sic] prices will appear on invoices, it might be subject to dumping suspection* [sic].

When Midland ignored this advice, and submitted purchase orders and letters of credit for television sets setting forth the "Real Price", it was harshly admonished for endangering the conspiracy, risking enormous additional dumping duties, and exposing prior entries to antidumping scrutiny. Its Japanese supplier invited Midland *"to coolly look straight at the dangerous surroundings"* created by a comparison with other Japanese suppliers' continued submission of false customs invoices, and demanded an explanation for this refusal to cooperate, App. Vol. 17 (7450a-52a):

Re: L/C [letter of credit] PRICE On Outstanding Orders
What is the exact reason why you stick to opening L/C [Letter of Credit] at the Real Price?
Because of overpaying?
Because of saving the interest?
Or other reason?

We have to coolly look straight at the dangerous surroundings, such as,

1. Due to 10% Dollar devaluation/Yen upvaluation. Other makers are going to increase the price. (For example, SONY announced $20.00 increase on retail price in the States. Mitsubishi announced at least 10% increase on FOB Japan price.)
2. *Reducing the price of the same model will make the customs have the suspicion of the dumping.*
3. Once MID/GNRL are suspected and are black-listed, *dumping duty will be imposed to you* and we cannot make the shipment-shipment hold.
4. Further, U.S. customs' authority can have the right further to *investigate the price details not only on present/future models but also on the past models* if they are/have [sic] been safe from dumping.
5. *If the FOB Japan price of ours is compared with others', great suspicion would be inevitable.*

General insisted that Midland continue to set forth the "voluntary camouflaged prices" — in effect a *phantom* "check price" — on its letters of credit until its Japanese manufacturer could "grasp more clearly the movement of the other makers," and coordinate its conduct with theirs, App. Vol. 17 (7452a):

> . . . we will suggest you to open L/C at the old check price until June shipment, at least. We think by someday around June/July *we can grasp more clearly the movement of the other makers'* and A/D [antidumping] matter.

The local Japanese buying office of Teledyne, Inc., another United States purchaser, also reported this pressure to continue to set forth the old prices on purchase orders and Customs Form 5515's until petitioners could coordinate their activities at the "end of July." App. Vol. 22 (9463a-64a). A Teledyne communication later in 1973 stated, App. Vol. 22 (9465a):

> "Re General z they recommend we do not change PO prices until may be end July because although check prices abolished, U. S. Antidumping rule still exists and they want to *wait for a while and see what competitors will be doing z*

> they are asking same thing to other customers such as Midland z."

An "Interoffice Memo" dated May 29, 1973, describes the coordination of these moves with respect to the prices to be set forth on purchase orders, App. Vol. 22 (9469a):

> "General therefore wants us to *wait until end of July*. They feel they will be in a position to agree to revise PO prices then. They are asking the same things to Midland and others."

Thus, the Japanese manufacturers continued this aspect of the conspiracy *even after* the non-renewal of the formal Agreements and Rules. Toshiba continued its "over-and-under" billing scheme with Sears. *See e.g.*, App. Vol. 16 (6962a-80a; 6995a-7001a); App. Vol. 23 (9717a-33a); App. Vol. 17 (7262a; 7492a-7508a; 7526a; 7555a). App. Vol. 10 (4107a-17a).

Ultimately in 1977, aspects of the conspiracy began to unravel. While respondents were subpoenaing documents and taking depositions of large buyers, two large United States buyers found it expedient to acknowledge the practice in filings with the Securities and Exchange Commission and in a very limited "voluntary disclosure" to the United States Customs Service. App. Vol. 10 (4107a-17a); App. Vol. 15 (6289a-6312a); App. Vol. 16 (6809a-29a); App. Vol. 17 (7555a); App. Vol. 21 (8937a-48a; 8971a-96a). Another importer was indicted and pleaded guilty to customs fraud charges on March 29, 1979. App. Vol. 10 (4107a-4117a). Petitioners, however, escaped indictment.[59]

(iii) *Petitioners' Joint and Knowing Acquiescence in and Approval of Each Other's Falsified Shipment Validation Forms to Further the Conspiracy.*

The Japanese manufacturers, whose Television Export Council and Television Export Examination Committee were assigned the function of "checking" each others' shipment valida-

59. An indictment of Sears Roebuck & Co. is currently pending before the Court of Appeals for the Ninth Circuit.

tion forms for compliance with the "check price" provisions of the Agreement and Rules, were aware that the "check prices" which they set forth on "Applications for Validation of Shipment" were not the true prices. Although the Agreements and Rules empowered the Council and the Committee to investigate and prevent sales at prices below the "check prices," and required petitioners to "comply with requests for reports and with demands for investigation," (*See, e.g.*, App. Vol. 14 (5878a)), petitioners continued to validate each other's applications notwithstanding their knowledge that each other's shipment validation forms did not reflect the true prices and that the true prices were below the reported "check prices." There was no showing that petitioners ever caused the Council or the Committee to investigate or to invoke the Agreements and Rules to prevent their putative "competitors" from continuing to sell below the "check prices." There was no showing that any petitioner — in order to prevent another Japanese "competitor" from obtaining a pricing edge in an illegal manner in sales to a United States customer — ever reported another petitioner's flagrant customs violations to United States Customs. On the contrary, petitioners and their major United States purchasers met together to discuss ways to continue their joint pricing system, and to continue to conceal their actual prices from United States Customs, and to continue to dump television receivers in the United States. App. Vol 21 (9073a-75a).[60]

60. The Japanese manufacturers' United States sales subsidiaries, operated at a loss over many years, acted as United States conduits by drawing funds on their own accounts and delivering checks for secret transfers to United States customers, and by "domesticating" imported goods to accommodate their private label and OEM purchasers that refused to be importer of record. App. Vol. 19 (8156a). App. Vol. 16 (6742a-79a); App. Vol. 19 (8004a-06a; 8016a-17a; 8037a-39a; 8041a); App. Vol. 24 (10111a-27a); App. Vol. 21 (8855a-73a; 8935a-68a); App. Vol. 22 (9495a-97a; 9417a-27a); App. Vol. 16 (6909a-20a; 6872a-75a); App. Vol. 19 (8217a-23a); App. Vol. 21 (8782a-3a; 8785a-7a; 8779a); App. Vol. 11 (4169a-73a); App. Vol. 22 (9430a); App. Vol. 21 (8769a); App. Vol. 11 (4171a-73a).

f. The Destructive Effects of Petitioners' Conspiracy.

Petitioners' "check prices" were substantially below not only petitioners' Japanese market prices but also television price levels in the targeted United States market. App. Vol. 8 (3056a-57a; 3073a-74a); App. Vol. 11 (4191a, 4197a-98a). Petitioners' steadily increasing shipments at actual prices concealed under the facade of the Agreements and Rules shattered prevailing "price points" in the United States market, drove United States prices down to levels that eventually made profitable operations impossible for United States manufacturers, and finally decimated the United States consumer electronic products industry. App. Vol. 11 (4269a-98a; 4304a-4530a); App. Vol. 5 (1957a; 1965a-6a).

United States manufacturers' profits dwindled and, in many cases, they incurred losses that ultimately forced them to abandon the manufacture and distribution of these products. App. Vol. 5 (1958a-71a); App. Vol. 6 (2475a-2507a); App. Vol. 11 (4201a-8a; 4211a; 4216a-21a; 4223a-8a; 4229a-31a). The volume of imports and the combined share of United States sales represented by the Japanese manufacturers' consumer electronic products increased many times. App. Vol. 5 (2157a-9a); App. Vol. 6 (2551a-98a); App. Vol. 11 (4123a-68a). By 1976, Japanese imports accounted for more than 50% of all portable and table model color television sales in the United States market, by far the largest portion of the business. App. Vol. 11 (4134a). United States production and United States producers' aggregate share of domestic sales plummeted. App. Vol. 6 (2486a-88a). The number of United States companies producing television receivers declined, with under-utilization and idling of United States television receiver assembly plants. App. Vol. 5 (1960a); App. Vol. 6 (2489a-93a). United States producers' operating profits declined drastically. App. Vol. 5 (1968a-69a). The number of persons employed in United States establishments in the industry and man-hours worked on television receivers also drastically declined. App. Vol. 5 (1960a-64a).

Elaborate studies of the television industry by Federal agencies with special expertise in analyzing the effects of imports

on domestic commerce describe the serious injury which United States manufacturers sustained. App. Vol. 11 (4191a-4208a). Plaintiffs' expert economic witnesses' studies (verified by affidavit) corroborate these findings. App. Vols. 5 and 6; App. Vol. 8 (3107a-13a). The operating results of the few domestic manufacturers which survived and of their distributors provide dramatic evidence of the destructive effects of petitioners' actions and the success of their conspiracy. App. Vol. 11 (4211a-31a; 4237a-4268a); App. Vol. 5 (1918a-1980a); App. Vol. 6 (2475a-2517a); App. Vol. 11 (4119a-4530a).

On the filing of NUE's action, General Electric recorded its view in an internal memorandum that "of all U.S. TV manufacturers, [General Electric] probably suffered the greatest damage from Japanese competition." (App. Vol. 11, 4229a). Although General Electric also considered filing suit, one executive stated the reason why it could not do so: *"[o]ne of the defendants [Toshiba-4233a] is a corporation in which we own 10% of the stock and other defendants are both customers and licensees."* (4231a). RCA's profits in the television manufacturing segment of its business were substantially reduced during the period, App. Vol. 11 (4211a-21a), but RCA received large sums in license royalties from the Japanese manufacturers, who had been able to develop little meaningful technology of their own in this field. App. Vol. 5 (1657a-63a). Many established television manufacturers with profitable operations in other fields of business (including NUE) did not survive. *See also* App. Vol. 11 (4211a-4530a).

As a further consequence of petitioners' conspiracy, United States competitors became ripe for acquisition. On May 28, 1974, recognizing the direction of these events, Motorola sold the assets of its Consumer Products Division to the Matsushita interests for cash and contemplated reciprocal arrangements between Motorola and Matsushita in related fields of the electronics business. App. Vol. 25 (10647a-914a). In the short span of seven months following the Matsushita-Motorola acquisition four U.S. television manufacturers — Admiral, Magnavox, Philco and Packard Bell — were all either acquired or went out of business. The American affiliate of N.V. Philips Gloeilampenfabrieken (Europe's largest television manufacturer

and joint-venture partner of the Matsushita interests under a comprehensive "Industrial Cooperation Agreement," App. Vol. 25 (10577a-618a)), acquired Magnavox by tender offer, App. Vol. 11 (4245a-68a), after exploring the feasibility of acquiring Zenith. App. Vol. 11 (4251a; 4257a). In 1976, Sanyo bought Warwick Electronics, Inc. ("Warwick"), a United States television manufacturer which for many years had supplied Sears Roebuck & Co. and which ultimately attributed its financial decline to pricing practices of Sanyo and Toshiba, which were designated by the cartel to sell to Sears. App. Vol. 11 (4237a-44a); App. Vol. 16 (6865a-66a); App. Vol. 41 (18493a-508a). A Sanyo executive boasted that the Warwick acquisition provided an opportunity "*to seize the majority share in the U.S. market.*" App. Vol. 16 (6862a; 6864a). Admiral was forced out of the television business thereafter.

Petitioners admitted this evidence of injury for purposes of summary judgment.

SUMMARY OF THE ARGUMENT

1. The admissible direct, as well as circumstantial, evidence of the charged conspiracy in the pretrial record as defined by the Court of Appeals is sufficient to create a genuine issue of fact regarding the existence of petitioners' conspiracy, and a trial is required. The unrebutted conspiracy evidence "tends to exclude the possibility of independent action"; thus, the evidence meets the standard of *Monsanto Co. v. Spray-Rite Service Corp.*, ___U.S. ___, 104 S.Ct. 1464, 1470-73 (1984), and includes sufficient unrebutted evidence of petitioners' motive to conspire in the manner in which the evidence shows they did. Evidence of conspiracy is sufficient to create an issue if it gives rise to a reasonable inference of "a conscious commitment to a common scheme designed to achieve an unlawful objective," *Monsanto Co. v. Spray-Rite Service Corp., supra*, 104 S.Ct. at 1471, and such evidence is sufficient "even though contrary inferences might reasonably be drawn." *Aspen Skiing Company v. Aspen Highland Skiing Corporation*, ___U.S.___, 53 U.S.L.W. 4818, 4823 (1985); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

2. Although the record contains such evidence, there is no mandatory requirement here of proof of conduct contrary to economic self-interest. Proof of such conduct may be relevant and, with evidence of parallel acts, sufficient in other contexts (as in refusal-to-deal cases) to warrant an inference of conspiracy from circumstantial evidence, but there is no universal and inflexible requirement that such evidence be presented in all Sherman Act conspiracy cases, particularly where, as here, there is direct evidence.

3. The "foreign sovereign compulsion" issue, which petitioners deliberately waived and abandoned below, is a false issue. The Japanese manufacturers *did not do* what they claim to have been "directed" to do. Instead, petitioners' actual conduct violated both Japanese law (according to the Japanese Government 32ad-51ad) and United States law, and petitioners lied to both governments to conceal their violations. They continued such conduct long after the existence of any alleged "direction." Moreover, petitioners' conduct was part and parcel of their conspiracy, which clearly violated United States law, and under *Loewe v. Lawlor*, 208 U.S. 274, 299 (1908), and many other decisions of this Court, such conduct is entitled to no immunity and such conduct may, in part, "*evidence*" the violation of law. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). The Court of Appeals correctly determined that unresolved factual issues relevant to these questions precluded summary judgment based on petitioners' "compulsion" defense.

4. Petitioners have been found to be doing extensive business in the United States. The courts below have *in personam* jurisdiction over petitioners and subject-matter jurisdiction over petitioners' entire conspiratorial course of conduct, and petitioners have not challenged either ruling. Thus, no foreign governmental "direction" can suffice to relieve petitioners in their commercial activities here of the duty to obey United States law. Moreover, no foreign governmental "compulsion" is entitled to judicial deference when it relates to conduct that is inconsistent with United States law, and where (as here) such conduct (a) amounts merely to *commercial* activity, and (b) has direct, exclusive and intended effects on United States commerce, and

was effectuated by and carried on by acts committed within the territorial boundaries of the United States.

5. Petitioners' reliance on an alleged MITI "direction" (evidenced by no contemporaneous written decree) is undermined by the explicit withdrawal provisions (required by Japanese statute) in the very Agreements and Rules in question. There is no *bona fide* invocation of the "foreign sovereign compulsion" doctrine here, because petitioners (a) could have withdrawn from the Agreements and the JMEA at any time, (b) had a right of judicial review of any such "direction," and, as Judge Higginbotham observed (Pretrial Order No. 5, Third Day at 240-241), (c) were not required to export.

6. To the extent that any diplomatic communication regarding factual or legal contentions in issue in a United States court may be entitled to any legal effect, they must, at a minimum, (a) possess sufficient specificity to permit a United States court, in the context of litigation of specific facts and issues, to determine whether the "direction" may be given effect within the legal limitations of any "compulsion defense" that may be recognized, and (b) must be presented in sufficiently timely fashion so as not to intrude upon the sovereignty of the United States and of its courts by disrupting orderly judicial procedures. As the United States Government concedes in this case (G.Br. at 26 n.26), the Japanese Government "failed to spell out its role . . . with sufficient clarity." Moreover, the belated presentation of a second Note Verbale 14 years after the filing of the NUE complaint, after the Court of Appeals' decision, and while the cases are pending in this Court, exceeds proper deference to the sovereignty of the United States. Recognition of such an irregular procedure would be an undesirable precedent that would encourage similar untimely efforts by foreign nations attempting to protect commercial interests of their nationals and would be unduly disruptive of orderly judicial procedures. The Japanese government communications in this case fail to satisfy any of these basic requirements and are entitled to no deference.

7. Since the Questions Presented in the petition involve only the antitrust segment of the cases, under Rule 21.1(a) no issue relating to the antidumping segment of these cases is before the Court. Moreover, a ruling on the conspiracy issue could not

adversely affect respondents' antidumping claims, because the counts of respondents' complaints that charge violations of the Antidumping Act of 1916, charge both that petitioners combined and conspired in violation of that Act, and also that petitioners violated the Act by "*importing*" and by "*assisting in importing.*" Apart from conspiracy evidence, there is evidence of petitioners' intent that suffices independently to satisfy the statutory intent requirement of the Antidumping Act of 1916, 15 U.S.C. §72. Respondents' antidumping counts therefore state offenses supported by sufficient evidence without the need for evidence of conspiracy. Since the Court of Appeals redefined the summary judgment record in reversing the district court's evidentiary rulings, "reinstatement" of the district court's summary judgments would also be inappropriate.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENTS' ADMISSIBLE DIRECT AND CIRCUMSTANTIAL EVIDENCE OF PETITIONERS' CONSPIRACY IS SUFFICIENT TO CREATE A GENUINE ISSUE OF FACT, AND PROPERLY REVERSED SUMMARY JUDGMENT

On the basis of the additional evidence it ruled was admissible, but which the district court had failed to consider, the Court of Appeals unanimously determined that respondents' conspiracy evidence is sufficient. Its determination was correct.

A. *The Japanese Manufacturers Mischaracterize the Conspiracy Alleged and Proven.*

The Japanese manufacturers mischaracterize the conspiracy and evidence to obscure its basic character as a conspiracy to dump designed to achieve their monopolistic purpose. Consistent with this strategy, they therefore ignore the direct evidence of their collusion regarding the Japanese market price component of this scheme and its economic effect when combined with their United States pricing system, and suggest that this direct evidence is merely evidence of "another conspiracy." Having

dismembered the conspiracy, petitioners argue abstractly and without record support that a conspiracy among Japanese manufacturers to depress prices in the United States market in order to drive United States manufacturers out of the business would be "economically illogical," regardless of its success to date. This question-begging strategem fails to address either the record evidence or the Court of Appeals' holdings.

The evidence shows an integrated course of conspiratorial conduct to restrain and monopolize trade and commerce in television receivers and other consumer electronic products through collusive dumping and other anticompetitive activities. It involved a scheme for simultaneously coordinating petitioners' Japanese market pricing with their United States import pricing for the purpose, and with the effect, of establishing sharp price differentials between the two markets. Thus, petitioners' reliance (P. Br. at 24-25) on commentators who are of the view that single-firm, single-geographic-market predatory pricing is "rare," is misplaced. Petitioners' factually unsupported attack on the "economic logic" of their scheme misses the mark by overlooking the subsidization of petitioners' coordinated dumping in the United States made possible by their price-fixing in the Japanese market.

The evidence of petitioners' conspiracy, detailed above, consists of

(a) undisputed evidence that for more than 10 years the Japanese manufacturers regularly and frequently discussed their Japanese market pricing, and direct evidence of petitioners' actual price collusion in the Japanese market, *supra* at 16-22;

(b) undisputed evidence, in the form of the signed Agreements and Rules, of their United States price arrangements, which a variety of other evidence shows that petitioners jointly used as a facade for coordinated United States pricing having different purposes and effects, and evidence that petitioners combined this secret system of price coordination with their simultaneous, admitted collusion on price in the closed Japanese market to make the Agreements and Rules a component of a larger unlawful scheme designed to produce large concealed

dumping margins which they knew would injure their United States competitors but would escape detection under the United States antidumping laws, *supra* at 22-53;

(c) undisputed evidence of large differentials between petitioners' Japanese market prices and their drastically lower United States market prices, persisting over many years, thus confirming the Treasury Department's dumping finding, *supra* at 28-31;

(d) undisputed evidence that petitioners discussed among them the differentials between their Japanese market price levels and their lower United States price levels, and discussed ways of jointly concealing (1) their dumping, (2) the fact that their actual import prices were below the "check prices," (3) that they were submitting false customs declarations at the time of entry, (4) that they were secretly refunding "difference money" to United States importers, and (5) how they had uniformly lied to the Treasury Department to conceal their dumping from it during its Antidumping Act of 1921 proceeding, *supra* at 21; 31-53;

(e) undisputed evidence of regular secret meetings among petitioners' Chairmen, Presidents and Television Department heads, where they discussed current and future prices, production, inventories and shipments and exchanged confidential company data and forecasts so that they might be harmonized *supra* at 16-22;

(f) undisputed evidence that the Japanese manufacturers met for at least ten years at the Television Export Council, where they discussed their United States pricing strategies, *supra* at 22-28;

(g) undisputed evidence that Japanese manufacturers' export sales were generally at a loss and that they also operated their United States subsidiaries at a loss over many years, *infra* at 81;

(h) undisputed direct evidence that petitioners agreed on methods to conceal their large differentials between their Japanese market prices and their United States prices from both the Japanese government and the United States government, and that in concealing their true prices they engaged in wholesale violations of both Japanese and United States laws; *supra* at 31-53;

(i) undisputed evidence that Japanese manufacturers and trading companies connived to devise ways to deceive MITI about their actual United States prices, *supra* at 39-42;

(j) undisputed evidence that they discussed and agreed upon the profit margins of their respective wholesale and retail distributors in the Japanese market, *supra* at 16-22;

(k) undisputed evidence that petitioners regularly exchanged, discussed and harmonized their production levels and agreed on joint adjustment of their production levels, *supra* at 16-22;

(l) undisputed evidence that petitioners regularly discussed and exchanged information on their respective inventory levels, *supra* at 16-22;

(m) undisputed evidence that petitioners regularly discussed and exchanged information on their respective shipments, *supra* at 16-22, 24-25;

(n) undisputed evidence that petitioners discussed, exchanged and "voted" on forecasts and projections of future demand, supply, production, shipment and inventories, both for the Japanese market and for exports, the majority of which were destined for the United States, *supra* at 16-22;

(o) unrebutted expert opinion evidence regarding the Japanese manufacturers' strong economic motives to conspire to dump and to eliminate their United States rivals, *infra* at 76-81;

(p) unrebutted expert opinion evidence analyzing the evidence that shows why petitioners' conduct was totally inconsistent with mere unilateral acts of "competing" companies, and evidence of acts against legitimate individual interests, *supra* at 31-53, 42-43, 52-53, and *infra* at 70-72, 78-81;

(q) undisputed evidence that petitioners systematically and uniformly lied to conceal their actual United States prices, and thereby to conceal and continue their dumping and to minimize the dumping duties, *supra* at 31-53;

(r) undisputed evidence that petitioners continued their United States pricing scheme long after their formal Agreements and Rules were not formally renewed, *supra* at 48-53;

(s) evidence that petitioners submitted to their own executives at the Television Export Council and Television Export Examination Committee every invoice for covered television receivers, and certain other consumer electronic products imported into the United States, disclosing to one another on current information model numbers, features, quantity shipped, pricing, date of shipment, tradename, and purchaser for every shipment to the major United States purchasers, *supra* at 22-28, 52-53; and

(t) undisputed evidence that petitioners were mutually aware of each other's Japanese market pricing, current production shipment and inventory, forecasts of demand both domestic and export, introduction, timing and pricing of new models, pricing and identities of their United States customs, methods of pricing to customers in the United States, and the existence of concealment and means and methods whereby they concealed their actual prices from United States Customs upon entry, and from the Treasury Department during proceedings to enforce United States antidumping laws, and their common purposes for so doing, *supra* at 16-53;

(u) evidence that petitioners knew that each was engaged in the conspiracy, each used identical terminology to disguise its participation and used identical means for implementing the scheme, for the same ultimate common purpose, which all understood, gave their adherence to it and continued to act in a fashion necessary to keep it up, and protected and ratified it by refraining from enforcing the price provisions of their Agreements and Rules or reporting each other's illegal conduct; *supra* at 42-43, 43-48, 52-53.

Considered together, without tightly compartmentalizing the various components of this conspiratorial plan, and without disregarding after scrutiny of each aspect their cumulative significance, this body of direct and circumstantial evidence "reasonably tends to prove that [the Japanese manufacturers] had a conscious commitment to a common scheme designed to achieve an unlawful objective," *Monsanto Co. v. Spray-Rite Service Corp.*, ___U.S. ___, 104 S.Ct. at 1473, and, as the Court below held, raises a genuine issue of fact whether petitioners were engaged in a conspiracy under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2.

This body of evidence includes direct evidence of major aspects of petitioners' conspiracy. Petitioners' assertion that the direct evidence of their collusion in the Japanese market is direct evidence, but "not of the conspiracy alleged" (P.Br. at 20) is based on nothing more than petitioners' mischaracterization of the conspiracy alleged and is incorrect. As a result, petitioners' statement of the question presented is highly misleading. Inference of conspiracy only from "parallel acts and other circumstantial evidence" alone is not the issue. As the Court of Appeals observed, the pretrial record contains both circumstantial evidence and direct evidence of the conspiracy charged. Similarly, petitioners' assertion (P.Br. at 6, 19) that their conspiracy to create the dumping differentials involved their concerted conduct to affect the Japanese market price component and that such conduct is "non-actionable," is incorrect and is not properly before the Court. The Court of Appeals (168A) and the district court specifically upheld subject-matter jurisdiction over petitioners' entire course of conduct — a holding that petitioners have not challenged. Petitioners have not challenged the district court's *in personam* jurisdiction findings based on the Japanese manufacturers' own direct commercial activities in the United States, as well as that of their subsidiaries. 494 F.Supp. 1161 (E.D. Pa. 1980); 402 F.Supp. 262. The fact that some of the activities that comprised petitioners' scheme occurred in Japan is therefore irrelevant. "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Continental Ore Co. v. Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962). Petitioners' entire course of conduct is appropriately to be considered in assessing the sufficiency of the conspiracy evidence, as the Court of Appeals correctly held. (166A).

B. *Zenith and NUE Are Entitled To Be Given the Full Benefit of Their Proofs Without Fragmenting and Compartmentalizing the Factual Components.*

Conspiracy has been defined as "a combination of two or more persons, by concerted action, to accomplish a criminal or

unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means." *Pettibone v. United States*, 148 U.S. 197, 203 (1893). The agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Copperweld Corporation v. Independence Tube Corporation*, ____U.S. ____, 104 S.Ct. 2731, at 2742 (1984). The essential combination in a Sherman Act conspiracy case "may be found in a course of dealings or other circumstances, as well as in any exchange of words." *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *United States v. A. Schrader's Son*, 252 U.S. 85 (1920). It may also also be inferred from "things actually done." *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600, 612 (1914). Therefore, business behavior is admissible to show conspiracy.

In these cases, petitioners are charged with conspiring to restrain and monopolize trade and commerce by means of concerted pricing arrangements and other anticompetitive activities. Although respondents submitted direct evidence in this case, proof of conspiracy may be, and often is, entirely circumstantial. It is well-established that "[n]o formal agreement is necessary to constitute an unlawful conspiracy." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). As the Court has said, "[i]t is not the form of the combination or the particular means used but the result to be achieved that the statute condemns." *Id.* at 809. Consequently, an unlawful conspiracy "may be and often is formed without simultaneous action or agreement on the part of the conspirators." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

Although most of their petitioners' acts in furtherance of their conspiracy violated either Japanese law or United States law, petitioners lay great stress on their contention that not all of their acts — specifically, their formal cartel arrangement — were unlawful. (P.Br. at 36A-47A). But it is not necessary that all the means that conspirators adopt to achieve the unlawful purpose of their conspiracy be themselves unlawful: "[a]cts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 707; *Poller*

v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 468-69; *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952); *Swift & Co. v. United States*, 196 U.S. 375, 397 (1905). It is "not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts." *American Tobacco Co. v. United States, supra*, 328 U.S. at 809; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465-466 (1921); *Truax v. Corrigan*, 257 U.S. 312, 327 (1921). Therefore, as shown below (Part II), even the fact that certain of petitioners' acts are claimed to have been "directed" by a Japanese government agency, and that petitioners complied therewith, would not immunize petitioners' unlawful conspiracy.

Petitioners' seek to separate dumping from the conspiracy and to fragment the conspiracy into *two* "separate conspiracies," violating a basic rule applicable to cases such as these. Because the character and effect of acts which may in themselves be legal can be accurately appraised only by examining the context in which they were committed, and because pieces of evidence may cumulate logically to reinforce each other in supporting an inference, by deductively combining to exclude some possibilities, or by inductively making other possibilities more likely, or both, it is fundamental that "*the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.*" *United States v. Patten*, 226 U.S. 525, 544 (1913); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). As the Court has said, a court or jury must "look at the whole picture and not merely at the individual figures in it." 370 U.S. at 699. Respondents are to "be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp., supra*, 370 U.S. at 699. Moreover, in so viewing the evidence, courts are "bound to view the evidence in the light most favorable to [respondents] and to give [them] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Id.* at 696.

The Court of Appeals correctly applied these fundamental precepts in appraising the evidence.

C. *On Summary Judgment, Proof of Sherman Act Conspiracy Is Not Deficient Merely Because a Contrary Inference Might Reasonably Be Drawn.*

Notwithstanding their admission of conspiracy with respect to major aspects of the overall plan, petitioners argue that a fact-finder could reasonably infer that they were simply "competing" with one another in other aspects. Putting to one side the unrebutted evidence, and the experts economic analysis of it, that such an inference would be impossible on this record, the circumstance that a fact-finder might reasonably draw a different inference from the evidence is never dispositive. Contrary inferences can often be drawn, and it is the task of the fact-finder to assess such competing inferences in a trial. As the Court said in *Aspen Skiing Company v. Aspen Highland Skiing Corporation*, No. 84-510, 53 U.S.L.W. 4818 (Opinion filed June 19, 1985), citing *Continental Ore Co.*, the applicable standard requires the Court to "interpret the entire record in the light most favorable to [respondents] and give to [them] the benefit of all inferences which the evidence fairly supports, *even though contrary inferences might reasonably be drawn.*" ____U.S. ____, 53 U.S.L.W. at 4823.

Nor is it part of the function of the trial judge on summary judgment to attempt to decide which reasonable inferences are "more probable" than others. Weighing the probabilities of competing inferences is for the jury. As the Court has said, "it is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944), cited with approval in the antitrust context in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. at 700-701. Even under the more stringent "beyond a reasonable doubt" standard applicable in criminal cases, the Government is not required to negate all competing reasonable

inferences. *Holland v. United States*, 348 U.S. 121, 139-140 (1954).

D. *Petitioners' Concerted Pricing Arrangements Are Unlawful Per Se.*

The Japanese manufacturers suggest that they must be shown to have fixed specific prices or price levels (P. Br. at 3), but respondents produced evidence that petitioners did coordinate their United States prices at specific levels, namely, price levels consistently below their Japanese market price levels. The *per se* rule applies, however, even where no specific prices or price levels are set, as long as prices or price levels are affected by concerted action for that purpose or with that effect.[61] Price-fixing--long illegal *per se* under the Sherman Act — "includes more than the mere establishment of uniform prices." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-223 (1940). In *Socony-Vacuum*, where the Court condemned a pattern of concerted conduct by certain oil companies of purchasing oil on the spot market for the purpose and with the effect of stabilizing prices, the Court said (310 U.S. at 222-223):

> Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the Trenton Potteries Company Case has no such limited meaning. * * * Hence, prices are fixed within the meaning of the Trenton Potteries Company Case if the range within which purchases or sales will be made is agreed upon, if the prices

61. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (elimination of short term credit); *United States v. Container Corp. of America*, 393 U.S. 333 (1969) (exchange of price information as stabilizing although lowering prices); *United States v. General Motors Corp.*, 384 U.S. 127, 147 (1966) (indirect effect on prices); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) (minimum prices); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951) (maximum prices); *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940) (buying surplus gasoline to stabilize prices); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Plymouth Dealers Ass'n. of Northern Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960) (establishing price list from which negotiations began).

> paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon.
>
> * * *
>
> . . . [T]he machinery employed by a combination for price-fixing is immaterial. Under the Sherman Act a combination formed for the purpose and with the effect of raising, *depressing*, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.

The Court has consistently reaffirmed this basic formulation of the *per se* rule for price-fixing. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 345 (1982); *Catalano v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (agreements *per se* unlawful "even though there [is] no direct agreement on the actual prices to be maintained.")[62] The evidence supports the inference that the Japanese manufacturers combined for such purpose and with such effect.

Evidence of some variations in petitioners' pricing is also immaterial. The issue is not whether petitioners were charging *uniform* low prices, but whether they conspired to dump and thereby to depress United States price levels to levels that would eliminate competitors in the targeted United States market. The objective of petitioners' conspiracy did not require uniform pricing in order to succeed. There was no need for *identical* dumping prices. The "Five Company Rule" limited the number of major United States customers each petitioner could supply to five and a separate "guideline" they adopted limited overlapping supply arrangements except for those that their own Television Export

62. *United States v. General Motors*, 384 U.S. 127, 147 (1966); *United States v. Socony-Vacuum Oil Co.*, *supra* (agreement to buy surplus oil to stabilize prices); *Sugar Institute v. United States*, 297 U.S. 553, 601-602 (1936)(agreement to adhere to previously announced prices, although particular prices not fixed); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-693 (1978) (agreement not to discuss prices until after initial selection of engineer); *FTC v. Cement Institute*, 333 U.S. 683, 690-693 (1948) (agreement to use a specific method of quoting prices); *Plymouth Dealers' Ass'n. of Calif. v. United States*, *supra* (use of fixed uniform list price as starting point for negotiations).

Examination Committee approved. Under this arrangement petitioners needed to beat only the prices of their United States competitors. A similar argument was rejected in *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700, 703 (1969), where the Court pointed out that a lack of uniformity was immaterial because "petitioners' complaint . . . was not that the respondent companies were charging uniform fees but that they were charging deliberately 'excessive and unreasonable' fees for the purpose of injuring the petitioner."

E. *The Evidence Excludes the Possibility That Petitioners Were "Competing" Among Themselves.*

Petitioners attempt to portray themselves as "competing" manufacturers, engaged in "normal competitive activities" and "aggressive competition" (P.Br. at 21-22), and, in an effort to explain away the furtive behavior with which the record is replete, petitioners liken the secret payments they made to conceal their actual import prices from United States Customs to secret "competitive rebates." (P.Br. at 30). Petitioners' explanation of the secretiveness of their conduct, however, does not square with the evidence. The "difference money" which defendants secretly transferred to United States importers was simply ancillary to their conspiracy to dump and to conceal their true dumping prices from the authorities. Petitioners' scheme was kept "secret" only from United States Customs and the United States Treasury Department. It was no secret among them: App. Vol. 15 (6337a-51a; 6361a; 6373a-75a); App. Vol. 16 (6668a; 6670a-72a; 6673a-76a; 6677a; 6679a; 6641a-42a); App. Vol. 17 (7094a-95a; 7443a-45a; 7450a-52a); App. Vol. 18 (7979a); App. Vol. 19 (8155a-66a); App. Vol. 20 (8646a-47a; 8659a-61a); App. Vol. 21 (8771a-75a; 8813a; 9041a-50a; 9056a; 9073a-79a; 9083a-93a); App. Vol. 22 (9381a-82a; 9463a-65a; 9469a; 9507a-10a). Secrecy was essential to prevent detection of dumping and was preserved at the cost of petitioners' United States customers' paying higher *ad valorem* duties on shipments, at the cost of petitioners' and their customers' lies on customs entry documents, and at the cost of petitioners' lies to the Treasury Department in proceedings under the Antidumping Act of 1921.

Japanese manufacturers divided major United States customers among themselves. In this fashion, by collusively selling at artificially high prices in the Japanese markets and by coordinating their pricing below their "check prices," the full brunt of petitioners' organized "competition" at predatory, dumping prices was brought down on rival independent manufacturers in the United States competing for those sales. That several of the largest American customers were permitted by the cartel to have two Japanese suppliers does not detract from the significance of the "Five Company Rule." That Rule still operated in even those few instances drastically to limit the number of potential suppliers. Exceptions were permitted only when the cartel approved.[63] The Court of Appeals properly rejected petitioners' contrary argument. (180A).

To establish that petitioners' price-fixing machinery in this case involved their conscious commitment to a common scheme designed to achieve their unlawful objective, respondents need only have shown

> that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. The circumstances . . . leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking.* * *Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *United States v. Masonite Corp*, 316 U.S. 265, 274-276 (1942); *Interstate Circuit Inc. v. United States*, 306 U.S. 208, 226 (1939).

63. Nor is it material, as petitioners claim (P. Br. at 35), that their scheme left some room for them to compete with each other for small accounts and local dealers that were not specifically allocated. The principal United States chain stores, mass merchandisers and OEM accounts, who accounted for the bulk of the business, were registered by the cartel members, allocated among them, and remained customers over many years. As the Court of Appeals held (180A), the fact that petitioners may have permitted some residual competition would not be fatal. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

The evidence was more than adequate to create a genuine issue of fact that petitioners all had an awareness of the general scope and purpose of the scheme and participated in it.

F. *Proof of Action Contrary to Economic Self-Interest, Although Probative and Often Sufficient Proof of Conspiracy, Is Not a Sine Qua Non of Conspiracy Evidence In All Cases.*

Petitioners argue that unless there is direct evidence of all aspects of a conspiracy, conspiracy proof is always insufficient unless it includes evidence of conduct "against the independent economic self-interest" of the alleged co-conspirators. (P.Br. at 18). However, *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), which petitioners cite, contains no such holding.

Nonetheless, petitioners contend that the Court of Appeals created an "exception" to *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968), and that its decision is inconsistent with that case. The Court of Appeals did not even cite *Cities Service*, and did not create an "exception" to its holding.

1. *Cities Service Is Inapposite.*

Cities Service did not announce any broad new standard for sufficiency of Sherman Act conspiracy evidence. In the seventeen years since it decided *Cities Service*, the Court has had occasion to cite that case only once, namely in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 n.22 (1970), *reversing* summary judgment in a Civil Rights Act conspiracy case. The Court did not even cite *Cities Service* in *Monsanto Co. v. Spray-Rite Service Corp.*, ____U.S.____, 104 S.Ct. 1464 (1984), the most recent decision on sufficiency of proof of Sherman Act conspiracy.[64] *Cities Service* is limited to its particular and unusual facts, and does not apply here.

64. As in this case, the petitioner in *Monsanto* also relied on *Cities Service* for an argument similar to that advanced by petitioners. Brief of Petitioner, Monsanto Company, at 32. Nonetheless, the Court did not adopt the restrictive approach.

Cities Service was not a horizontal price-fixing case. Nor were the plaintiff and Cities Service competitors. Cities had no natural motivation to join a conspiracy to injure the plaintiff's business. Iran had nationalized the Iranian assets and oil concession rights of British Petroleum ("BP") and transferred them to National Iranian Oil Co. ("NIOC"). Thereafter, BP threatened to sue any purchaser of NIOC oil. 391 U.S. at 278. Waldron, a broker who had negotiated an exclusive contract to purchase NIOC oil, brought suit alleging a conspiracy among BP and six integrated American oil producers to boycott NIOC's oil in world markets. Cities, an independent refiner and distributor that held no significant oil reserves, was named a defendant later when, after initially expressing an interest in buying the NIOC oil from Waldron, it decided against doing so. The Court's decision dealt only with the merits of Cities' motion for summary judgment.

Waldron had initially contended that Cities had joined the boycott (1) when it was "bought off" or "paid off" by offers of Kuwait oil from Gulf, a defendant, and (2) when a consortium created later made other oil available to Cities. However, the actual timing of these occurrences defeated the inference. Cities had negotiated a final agreement with Gulf for Kuwait oil long before Iran nationalized BP's assets and some two years *before* plaintiff had approached Cities with the NIOC oil. Moreover, Gulf's price was less than Waldron's. The Consortium's offer to Cities came some two years *after* the date plaintiff alleged Cities had joined the conspiracy. Not having argued that Cities' acquiescence and participation in the conspiracy was obtained by threat of retaliation, plaintiff was foreclosed from advancing that position on appeal. 391 U.S. at 280 n.16. Waldron could rely *only* on evidence that Cities, two years *before* plaintiff's approach, had decided to buy cheaper oil from Gulf instead of buying Waldron's oil, and being sued by BP and boycotted by the other defendants.

Plaintiff admitted it did not know what Cities' motive might be, and contended that "Cities' motive for entering the alleged conspiracy was basically irrelevant," (391 U.S. at 265-66), and that it was "unnecessary to demonstrate why Cities conspired." (391 U.S. at 279). Plaintiff also conceded that "Cities' interests . . . were directly opposed to those of the other

defendants" (391 U.S. at 279), because unlike the others it did not have large supplies of foreign oil, was not a member of the international cartel to control foreign oil, and had no wish to re-establish the *status quo* prior to nationalization. 391 U.S. at 279. They coincided with plaintiff's. 391 U.S. at 285.

Against this background, the Court said, "to suggest, as petitioner does, that Cities' participation in the conspiracy is shown by its failure to deal with him is itself to rely on motive." *Id.* at 279. But the record "contain[ed] *an overwhelming amount of . . . contrary evidence of Cities' motives.*" 391 U.S. at 277. The Court summarized the precise issue by saying that "[p]etitioner is . . . forced to take the position that *the one fact that he has produced, Cities' failure to make a deal with him for Iranian oil, is sufficiently probative of conspiracy to entitle him to resist summary judgment.*" 391 U.S. at 286. The Court said that "due to the absence of probative force of Cities' failure to deal with Waldron as being in itself evidence of conspiracy, petitioner's position is, in effect, that he is entitled to rest on the allegations of conspiracy contained in his pleadings." 391 U.S. at 289. Answering this contention, the Court stated its narrow holding as follows:

> "Essentially all that the lower courts held in this case was that Rule 56(e) placed on Waldron the burden of producing evidence of the conspiracy he alleged *only after* respondent Cities Service *conclusively showed* that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them. That holding was correct." 391 U.S. at 289.

The differences between the direct and circumstantial evidence of conspiracy and the motive evidence in this case and the single, inadequate item of circumstantial evidence in *Cities Service* are striking and decisive.[65] In *Cities Service*, the only evidence plaintiff cited was Cities' refusal to buy. Here, however, although evidence of petitioners' consciously parallel conduct is extensive, the record is replete with many of the classic hallmarks of collusion, including direct evidence and admissions of collusion, meetings, communications, information exchanges, and carefully coordinated and concealed activities that leave no doubt of petitioners' conscious commitment to a common plan.[66] Here, unlike Cities Service, petitioners have made no "*conclusive*" factual showing. They have made *no* showing at all.

65. The lower courts have accordingly read *Cities Service* narrowly. In *Tunis Brothers Co. v. Ford Motor Co.*, 763 F.2d 1482, 1498 (3d Cir. 1985) (Higginbotham, C. J.), the Court read *Cities Service* as standing for the proposition that "[i]f there is substantial factual evidence supporting *both* an inference of conspiracy *and* an inference of lawful conduct, and the crucial question involves motive, summary judgment is inappropriate." *see also*, *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 681 (9th Cir. 1985) ("[i]n determining whether an inference may be reasonable, the district court should not weigh competing inferences."); *Southway Theatres, Inc. v. Georgia Theatres Co.*, 672 F.2d 485, 494, 95 (5th Cir. 1982), (*Cities Service* applicable to conspiracy claims but "ultimate inference that a conspiracy existed need not be more probable than the inference that the refusal to deal resulted from independent business judgment"); *Ambook Enterprises v. Time Inc.*, 612 F.2d 604, 616 (2d Cir. 1979) (*Cities Service* indicating only that "one factor" to consider in determining if agreement should be inferred from parallel conduct was whether agreement benefited the alleged conspirators)

Again, unlike *Cities Service*, here there is extensive evidence relating to petitioners' motive that contradicts their bald claim in their brief that "[t]here could be no rational motive" for their conspiracy. As in *Poller* — and unlike *Cities Service* — the Japanese manufacturers are in a "competitive relationship" with Zenith and were, until it was forced to abandon the business, with NUE. Japanese manufacturers benefited from the elimination of their United States competitors. The Court of Appeals

66. Although petitioners were the summary judgment movants and thus had the Rule 56(c) burden to make a "*conclusive*" factual showing that they were entitled to judgment, both the Court of Appeals and the district court addressed exclusively the sufficiency of *respondent's* factual opposition to petitioners' largely unsupported summary judgment motions, App. Vol. 3 (753a-928a; 1021a-98a). *Compare Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 161 (1970) ("No defense to an insufficient showing is required.") Although the Court of Appeals (a) held that a preclusive Case Management Order could shift the normal Rule 56 burden of the movant to the opponent of the motion, (b) measured the sufficiency of respondents' conspiracy evidence under a more stringent procedural standard, and (c) found it sufficient without reference to the inconclusive nature or non-existence of petitioners' factual submissions in support of their motions (60A-64A), the Court of Appeals' judgment in Nos. 81-2331/2332/2333 may also be affirmed on the independent ground that petitioners' factual showing in support of their motions was wholly insufficient.

analyzed this evidence of motive. (169A-180A). *See* reports of Dr. Horace J. DePodwin, Dr. Gary Saxonhouse, Dr. Kozo Yamamura, Professor John O. Haley, Mr. Stanley Nehmer, and Morris J. Cohen & Co. at App. Vols. 5, 6 and 7; App. Vol. 8 (3099a-3125a); App. Vol. 8 (2965a-3097a); App. Vol. 8 (3161a-92a) (experts' qualifications).

Petitioners account for more than 75% of Japanese production in the highly concentrated Japanese television industry. App. Vol. 5 (1721a-23a);(172A). Founded in the 1950s on the basis of licensed American technology, App. Vol. 5 (1657a-68a), the Japanese industry adopted as its television broadcast signal encoding system the United States standard. Appendix in No. 80-2080 (1325b). Although compatible technology made competition in Japan from United States manufacturers feasible, governmentally-imposed and private trade barriers prevented competition by American and other non-Japanese manufacturers in the Japanese market. App. Vols. 5, 6 and 7 (1904a-14a; 2297a-2323a; 2924a-37a) (170A; 370A-373A); App.Vol. 7 (2742a-8a; 2924a); (170A; 370A-373A). Thus, a stable horizontal price-fixing agreement among the few dominant Japanese manufacturers in the concentrated, closed Japanese market was feasible: the manufacturers were protected from price competition in Japan from non-parties. (170A); App. Vol. 5-6 (1904a-17a; 2297a-2323a).

During the 1960s and 1970s, petitioners created plant capacity that far exceeded what the Japanese market could absorb at a desirable price. App. Vol. 5 (1678a-1724a); (171A). Japanese manufacturers had relatively higher fixed costs than American manufacturers, because of Japanese employment and financing practices, as well as higher debt-equity ratios. They therefore had larger fixed obligations. App. Vol. 7 (2889a-2917a). Their higher fixed costs provided a strong motive for Japanese manufacturers to utilize the excessive capacity at the highest possible rate. App.Vol. 7 (2900a-01a) (170A-171A). The Japanese manufacturers therefore had a strong motive to use all capacity, to produce in quantities that far exceeded Japanese market demand, and to dispose of this excess capacity in a market outside Japan. App. Vols. 5-7 (1708a-12a); (2889a-2901a). Since, however, unlimited price competition in all markets in an industry

characterized by excess capacity would be likely to produce losses, if it were feasible to avoid price competition, petitioners would be more likely to have made efforts to do so. (171A). Because the Japanese market was concentrated and sheltered from outside competition, making complete collusion easy and stable, there was a motive to collude and effective collusion was possible, as the Court of Appeals held. (171A).

In addition, Japanese manufacturers belonged to industry trade associations which met at regular intervals and exchanged information about plant capacity, inventories and pricing. App. Vol. 5 (1725a-46a); App. Vol. 6 (2254a-89a); App. Vol. 7 (2749a-2800a). They had extensive opportunities to conspire. Such concert of action would make possible export sales at prices sufficiently low to absorb excess capacity, as the Court of Appeals noted (172A). Each defendant, in fact, consistently sold comparable models in the Japanese market at prices higher than they were being sold in the United States. App. Vol. 5 (1817a-82a; 2205a-37a); App. Vol. 9 (3285a-3468a) (172A). Such conduct over a long period tends to show that each manufacturer was confident that it would be able to support low price sales in the export market by higher-price sales at home, as the Court of Appeals recognized. (172A). Uncontradicted direct evidence of agreed-upon price stabilization in Japan shows that petitioners did conspire, and petitioners have admitted it. (P.Br. at 3 n.2). The Court of Appeals held that, "on this record a fact-finder could reasonably infer the existence, among some Japanese manufacturers, of an agreement to stabilize prices in the Japanese home market, thereby deriving profits which would support sales at low prices in the United States." (175A). The direct and circumstantial evidence of a price stabilization conspiracy in Japan here is reinforced by the conclusions of several of respondents' economic experts, who, after studying the industry and examining the evidence, opined that there was a price-fixing cartel in operation. *See*, App. Vol. 5 (1611a-1633a; 1725a-45a; 1981a-82a); Vol. 6 (2334a-51a; 2414a-25a); Vol. 7 (2749a-94a).

Given the near-identity of Japanese and United States technical conventions, the United States had the greatest potential as the foreign market for petitioners to exploit, and petitioners had a motive to find a market for their excess production and to sell

at prices low enough to eliminate competition in the United States by American firms. (177A). Acting in concert, petitioners also had the ability to make exports to the American market at predatory dumping prices and to subsidize such pricing in part by profits from sales in the Japanese market at their collusively-established prices in that closed market. Petitioners accurately predicted in their "Rationales" that sales at such prices would disrupt the United States market and injure United States businesses, and they proceeded systematically to engage in such sales. App. Vol. 14 (6091a).

Conspiracy conferred vital benefits. Each Japanese company had targeted customers which it could service with assurance that other cartel members would not become involved, except to the limited extent that the cartel itself approved. App. Vol. 5 (1629a). Each Japanese firm was assured that what was a low, dumping price for their product would not be further affected by the actions of its Japanese associates. App. Vol. 5 (1629a). The cartel's concerted action generated a larger volume of investment in the Japanese industry than would have otherwise been the case, App. Vol. 5 (1629a); App. Vol. 6 (2258a), and this added capacity both enabled and encouraged the Japanese to penetrate the United States market far more deeply than they would have had they competed lawfully and simultaneously discouraged additions to capacity by United States manufacturers, who could no longer even realize adequate returns on their existing capital investments. App. Vol. 5 (1629a-30a). The Japanese companies were able to invest with impunity, secure in the knowledge that any output in excess of what the Japanese market could absorb at the established monopoly prices could be dumped in the United States, thus facilitating their broader anticompetitive strategy. App. Vol. 6 (2258a); App. Vol. 5 (1629a-30a).

By regularly exchanging detailed information as to production, shipments, inventories, pricing, export and domestic, and domestic and export forecasts, petitioners were able to reduce uncertainty in their planning, minimize the financial risks such uncertainty brings, and were able better to plan additions to production capacity, to police violations of their agreements, to coordinate a joint approach to the United States market and

measure their performance against an agreed-upon industry standard, and to facilitate joint action on domestic prices and distribution margins, and agreements on United States customers — all significant advantages to each petitioner which United States manufacturers did not enjoy. App. Vol. 5 (1627a; 1633a). Such information put petitioners in an advantaged position as compared to United States competitors who may have been equally or even more efficient, but who did not possess such valuable information. App. Vol. 5 (1627a). By limiting competition among themselves for individual United States customers, petitioners segmented the United States market, permitting each to capitalize on its own strengths and to economize on marketing and distribution costs. Designated Japanese suppliers could be assigned to confront specific United States firms, and competition among Japanese firms for United States sales could be eliminated, permitting each maximum flexibility to set artificial prices above or below competitive levels depending on United States market conditions, with little regard for the disciplines of cost and capital formation which governed United States competitors. App. Vol. 5 (1633a); App. Vol. 6 (2257a).

Conspiracy enabled petitioners to entrench their position in the United States market to a degree that *individual* action by each of them could never have achieved, App. Vol. 5 (1619a; 1628a), enabling the Japanese companies to charge higher prices and earn greater profits in the closed Japanese market they jointly controlled, and allowing petitioners to lower their prices in the United States market to a level sufficient to eliminate competition from United States competitors, while still maintaining an acceptable rate of return overall. App. Vol. 6 (2257a). Petitioners themselves articulated the benefit of a *cooperative* effort to expand their joint United States market share, resolving in their "Rationales" that "*acting as one body, they will strive . . . to aim for steady expansion of exportation.*" (6063a). App. Vol. 14 (5823a-24a; 5890a; 5970a; 5986a; 6015a; 6063a; 6093a); *See also*, App. Vol. 8 (3015a-92a at 3075a-83a).

Although petitioners had a strong motive to dump, without the conspiracy it would have been impossible to coordinate the necessary joint approach for concealing their true prices and evading the United States antidumping laws, which was essential

to the long-term objectives of the conspiracy. Uncoordinated dumping by each in the early 1960s would simply have resulted in a prompt country-wide dumping finding and assessment of dumping duties that would have frustrated petitioners' common purpose. Conspiracy offered the simultaneous benefits of coordinated dumping and deceptive plausibility in concealment of their true prices achieved by uniform reporting of "check prices." Thereafter, as part of the conspiracy, they were able jointly to defend their secret pricing system by orchestrating their uniform lies to the Treasury Department, by continuing to report phantom "check prices" in the dangerous period after the facade was removed, thus jointly preventing detection of their prior dumping, reducing the amount of dumping duties ultimately assessed, and blunting enforcement of the United States antidumping laws with respect to future United States imports of their products, and thereby permitting them to continue to dump.[67] App. Vol. 15 (6338a-40a); App. Vol. 17 (7443a-45a; 7450a-52a); App. Vol. 22 (9463a-65a; 9469a).

The Court of Appeals also discussed the evidence (a) suggesting that NUE and Zenith were injured by an export cartel (179A), App. Vol. 5 (1611a-1917a; 2195a-2237a); and (b) that petitioners set "check prices" that were dumping prices, evidence of collective intent to harm American competitors; (c) that the

67. A further telling indication of petitioners' motive is their uniform conduct in exporting to the United States, rather than marketing in Japan, the output of their large, low-cost Taiwan and Korean television plants. By 1970-1971, Japanese manufacturers had already established, or begun to establish, manufacturing facilities in Taiwan and Korea. Given their relative proximity to the Japanese market, lower transportation costs to ship the product to market, and high prevailing prices for television receivers in Japan, App. Vol. 9 (3291a-3468a), exports of at least part of the output of these Taiwan and Korean plants to Japan could be expected of independent competitors desirous of capitalizing on low production costs to garner a larger Japanese market share. On the other hand, such importation could be expected seriously to affect price levels and threaten the stability of the cartel's financial base in Japan. App. Vol. 5 (1713a-20a); App. Vol. 6 (2446a-51a). Although Japanese firms located in Taiwan produced 1,140,000 television sets in 1972, only 42 sets were shipped to Japan. Petitioners shipped their low-cost output across the Pacific Ocean to large importers in the United States. App. Vol. 5 (2153a-59a); App. Vol. 6 (2449a-50a; 2532a-36a).

Japanese manufacturers and their subsidiaries jointly transformed the character and effect of the formal cartel arrangement (179A); and (d) that petitioners tried to conceal this activity both from MITI and from the United States Customs Service and knew that others were engaged in this system but did not report it to either government. (179A).[68]

There is also admissible expert opinion evidence, as the Court of Appeals noted (179A), that petitioners' export sales for long periods were at prices which produced losses, often as high as twenty-five percent on sales, App. Vol. 5 (1884a-1903a; 1716a-20a)--further circumstantial evidence pointing to intentional predatory pricing, as the Court of Appeals noted. (179A); *see also* App. Vol. 11 (4171a-3a); App. Vol. 19 (8063a); App. Vol. 21 (9131a); App. Vol. 22 (9430a). Petitioners' Five-Company Rule operated simultaneously with their horizontal price-fixing in Japan, permitting an inference (179A) that the allocation of United States customers, combined with price-fixing in Japan, and aggravated dumping in the United States, was intended to concentrate the effects of petitioners' dumping upon American competitors, while eliminating competition among the Japanese manufacturers in both markets. (179A). As the Court of Appeals held (180A), there is sufficient admissible record evidence not only to support "a finding of a conspiracy to sell at artificially high prices in Japan while at the same time selling at artificially low prices in the United States," but also to support a finding of strong *motive* on petitioners' part to conspire in this fashion. (177A).

The Court of Appeals' unanimous decision is not inconsistent with *Cities Service*.

68. The Government observes that "[i]t was not inconsistent with petitioners' independent self-interest for them to fail to report the secret rebates" of others "since detection of the rebates could have exposed each petitioner to liability for violations of antidumping laws." (G. Br. at 12-13). This simply underscores the highly interdependent nature of such conduct and reinforces the inference of conspiracy. Moreover, public policy should dictate that violation of United States laws never be recognized as consistent with *legitimate* business interests. No court has ever held that action contrary to individual business interests includes anything but *legitimate* business interests.

2. *Monsanto Does Not Support Petitioners' Argument.*

Monsanto Co. v. Spray-Rite Service Corp., ___U.S. ___ , 104 S.Ct. 1464, does not require a different result in this case. In *Monsanto* the Court dealt only with an alleged vertical conspiracy among a manufacturer and its distributors to terminate a distributor for failure to adhere to resale prices announced by the manufacturer. The opinion in *Monsanto* addresses the sufficiency of the normal categories of evidence in such distributor-termination cases. What the Court held was that a terminated distributor must adduce evidence "that the manufacturer, and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" 104 S.Ct. at 1471. Summarizing the standard to be applied in such distributor-termination cases, the Court said that "[t]he correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. *That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.*" 104 S.Ct. at 1473. To the extent that *Monsanto* has any bearing here, the Third Circuit's decision is fully consistent with it. Indeed, the Court in *Monsanto* relied on Third Circuit precedent in framing the general rule. 104 S.Ct. at 1471, 1473.

3. *The Court Has Never Adopted a Sweeping Requirement of Proof of Action Contrary to Individual Self-Interest In Every Sherman Act Conspiracy Case.*

Petitioners argue that proof of conduct contrary to individual self-interest is necessary in every case. To be sure, evidence of conduct contrary to individual self-interest is a relevant factor. In many cases, such evidence would be sufficient together with parallel business behavior to warrant an inference of conspiracy. However, neither this Court nor any court of appeals has held that it is a *sine qua non* in every Sherman Act conspiracy case.

Petitioners' argument ultimately rests on two inapposite Third Circuit decisions. Both *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984), and *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870 (9th Cir. 1982), cited by petitioners, rely on *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975), and *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), Third Circuit decisions authored by Chief Judge Seitz, who was a member of the Third Circuit panel that unanimously upheld respondents' conspiracy evidence in this case. There is no inconsistency, and moreover, petitioners misconstrue the holdings in those cases. *Zoslaw* is expressly limited to cases involving "no direct evidence of conspiracy." 693 F.2d at 884.[69] *Kreuzer* is, similarly, limited to cases in which the *only* probative evidence presented is parallel behavior.[70] Nor is such a requirement of acts contrary to self-interest to be found as a *sine qua non* in the influential Third Circuit precedents. The Third Circuit employs the factor as one among several used to define the set of ***sufficient conditions*** for inference of conspiracy in cases involving refusals to deal. In *Bogosian*, the Court made it clear that it applies that factor only to cases when a plaintiff presents proof of consciously parallel behavior — "*without more*." 561 F.2d at 446. The Third Circuit has been careful to point out that its decisions mentioning that factor only define "*one means*" of proving conspiracy, *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 114 (3d Cir. 1980), and that "[w]e can envision *other* factors which might, when coupled with consciously parallel behavior, support such an inference." *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 209 (3d Cir. 1980). Petitioners' argument is without precedent.

---

69. Thus, the court said, "[i]n this case. . .*since appellants presented no direct evidence of conspiracy*, appellants' only chance depended on their presentation of circumstantial evidence sufficient to support the inference of a "conscious parallelism" conspiracy theory and on such further inferences as appellants might be able to draw from trade association and credit managers' meetings among the various distributors." 693 F.2d at 884.

70. Thus, after discussing the role of evidence of conduct contrary to the independent interest of the conspirators, the court stated by way of clarification: "[t]hus, *parallel behavior alone* is insufficient evidence from which to infer a conspiracy." 735 F.2d at 1488.

Circumstantial evidence of conspiracy traditionally recognized in antitrust cases has included evidence of (1) "*things actually done*," such as parallel business behavior, other business behavior, or a course of dealing; (2) "*an exchange of words*," such as communications at meetings, telephone discussions or correspondence among competitors. Direct evidence of conspiracy — written agreements or documents or in testimony that agreements were reached — is rare. The acts contrary to self-interest factor assumes special importance in cases where practically the *only* conspiracy evidence is evidence of otherwise ambiguous parallel business behavior. *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). The narrow question presented in such cases is whether such consciously parallel business behavior *alone* may sometimes support an inference of conspiracy. They do not involve the sufficiency of evidence when business behavior beyond consciously parallel behavior is relied upon; they do not involve the sufficiency of conspiracy evidence where there is evidence of an exchange of words, *e.g.*, meetings, correspondence, telephone conversations; they do not involve the sufficiency of evidence when circumstantial evidence, of both types, is combined with *direct* evidence. Those cases support the precept that, even in the absence of *any* other "plus factor" evidence (such as evidence of opportunity to conspire or "an exchange of words" — meetings, telephone discussions, correspondence, or direct evidence, such as agreements or testimony) consciously parallel business behavior may sometimes be sufficient by itself, where — by reason of the very nature of such parallel conduct in its context — it satisfies an additional criterion which tends reasonably to indicate a conscious commitment to a common scheme. Those cases constitute an exception to the precept that consciously parallel business behavior *alone* is insufficient to support an inference of conspiracy, by defining a further circumstance that, in the absence of direct evidence or "plus factor" evidence, permits an inference of conspiracy to be drawn. They define *sufficient* conditions for the inference of conspiracy, not *necessary* conditions to be satisfied in *every* antitrust conspiracy case.

Neither this Court nor any other has ever held that proof of acts contrary to economic self-interest is necessary for the inference of conspiracy to be drawn in *every* Sherman Act case in which circumstantial evidence is presented.[71] In cases where other "plus factor" evidence or *direct* evidence is presented, the standard is not applied.[72]

Nor should a more stringent rule be fashioned for sufficiency of evidence of conspiracies to depress prices. "The *per se*

---

71. In *Interstate Circuit*, the Court's narrow holding was only that "[i]t was *enough* that" there was certain parallel conduct of a particular type. *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), cited by the Government, did not deal with the sufficiency of a plaintiff's proof to establish a *prima facie* case at all. The jury returned a verdict for the defendants, and the issue before the Court was whether plaintiff's circumstantial evidence was *so strong that it was entitled to judgment n.o.v.*

72. *Norfolk Monument Co.* v. *Woodlawn Mem. Gardens*, 394 U.S. 700 (1969) (parallel business practices plus circulation of pamphlet and meetings held sufficient); *Park* v. *El Paso Board of Realtors*, 764 F.2d 1053 (5th Cir. 1985) (rejecting requirement of conduct contrary to individual self-interest test where plaintiff presented other evidence of collusion, including direct evidence, in addition to parallel acts); *Ambook Enterprises* v. *Time, Inc.*, 612 F.2d 604 (2d Cir. 1979), *cert. denied*, 448 U.S. 914 (1980); *Gainesville Utilities* v. *Florida Power & Light Co.*, 573 F.2d 292, 301 (5th Cir. 1978) (parallel business behavior plus correspondence held sufficient); *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242, 245 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (similar pricing plus meetings, telephone calls, and correspondence held sufficient evidence of conspiracy to depress prices); *Esco Corp.* v. *United States*, 340 F.2d 1000 (9th Cir. 1965) (similar pricing plus meetings at which price information was exchanged held sufficient to warrant criminal conviction); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (similar pricing plus evidence of several meetings of industry leaders held sufficient evidence of conspiracy to depress price levels); *Pittsburgh Plate Glass Co.* v. *United States*, 260 F.2d 397 (4th Cir. 1958), *aff'd*, 360 U.S. 395 (1959) (simultaneous announcement of identical price increases subsequent to meeting held sufficient to sustain criminal conspiracy conviction); *Standard Oil Co.* v. *Moore*, 251 F.2d 188, 204-12 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958) (exchange of information and parallel practices held sufficient); *C-O Two Fire Equipment Co.* v. *United States*, 197 F.2d 489, 497 (9th Cir. 1952), *cert. denied*, 344 U.S. 892 (1952) (similar pricing plus meetings of executives and product standardization held sufficient for criminal convictions); *Strobl* v. *New York Mercantile Exchange*, 582 F.Supp. 770 (S.D.N.Y. 1984) (upholding sufficiency of evidence of meetings, telephone conversations, some evidence of agreement and parallel conduct);

rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.'" *Arizona* v. *Maricopa County Medical Society*, *supra*, 457 U.S. at 348. The Court has said "[t]he anticompetitive potential inherent in all price-fixing arrangements justifies their facial invalidation even if procompetitive justifications are offered for some," *Id.* at 351, and has long rejected "[the] position that fixed prices are reasonable if they are lower than free competition would yield." *Id.* at 352 n.25. A combination "formed for the purpose and with the effect of raising, *depressing*, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951). "It makes no difference. . . whether the effect of the agreement is to raise or to decrease prices," because the alleged "reasonableness" of prices is no excuse for price fixing. *United States* v. *McKesson & Robbins*, 351 U.S. 305, 310 (1956); *Catalano, Inc.* v. *Target Sales, Inc.*, *supra*, 446 U.S. at 647; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396-397 (1927).

Moreover, there is unrebutted record evidence that petitioners' "check prices" were *dumping prices*; that their lower, *actual* prices were even *lower dumping prices*, and (179A); as the Court of Appeals noted that their United States prices were often *below cost*. App. Vol. 5 DePodwin Report (1716a-20a; 1884a-1904a); App. Vol. 11 (4169a-74a). A conspiracy to depress prices, particularly one that creates such geographic price differentials, is the traditional weapon of monopolists, such as the trusts the Sherman Act was enacted to check — combinations of formerly independent producers that destroyed competition by destroying competitors. Courts have repeatedly condemned this type of conspiracy.[73] This case presents similar

73. The Standard Oil Trust, dissolved by the Court in *Standard Oil of New Jersey* v. *United States*, 221 U.S. 1 (1911), employed a strategy of "local price cutting at the points where necessary to suppress competition." 221 U.S. at 42-43, forcing competitors "either to become members of the combination or [to be] driven out of business." 221 U.S. at 32-33. *See also*, *United States* v. *American Tobacco Co.*, 221 U.S. 106, 182 (1911) (concerted price warfare by

monopolistic conduct by a foreign cartel of large Japanese corporations doing business here and operating internationally in classic predatory fashion.

Notwithstanding evidence of petitioners' conspiracy and of their flagrant customs law violations, petitioners seek to cast themselves as acting in the public interest in depressing United States prices of consumer electronic products. (P.Br. at 21-22) The courts have repeatedly rejected this pretext. *See*, *Arizona* v. *Maricopa County Medical Society*, *supra*, 457 U.S. at 352 n.25; *United States* v. *Corn Products Refining Co.*, 234 F. 964, 1011-13 (S.D.N.Y. 1916) (L. Hand, J.). "The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended. . . ." Spelling, *A Treatise on Trusts and Monopolies*, 217 (1893).[74]

The United States Government has expressed concern that the Court of Appeals' reversal of summary judgment might lead to actions under the antitrust laws "to deter lawful price competition." (G.Br. at 15). There was nothing "lawful" about petitioners' fraudulently concealed dumping prices. Foreign competitors who, unlike petitioners, compete lawfully and do not belong to predatory foreign price-fixing cartels that conspire to fix prices in closed foreign markets abroad, and to dump in the

Tobacco Trust); *United States* v. *Swift & Co.*, 286 U.S. 106, 116 (1932) (Beef Trust: "fixing prices. . . over temporary periods of time as to eliminate competition by rivals less favorably situated"); *Nash* v. *United States*, 229 U.S. 373 (1913); *Thomsen* v. *Cayser*, 243 U.S. 66 (1917); *Paterson Parchment Paper Co.*, v. *Story Parchment Co.*, 37 F.2d 537 (1st Cir. 1930), *rev'd on other grounds*, 282 U.S. 555 (1931); *Porto Rican American Tobacco Co. of Porto Rico* v. *American Tobacco Co.*, 30 F.2d 234 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *United States* v. *International Harvester Co.*, 214 F. 987 (D. Minn. 1914) (Farm Machinery Trust: concerted depressed pricing to destroy rivals); *United States* v. *E. I. DuPont de Nemours & Co.*, 188 F. 127, 138-145 (C.C. Del. 1911) (Gunpowder Trust: "Fundamental Agreement" controlling prices and markets to destroy competitors by selectively lowering prices).

74. *See* 21 Cong. Rec. at 2458, remarks of Sen. Sherman citing *Richardson* v. *Buhl*, 77 Mich. 632, 43 N. W. 1102 (1899) (Match Trust) ("[i]t is no answer to say that this monopoly has in fact reduced the price of friction-matches. *That policy may have been necessary to crush competition*")

United States, and to devise fraudulent schemes to shield their dumping from detection have no reason to fear United States laws. There is no danger that application of normal antitrust rules in this case will deter legitimate competition.

II. THE COURT OF APPEALS CORRECTLY HELD THAT UNRESOLVED FACTUAL ISSUES PRECLUDE SUMMARY JUDGMENT WITH RESPECT TO PETITIONERS' "SOVEREIGN COMPULSION" DEFENSE.

The belated reappearance of a "sovereign compulsion defense" in these cases introduces another false issue. The district court did not decide any of the many legal and factual questions surrounding their alleged "compulsion defense" in this case. (393A-394A). The Court of Appeals also found it unnecessary to reach the question. (188A-189A).

Petitioners deliberately elected not to defend the summary judgments on this alleged ground in the Court of Appeals. Petitioners' liaison counsel informed the Court of Appeals that the Japanese manufacturers "[did] not press it."[75] Although such a defense would be, as the Government concedes, an "affirmative defense" (G. Br. at 22), that is waived if not pleaded, with the exception of Mitsubishi Electric Corporation petitioners never asserted "compulsion" as an affirmative defense in their answers to the complaints or moved pursuant to F.R.Civ.P. 12(b). They did not raise this issue below in the questions presented in their briefs in the Court of Appeals. Moreover, when the State Department transmitted to the clerk of the district court the original 1975 MITI Note, the State Department's Legal Adviser, Mr. Philip Trimble, expressly stated that "*neither the State Department nor the United States Government takes any position on the content of the statement or on any other aspect of the litigation in question.*" (6A).

75. "[Plaintiffs' counsel] points to these check price agreements about which I think your Honors know very well, we like to refer to them as government mandated export agreements because of the record that has been developed down below about MITI having required it *but whether they did or not is obviously of no importance on this appeal and we do not press it on this appeal. . . .*" Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 22, 1982, at 88-89.

This Court does not decide in the first instance an issue not pressed and not decided by the lower courts. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

The Court of Appeals accepted the MITI Note at face value, and assumed, without deciding, "that a government-mandated export cartel arrangement fixing minimum prices would be outside the ambit of Section 1 of the Sherman Act," holding "summary judgment on that ground is not possible," because the evidence clearly showed that *petitioners did not comply with the purported "direction"* (188A-189A).

Its treatment of the issue was in complete accord with this Court's settled precedents.

A. *Petitioners' Involvement Was Simply A Constituent Element In A Broader Unlawful Arrangement.*

Undisputed evidence shows that petitioners selectively ignored provisions of the Arguments and Rules and, instead, used their formal cartel arrangements as a facade for concerted conduct having different purposes and effects, and combined this price coordination with simultaneous price collusion in the closed Japanese market, thereby making the Agreements and Rules a component of a larger conspiratorial scheme designed to produce large concealed dumping margins which they knew would injure United States competitors and disrupt the United States market but would escape detection. The Japanese manufacturers even continued this front *long after* the Agreements and Rules were not formally renewed when there was no claimed "direction". See, *supra*, at 48-52. Their participation in the formal cartel arrangements which they claim were "directed" by MITI was only one constituent element in a broader course of illegal conduct. This aspect of the case is governed by the fundamental rule established as long ago as *Loewe* v. *Lawlor*, 208 U.S. 274, 299 (1908), where (quoting from *Aikens* v. *Wisconsin*, 195 U.S. 194, 206 [1904]), the Court held that "[n]o conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts may be made a step in a criminal plot, and, *if*

it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

This fundamental rule derives, in part, from the definition of conspiracy itself: a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose *by means that are lawful or unlawful*, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465-466 (1921); *Truax* v. *Corrigan*, 257 U.S. 312, 327 (1921). Consequently, if the end is unlawful, the conspiracy is also unlawful even though some of the means, or even all of the means adopted to achieve it, may be lawful. Mr. Justice Holmes stated the underlying reason for the rule as long ago as *Aikens* v. *Wisconsin*, 195 U.S. 194, 205 (1904): an act "derives all its character from the consequences which will follow it under the circumstances in which it was done." Therefore, "acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra*, 370 U.S. at 707.

This Court has applied the rule uniformly for more than eighty years and has rejected the same kind of defense which petitioners offer here in many leading antitrust cases.[76] The Court has applied the fundamental rule not only where the means used involved acts not in themselves illegal, but even where an unlawful course of conduct is "in part initiated, *evidenced*, or carried out" by conduct that is *constitutionally protected*. *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

Even if petitioners had *complied* with the alleged "direction", their argument would be wholly without merit.

---

76. *See, e.g., California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Maryland & Virginia Milk Producers Ass'n.* v. *United States*, 362 U.S. 458, 472 (1960); *Georgia* v. *Pennsylvania Ry. Co.*, 324 U.S. 439, 457-463 (1945); *Swift & Co.* v. *United States*, 196 U.S. 375, 397 (1905).

B. *Petitioners Did Not Comply With the Alleged MITI "Direction".*

No "compulsion" claim can be recognized as *bona fide* where a defendant has failed to comply with the "direction". Petitioners, who claim that MITI "directed" them to form a cartel to fix "minimum" United States prices for certain benign purposes, set those prices far below their Japanese market prices and then sold their products at prices far *below* those "minimum" prices, jointly using those "check prices" to coordinate and conceal their dumping. Petitioners' course of conduct went far beyond the scope of any MITI "direction". Neither the petitioners, nor the Government of Japan nor the Government of the United States contends that what petitioners actually did was "directed" by MITI.

The Japanese manufacturers fixed prices in Japan at artificially high levels. MITI did not "direct" petitioners to do so. The Japanese Fair Trade Commission brought repeated proceedings against them for violation of the Japanese anti-monopoly laws. MITI did not "direct" petitioners to sell their products in the United States at prices far below the prices they fixed in the closed Japanese market *i.e., to dump*, in violation of United States statutes, or to lie about their actual import prices on United States customs entry documents, or to lie to the United States Treasury Department about their prices and submit false responses in the 1921 Antidumping Act proceeding, or "direct" them to engage in acts in furtherance of the conspiracy in devising methods to conceal their actual prices or to make clandestine payments, which, although necessary to continue their dumping campaign in the United States, Japan has stated involves wholesale violation of Japan's Foreign Exchange and Foreign Trade Control Law and Customs Law (43ad-51ad), and which the United States Government concedes "sovereign compulsion does not shield." (G.Br. at 26). It never "directed" petitioners to lie *to MITI about their actual prices on consumer electronic products sold in the United States.* It never "directed" them to conspire to supply false statistical data concerning the value of domestic and export shipments of these products to

MITI and other Japanese agencies to conceal their dumping, as the minutes of the EIAJ Statistics Committee show they did. (App. Vol. 13 (5609a-10a).

Moreover, the "check prices," which petitioners describe as "minimum" prices, did not require petitioners to dump. The Japanese manufacturers were free to sell at any United States import prices above the "check prices." Petitioners could have sold at prices in Japan that were above, below or equal to the "check prices," as they chose. They could have sold in the United States at the same higher price levels that they maintained in the Japanese market and been in full compliance with the "minimum" check price Agreements. Had they done that, there would have no predation here. They could also have lowered the Japanese prices to their United States levels and avoided violation. Had they done that, however, they could not have sustained the revenue losses entailed and could not have achieved the objectives of their conspiracy.

C. *Merely Commercial Acts That Are Implemented By Acts Within The Territorial Boundaries Of The United States And Have Intended Effects On United States Trade And Commerce Are Not Immune From United States Law Even If "Compelled" By A Foreign Government.*

Petitioners have been found to be transacting business in the United States on a very extensive basis. The Court of Appeals noted that petitioners' conduct "*impinged severely on primary-line competition in consumer electronic products in the American market.*" (168A-169A). Both the Court of Appeals (168A-169A) and the district court held that the United States courts have subject matter jurisdiction over petitioners' entire course of conduct in this case.

Mere *commercial* acts "compelled" by a foreign sovereign are not immune from the United States antitrust laws. The notion of "sovereign compulsion," said to be a corollary of the act of state doctrine, is subject to the well-established exception for conduct that is "*commercial,*" as opposed to "public" or

"governmental."[77] No immunity could arise from compliance with "directions" of Japanese agency employees concerning the marketing of consumer electronic products in the United States, activity that is unquestionably commercial.

Moreover, there is no antitrust immunity for governmentally "compelled" acts that occur outside the territorial boundaries of a foreign state and in the course of the foreign and interstate trade and commerce of the United States, such as petitioners' conduct.[78] This limitation derives from the established contours of the act of state doctrine, which counsels deference only to acts of a foreign government "*done within its own territory.*" *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964).

Petitioners voluntarily chose to engage in business in the United States. No foreign governmental "direction" can suffice to relieve them of their basic duty to comply with our laws. *Airline Pilots Association International* v. *TACA International Airlines*, 748 F.2d 965, 969-972 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 2324 (1985).

77. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 697-698 (1976) (opinion expressing views of four Justices); *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976); *Hunt* v. *Mobil Oil Co.*, 550 F.2d 68, 79 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *Sage Int'l. Ltd.* v. *Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981); *Outboard Marine Corp.* v. *Pezetel*, 461 F. Supp. 384, 394-95 (D. Del. 1978); Letter of Jack Tate, Acting Legal Advisor, Department of State, to Philip Perlman, Acting Attorney General (May 19, 1952), 26 Dept. State Bull. 984 (1952) ("Tate Letter," repr. 425 U.S. at 711); Letter of Monroe Leigh, Legal Advisor, Department of State, to Robert H. Bork, Solicitor General (Nov. 26, 1975), repr. 425 U.S. at 706; 1 Atwood & Brewster, *Antitrust and American Business Abroad* (2d ed. 1981) §§ 5.18, 8.09 and 8.21, at 135-137, 250-251, and 269-270. This distinction has been codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602 *et seq.*; *see also* Antitrust Guide for International Operations, United States Department of Justice, Antitrust Division, dated January 26, 1977, at 8 n.21 ("Antitrust Guide").

78. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); *Antitrust Guide*, at 54. 1 Atwood & Brewster, *Antitrust and American Business Abroad* §8.22, at 270 (2d. ed. 1981).

D. *The Vague and Belated Japanese Diplomatic Communications Are Insufficiently Specific and Too Untimely To Be Given Any Effect.*

If legal effect is to be given to diplomatic communications regarding factual, or legal, contentions relating to "foreign sovereign compulsion" claims in United States courts, at a minimum they must (a) be sufficiently specific to permit adjudication of the facts pertinent to the validity of a particular claim of "compulsion", and (b) be presented in sufficiently timely fashion so as not to disrupt orderly judicial procedures and thereby intrude upon the sovereignty of the United States and its courts. The Japanese government communications in this case satisfy neither of these basic requirements, and they are entitled to no legal effect.

Whether to recognize foreign governmental acts in the context of litigation is ultimately a judicial question, and judicial action may be guided, but not controlled, by the petition of interested governments relating to a particular set of acts.[79] A conclusory foreign government statement lacking sufficient specificity to enable the courts to adjudicate the facts relating to the doctrinal limitations to any "compulsion defense" cannot be dispositive. *See* G.Br. at 23.

The 1975 MITI Note does not specifically state where, or how (whether in writing or orally), or when, or by whom, or to whom the alleged MITI "direction" was given. The nature of the alleged "direction" is not specified, nor does the MITI Note contain any statement by a Japanese legal officer stating the legal effect, if any, under Japanese law of the type of alleged "direction" that purportedly was given.[80] The Notes fail to spell out with clarity MITI's role in the creation of these cartels. The United States Government in its brief expressly "[does] not at

79. *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 715 (1976) (concurring opinion of Mr. Justice Powell); *First National City Bank* v. *Banco Nacional De Cuba*, 406 U.S. 759, 790 (1972) (dissenting opinion of Mr. Justice Brennan).

80. Diplomatic communications on legal subjects from foreign officials other than the highest authority empowered under law of the foreign state to issue official legal opinions are not entitled to conclusive weight. Cf. *United States* v. *Pink*, 315 U.S. 203 (1942).

this point dispute the court's conclusion that the Government of Japan failed to spell out its role. . .with sufficient clarity." (G.Br. at 26 n.26). The MITI Note and the Note Verbale of May 1984 provide at best ambiguous support for some kind of fuzzy involvement by a Japanese governmental agency. Neither communication (1) addresses the separate "Guidelines" for implementing the Five-Company Rule, which prohibited petitioners from registering the same customer App. Vol. 14 (6230a-31a); (2) the continuation of petitioners' conduct *after the* formal Agreements and Rules were not renewed; (3) the sanctions, if any, that could be imposed for petitioners' failure to comply with the alleged MITI "direction"; (4) whether the "direction" was merely legally insignificant "precatory compulsion" such as Japanese "administrative guidance"; or (5) the explicit statutorily required "Withdrawal" provisions in the Agreements.

E. *The Japanese Diplomatic Communications Are Untimely and Disruptive of Orderly Judicial Proceeding of United States Courts.*

After nearly 14 years of litigation, and after the decision of the Court of Appeals, the Government of Japan has seen fit to present a further Note Verbale, dated May 1984, designed to touch up MITI's 1975 Note, and to demand in its brief that this Court give instant conclusive legal effect at this late stage to its vague assertions in defense of these Japanese manufacturers. The United States has a strong interest in orderly judicial proceedings in its courts, and recognition of such eleventh-hour diplomatic communications would set a bad precedent for such undesirable disruptive efforts in commercial litigation.

F. *The Diplomatic Communications Do Not Adequately Define the Nature of the Alleged "Direction".*

The diplomatic communications in this case state only that the government agency *would have* invoked certain governmental powers to enter a formal decree had petitioners not followed some unspecified "direction." In effect, they state that no formal decree or order of compulsion was ever entered requiring peti-

tioners to do anything.[81] Petitioners do not advance a *bona fide* claim of true "compulsion".

Mere official encouragement, approval or precatory compulsion gives rise to no immunity under the United States antitrust laws. *Continental Ore Co.* v. *Union Carbon Carbide & Carbon Corp., supra*, 370 U.S. 690, 707; *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979) ("It is necessary that foreign law must have coerced the defendant into violating American antitrust law"); *United States* v. *Watchmakers of Switzerland Information Center*, 1963 Trade Cas. ¶70,600, at 77,456-57 (S.D.N.Y. 1962). However, because the Japanese diplomatic communications fail to specify the nature of the alleged "direction", a United States court would be unable to apply American law to test the validity of this attempted invocation of a "compulsion" defense.

Moreover, petitioners' absolute right of withdrawal from the cartel negates any assertion of "compulsion." Each of the Manufacturers' Agreements during the entire period (1963-1973) contains an explicit provision permitting withdrawal at any time without condition. App. Vol. 14 (5875a; 6008a); App. Vol. 41 (18391a-456a). This is consistent with Japanese law, which explicitly *prohibits* undue restriction on the right to withdraw from

81. The Japanese legislation relied upon as requiring the conduct in question is merely *permissive*, allowing the formation of export cartels if the *approval* of the MITI is obtained. (25ad, 27ad). No penal or other sanction has been shown to apply upon the failure or refusal of any party to comply with this kind of encouragement, *see* Y. Kanazawa, "The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power," in A. von Mehren (ed.), Law in Japan 480, 501 (1973) ("MITI recommends to each of the firms in an industry that it observe certain restrictions on its production or private practices. The official has no authority in law to enforce his recommendation."); App. Vol. 8 (3139a-3144a). The fact that petitioners had an unexercised right of legal review of any such direction also undermines the *bona fides* of petitioners' reliance upon the alleged "direction." *See Antitrust Guide, supra*, at 52. *See also* Competitive Impact Statement for Proposed Consent Judgment in *United States* v. *C. Itoh & Co.*, 47 Fed. Reg. 30,311, 30,313, 30,315 (July 13, 1982) ("Administrative guidance as that term is generally used and understood is not legally binding and as such does not have the force of law.").

such arrangements. (26ad-27ad). The Japanese diplomatic communications fail to explain this inconsistency. Participation in the related JMEA Rules was likewise entirely voluntary. The Rules only applied to JMEA members, and no manufacturer or exporter was required to become or remain a member of the JMEA. Japan's notes also fail to explain this further inconsistency.

III. NEITHER THE 1916 ANTIDUMPING ACT ISSUE NOR "REINSTATEMENT" OF THE DISTRICT COURT'S SUMMARY JUDGMENT IS PROPERLY BEFORE THIS COURT.

Petitioners attempt to smuggle into this appeal an issue concerning the sufficiency of respondents' evidence of the *intent* required under the Antidumping Act of 1916, by suggesting that the alleged insufficiency of *antitrust* conspiracy evidence requires dismissal of these separate *antidumping* claims. (P. Br. at 46-47). The Questions Presented involve no issue relating to the Court of Appeals' separate Opinion and Judgment in the antidumping segment of this litigation, and petitioners' argument is in cavalier disregard of Rule 21.1(a).

The Antidumping Act of 1916, 15 U.S.C. §72, makes individual dumping unlawful, as well combinations and conspiracies to dump: persons "*importing*" or "*assisting in importing*" may violate the Act, independent of any proof of overall conspiracy. In the separate counts under the Antidumping Act of 1916, respondents' complaints[82] charge not only that petitioners combined and conspired, but also that they individually "*imported*" and "*assisted in importing*" in violation of the Act. Respondents' evidence of petitioners' intent (other than the conspiracy evidence) includes (i) evidence of the size and persistence of each petitioner's dumping margin, (ii) efforts of each petitioner to evade the United States antidumping laws and the necessary cooperation in each others' dumping scheme and concealment, (iii)

82. Appendix to the Briefs in No. 80-2080, Vol. 1 at 616b-626b, and 196b-216b.

evidence that petitioners' prices were below their costs, (iv) evidence relating to losses of petitioners' United States subsidiaries, and (v) evidence of specific statements evincing an intention to restrain and monopolize the United States market or injure the United States industry. Since the antidumping claims are not before the Court, such evidence, which includes evidence that the district court ruled inadmissible and failed to consider, but which the Court of Appeals reviewed, suffices by itself to satisfy the intent requirement of the Act and to require a trial on the antidumping segment of the litigation. If it is reconsidered, it should properly be examined on remand and not addressed for the first time in this Court. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981).

Petitioners' suggestion that remand would not be required should they prevail on the conspiracy issue in this Court overlooks the fact that, with reversal of most of the district court's evidentiary rulings and with other issues of admissibility concerning items of respondents' evidence still open on remand, the summary judgment record has been substantially redefined by the Court of Appeals' evidentiary rulings and has not yet even been finally determined in this case. The record, therefore, is not in a posture that would permit the Court to consider "reinstatement" of the summary judgments which the district court entered based upon the factual record which the district court misdefined by its erroneous evidentiary rulings.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the unanimous Judgment of the Court of Appeals for the Third Circuit in the antitrust segment of these cases.

Respectfully submitted,

EDWIN P. ROME
(Counsel of Record)
WILLIAM H. ROBERTS
ARNOLD I. KALMAN
Blank, Rome, Comisky & McCauley
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500
Attorneys for Respondents
Zenith Radio Corporation and
National Union Electric Corporation

OF COUNSEL:
Philip J. Curtis
John Borst, Jr.
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, IL 60025

September 6, 1985

ADDENDUM

INDEX TO ADDENDUM

STATUTES.

Statutes Imposing Criminal Sanctions for "Double Invoicing" and Customs Fraud.

Certain Provisions of the Antidumping Act of 1921.

Provisions of the Tariff Act of 1930 Requiring the True Price for Imported Merchandise To Be Declared On Custom Invoices and Imposing Forfeiture Penalty for False Statements On Such Invoices.

EXECUTIVE AGREEMENT.

RULES.

JAPANESE STATUTES.

Provisions Of Japanese Statutes Pertaining To Export Cartels.

MISCELLANEOUS.

Statutes Imposing Criminal Sanctions for "Double Invoicing" and Customs Fraud

18 U. S. C. §542

Entry of goods by means of false statements.

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission—

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term "commerce of the United States", as used in this section, shall not include commerce with the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

June 25, 1948, c. 645, 62 Stat. 715; June 30, 1955, c. 258, §2(e), 69 Stat. 242.

18 U. S. C. §551

Concealing or destroying invoices or other papers.

Whoever willfully conceals or destroys any invoice, book, or paper relating to any merchandise imported into the United States, after an inspection thereof has been demanded by the collector of any collection district; or

Whoever conceals or destroys at any time any such invoice, book, or paper for the purpose of suppressing any evidence of fraud therein contained—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 718.

18 U. S. C. §1001

Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Certain Provisions of the Antidumping Act of 1921.*

§160. Initiation of investigation; injury determination; findings; withholding appraisement; publication in Federal Register.

(a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160 to 171 of this title called a "finding") of his determination and the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the Secretary has reason to believe or suspect, from the invoice or other papers or from information presented to him or to any person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value), he shall forthwith publish notice of that fact in the Federal Register and shall authorize, under such regulations as he may prescribe, the withholding of appraisement reports as to such merchandise entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping has been raised by or presented to him or any person to whom authority under this section has been delegated, until the further order of the Secretary, or until the Secretary has made public a finding as provided for in subdivision (a) in regard to such merchandise.

(c) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the United States Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative. (May 27, 1921, ch. 14, §201, 42 Stat. 11; Sept. 1, 1954, ch. 1213, Title III, §301, 68 Stat. 1138; Aug. 14, 1958, Pub. L. 85-630, §§1, 4(b), 72 Stat. 583, 585.)

* The Antidumping Act of 1921, 19 U. S. C. §§160-173 (1958) was repealed in 1979 and the statute currently in force now appears as §736 of the Trade Agreements Act of 1979, 93 Stat. at 1972. The determination of dumping by petitioners, under the Antidumping Act of 1921, with respect to monochrome and color television receiving sets from Japan, is reproduced at 4188a-4200a.

SPECIAL DUMPING DUTY

§161. Amount of duty to be collected; determination of foreign market value of goods.

(a) In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

(b) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to—

(1) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 170a (3) of this title is used in determining foreign market value,

then due allowance shall be made therefor.

(c) In determining the foreign market value for the purposes of subsection (a) of this section, if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the exporter's sales price and the foreign market value (or that the fact that the exporter's sales price is the same as the foreign market value) is wholly or partly due to—

(1) the fact that the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

(2) other differences in circumstances of sale, or

(3) the fact that merchandise described in subdivision (C), (D), (E), or (F) of section 170a (3) of this title is used in determining foreign market value,

then due allowance shall be made therefor. (May 27, 1921, ch. 14, §202, 42 Stat. 11; Sept. 1, 1954, ch. 1213, Title III, §302, 68 Stat. 1139; Aug. 14, 1958, Pub. L. 85-630, §§2, 4(b), 72 Stat. 583, 585; June 2, 1970, Pub. L. 91-271, Title III, §311, 84 Stat. 292.)

OATHS AND BONDS ON ENTRY

§167. Oath and bond of person for whose account merchandise is imported before delivery thereof.

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided in section 160 of this title, and delivery of which has not been made by the appropriate customs officer before such finding has been so made public, unless the person by whom or for whose account such merchandise is imported makes oath before such customs officer, under regulations prescribed by the Secretary, that he is not an exporter, or unless such person declares under oath at the time of entry, under regulations prescribed by the Secretary, the exporter's sales price of such merchandise, it shall be unlawful for such customs officer to deliver the merchandise until such person has made oath before such customs officer, under regulations prescribed by the said Secretary, that the merchandise has not been sold or agreed to be sold by such person, and has given bond to such customs officer, under regulations prescribed by the Secretary, with sureties approved by such customs officer, in an amount equal to the estimated value of the merchandise, conditioned: (1) That he will report to such customs officer the exporter's sales price of the merchandise within thirty days after such merchandise has been sold or agreed to be sold in the United States; (2) that he will pay on demand from such customs officer the amount of special dumping duty, if any, imposed by sections 160 to 171 of this title, upon such merchandise; and (3) that he will furnish to such

customs officer such information as may be in his possession and as may be necessary for the ascertainment of such duty, and will keep such records as to the sale of such merchandise as the Secretary may by regulation prescribe. (May 27, 1921, ch. 14, §208, 42 Stat. 14; June 2, 1970, Pub. L. 91-271, Title III, §312, 84 Stat. 292.)

Provisions of the Tariff Act of 1930 Requiring the True Price for Imported Merchandise To Be Declared On Customs Invoices and Imposing Forfeiture Penalty for False Statements On Such Invoices

SECTION 481, 19 U. S. C. §1481. Invoice; contents.

In general.

(a) All invoices of merchandise to be imported into the United States shall set forth—

(1) The port of entry to which the merchandise is destined;

(2) The time when, the place where, and the person by whom and the person to whom the merchandise is sold or agreed to be sold, or if to be imported otherwise than in pursuance of a purchase, the place from which shipped, the time when and the person to whom and the person by whom it is shipped;

(3) A detailed description of the merchandise, including the name by which each item is known, the grade or quality, and the marks, numbers, or symbols under which sold by the seller or manufacturer to the trade in the country of exportation, together with the marks and numbers of the packages in which the merchandise is packed;

(4) The quantities in the weights and measures of the country or place from which the merchandise is shipped, or in the weights and measures of the United States;

(5) The purchase price of each item in the currency of the purchase, if the merchandise is shipped in pursuance of a purchase or an agreement to purchase;

(6) If the merchandise is shipped otherwise than in pursuance of a purchase or an agreement to purchase, the value for each item, in the currency in which the transactions are usually made, or, in the absence of such value, the price in such currency that the manufacturer, seller, shipper, or owner would have received, or was willing to receive, for such merchandise if sold in the ordinary course of trade and in the usual wholesale quantities in the country of exportation;

(7) The kind of currency, whether gold, silver, or paper;

(8) All charges upon the merchandise, itemized by name and amount when known to the seller or shipper; or all charges by name (including commissions, insurance, freight, cases, containers, coverings, and cost of packing) included in the invoice prices when the amounts for such charges are unknown to the seller or shipper;

(9) All rebates, drawbacks, and bounties, separately itemized, allowed upon the exportation of the merchandise; and

(10) Any other facts deemed necessary to a proper appraisement, examination, and classification of the merchandise that the Secretary of the Treasury may require.

Shipments not purchased and not shipped by manufacturer.

(b) If the merchandise is shipped to a person in the United States by a person other than the manufacturer, otherwise than by purchase, such person shall state on the invoice the time when, the place where, the person from whom such merchandise was purchased, and the

price paid therefor in the currency of the purchase, stating whether gold, silver, or paper.

Purchases in different consular districts.

(c) When the merchandise has been purchased in different consular districts for shipment to the United States and is assembled for shipment and embraced in a single invoice which is produced for certification under the provisions of paragraph (2) of subdivision (a) of section 1482 of this title, the invoice shall have attached thereto the original bills or invoices received by the shipper, or extracts therefrom, showing the actual prices paid or to be paid for such merchandise. The consular officer to whom the invoice is so produced for certification may require that any such original bill or invoice be certified by the consular officer for the district in which the merchandise was purchased.

Exceptions by regulations.

(d) The Secretary of the Treasury may by regulations provide for such exceptions from the requirements of this section as he deems advisable.
June 17, 1930, c. 497, Title IV, §481, 46 Stat. 719.

SECTION 485, 19 U. S. C. §1485.* Declaration.

(a) Requirement; form and contents.

Every consignee making an entry under the provisions of section 1484 of this title shall make and file therewith, in a form to be prescribed by the Secretary of the Treasury, a declaration under oath, stating—

(1) Whether the merchandise is imported in pursuance of a purchase or an agreement to purchase, or whether it is imported otherwise than in pursuance of a purchase or agreement to purchase;

(2) That the prices set forth in the invoice are true, in the case of merchandise purchased or agreed to be purchased; or in the case of merchandise secured otherwise than by purchase or agreement to purchase, that the statements in such invoice as to value or price are true to the best of his knowledge and belief;

(3) That all other statements in the invoice or other documents filed with the entry, or in the entry itself, are true and correct; and

(4) That he will produce at once to the appropriate customs officer any invoice, paper, letter, document, or information received showing that any such prices or statements are not true or correct.

(b) Books and periodicals.

The Secretary of the Treasury is authorized to prescribe regulations for one declaration in the case of books, magazines, newspapers, and periodicals published and imported in successive parts, numbers, or volumes, and entitled to free entry.

* Provisions of this statute were subsequently amended on November 6, 1978, by Pub. L. 95-598, Title III, §315, 92 Stat. 2678.

(c) Agents.

In the event that an entry is made by an agent under the provisions of section 1484 of this title and such agent is not in possession of such declaration of the consignee, such agent shall give a bond to produce such declaration.

(d) Liability of consignee for increased duties.

A consignee shall not be liable for any additional or increased duties if (1) he declares at the time of entry that he is not the actual owner of the merchandise, (2) he furnishes the name and address of such owner, and (3) within ninety days from the date of entry he produces a declaration of such owner conditioned that he will pay all additional and increased duties, under such regulations as the Secretary of the Treasury may prescribe. Such owner shall possess all the rights of a consignee.

(e) Separate forms for purchase and nonpurchase importations.

The Secretary of the Treasury shall prescribe separate forms for the declaration in the case of merchandise which is imported in pursuance of a purchase or agreement to purchase and merchandise which is imported otherwise than in pursuance of a purchase or agreement to purchase.

(f) Deceased or insolvent persons; partnerships and corporations.

Whenever such merchandise is consigned to a deceased person, or to an insolvent person who has assigned the same for the benefit of his creditors, the executor or administrator, or the assignee of such person or receiver or trustee in bankruptcy, shall be considered as the consignee; when consigned to a partnership the declaration of one of the partners only shall be required, and when consigned to a corporation such declaration

may be made by any officer of such corporation. Whether the consignee is an individual, a partnership, or a corporation, the declaration may be made by any person who has knowledge of the facts and who is specifically authorized by such individual, a member of such partnership, or an officer of such corporation to make such declaration. (June 17, 1930, ch. 497, Title IV, §485, 46 Stat. 724; June 25, 1938, ch. 679, §13, 52 Stat. 1083; June 2, 1970, Pub. L. 91-271, Title III, §301(b), 84 Stat. 287.)

SECTION 592, 19 U.S.C. §1592.* Penalty against goods.

If any consignor, seller, owner, importer, consignee, agent, or other person or persons enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or makes any false statement in any declaration under the provisions of section 1485 of this title (relating to declaration on entry) without reasonable cause to believe the truth of such statement, or aids or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement; or is guilty of any willful act or omission by means whereof the United States is or may be deprived of the lawful duties or any portion thereof accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be subject to forfeiture, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates. The arrival within the territorial limits of the United States of any merchandise consigned for sale and remaining the property of the shipper or consignor, and the acceptance of a false or fraudulent invoice

* Provisions of this statute were subsequently amended on October 3, 1978, by Pub. L. 95-410, Title I, §110(a), 92 Stat. 893.

thereof by the consignee or the agent of the consignor, or the existence of any other facts constituting an attempted fraud, shall be deemed, for the purposes of this section, to be an attempt to enter such merchandise notwithstanding no actual entry has been made or offered. (June 17, 1930, ch. 497, Title IV, §592, 46 Stat. 750; Aug. 5, 1935, ch. 438, Title III, §304(b), 49 Stat. 527.)

THE GENERAL AGREEMENT ON TARIFFS AND TRADE, 62 Stat. 3682

The Governments* of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM, the UNITED STATES OF BRAZIL, BURMA, CANADA, CEYLON, the REPUBLIC OF CHILE, the REPUBLIC OF CHINA, the REPUBLIC OF CUBA, the CZECHOSLOVAK REPUBLIC, the FRENCH REPUBLIC, INDIA, LEBANON, the GRAND-DUCHY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS, NEW ZEALAND, the KINGDOM OF NORWAY, PAKISTAN, SOUTHERN RHODESIA, SYRIA, the UNION OF SOUTH AFRICA, the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, and the UNITED STATES OF AMERICA:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce,

Have through their Representatives agreed as follows:

---

* The government of Japan acceded to the General Agreement on Tariffs and Trade on June 7, 1955, and, thereafter, was enforced on September 10, 1955. U.N.T.S. 220/164; GATT, BISD 4S/7 (1955); *see also* J. Jackson, World Trade and the GATT 888-892 (1969).

* * *

PART II

* * *

Article VI

Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price

difference determined in accordance with the provisions of paragraph 1.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain that material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the

court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

Provisions of Japanese Statutes Pertaining to Export Cartels.

ACT CONCERNING PROHIBITION OF PRIVATE MONOPOLY AND MAINTENANCE OF FAIR TRADE*

(Act No. 54 of 14 April 1947)

PART I—GENERAL PROVISIONS

SECTION 1

This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology, and the like, and all other undue restriction of business activities through combinations, agreements, etc., aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.

SECTION 2

• • •

(5) The term "private monopolization" as used in this Act shall mean such business activities, by which any entrepreneur, individually, by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

* The English translation of this Act is taken from H. Iyori, *Antimonopoly Legislation In Japan* (1969).

(6) The term "unreasonable restraint of trade" as used in this Act shall mean such business activities, by which entrepreneurs by contract, agreement, or any other concerted activities mutually restrict or conduct their business activities in such a manner as to fix, maintain, or enhance prices; or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

(7) The term "unfair business practices" as used in this Act shall mean any act coming under any one of the following paragraphs which tends to impede fair competition and which is designated by the Fair Trade Commission.

i) Unduly discriminating against other entrepreneurs;

ii) Dealing at undue prices;

iii) Unreasonably inducing or coercing customers of a competitor to deal with oneself;

iv) Trading with another party on such conditions as will restrict unjustly the business activities of the said party;

v) Dealing with another party by unwarranted use of one's bargaining position;

vi) Unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is a stockholder or an officer and his customers; or, in case such entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interest of such company.

EXPORT AND IMPORT TRADING ACT*

(Act No. 299, 5 August 1952)

PART I—GENERAL PROVISIONS

SECTION 1

The purpose of this Act is to prevent unfair export trading and to establish order in export and import trading, and thereby to promote the sound development of foreign trade.

PART III—AGREEMENTS CONCERNING EXPORTS

SECTION 5

Exporters may enter into an agreement on price, quantity, quality, design, or any other matter in relation to commodities of a particular kind to be exported to a specific destination, by notifying the Minister of International Trade and Industry within ten days from the day of its conclusion.

SECTION 5-BIS

The Minister of International Trade and Industry shall, in case he deems, in the event of having received a notice under the provisions of the preceding subsection, that the agreement under notice does not conform to one of the following paragraphs, order the exporters to modify the agreement, or prohibit its conclusion prior to such agreement being entered into:

i) There is no fear of violating treaties and other arrangements concluded with foreign governments or the international agencies;

ii) The interest of importers or enterprises concerned at the destination is not injured and there is

* The English translation of this Act is taken from H. Iyori, *Antimonopoly Legislation In Japan* (1969).

no fear of gravely injuring international confidence in Japanese exporters;

iii) In addition to the preceding two paragraphs, there is no fear of injuring the sound development of export trade;

iv) Its contents are not unjustly discriminatory;

v) The participation in or the withdrawal from the agreement is not unjustly restricted;

vi) There is no fear of unjustly injuring the interests of domestic agriculture, forestry and fishery enterprises concerned, smaller enterprises concerned and other enterprises concerned or consumers in general.

SECTION 5-2

(1) Exporters may enter into an agreement on price, quantity, quality, design, or any other matter in domestic transactions relating to commodities of a particular kind to be exported to a specific destination, or may enter into an agreement on these matters with producers or sellers of the said commodities to be exported to the said destination by obtaining the authorisation of the Minister of International Trade and Industry.

(2) The Minister of International Trade and Industry shall not, unless he deems that the agreement which is the subject of an application for authorisation under the preceding subsection conforms to each paragraph of subsection (2) of the preceding section, grant authorisation under the said subsection.

(3) The Minister of International Trade and Industry shall, in case an application for authorisation under subsection (1) has been made, take the measure of authorisation or refusal in regard to the agreement under the said application within twenty days from the day of the receipt of the said application.

(4) When the measure under the preceding subsection has not been taken within the period specified in the said subsection, authorisation under subsection (1) in regard to the agreement which is the subject of the said application shall be considered as having been given on the day following that on which the said period was completed.

(5) When the Minister of International Trade and Industry has requested the applicant to supply a report in regard to the application for authorisation under subsection (1), the period from such day to the day on which the Minister of International Trade and Industry receives such report shall not be calculated in the period under subsection (3).

SECTION 5-3

(1) Producers or sellers may enter into an agreement on price, quantity, quality, design, or any other matters in domestic transactions relating to commodities of the particular kind to be exported to the specific destination by obtaining the authorisation of the Minister of International Trade and Industry and the competent Minister in regard to the said commodities.

(2) The provisions of subsections (2) to (5) of the preceding section shall apply mutatis mutandis to an agreement under the preceding subsection.

PART IV—EXPORT ASSOCIATIONS

SECTION 11

(1) An export association may conduct the following activities: Provided that any other export associations (hereinafter referred to as "non-investing export associations") than export associations requiring their members to make investments (hereinafter referred to as "investing export associations") shall not conduct the activities referred to in paragraphs (vi) and (vii):

i) Prevention of unfair export trading by members (which term hereinafter means those who constitute an export association directly or indirectly), belonging to any export association;

ii) The maintenance and cultivation of overseas export markets, for example by survey, publicity, good offices, in regard to export;

iii) Improvement of price, quality, design and any other matter relating to commodities to be exported;

iv) Dealing with complaints and disputes relating to exports;

v) Activities incidental to activities within each of the preceding paragraphs;

vi) In addition to those matters referred to in the preceding four paragraphs, facilities for furtherance of the common interests of members of the export association;

vii) Loan of funds (including discounting of notes) to its members and borrowing thereof in favour of its members.

(2) In addition to those matters provided for in the preceding subsection, any export association may provide for matters to be observed by its members in regard

to price, quantity, quality, design, or any other matter in export trading commodities of the particular kind to be exported to the specific destination, in accordance with its Articles, by notifying the Minister of International Trade and Industry within ten days from the day of its establishment.

(3) The provisions of Section 5 subsection (2), Section 6 subsection (1) and Section 7 subsection (1) shall apply mutatis mutandis to matters to be observed by its members under the preceding subsection.

(4) In addition to those matters provided for in subsections (1) and (2), any export association may, by obtaining the authorisation of the Minister of International Trade and Industry, provide for matters to be observed by its members in regard to price, quantity, quality, design, or any other matter in domestic transactions in commodities of the particular kind to be exported to the specific destination in accordance with its articles, or may enter into a collective agreement on these matters in favor of its members.

(5) The provisions of Section 5-2 subsections (2) to (5), Section 6 subsection (2) and Section 7 subsection (2) shall apply mutatis mutandis to matters to be observed by its members and to a collective agreement under the preceding subsection.

PART VIII—MISCELLANEOUS PROVISIONS

SECTION 33

(1) The provisions of the Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Act No. 54 of 1947) shall not apply to an agreement that has been notified under the provisions of Section 5 subsection (1), or that has been entered into by obtaining approval as mentioned in Section 5-2 subsection (1), Section 5-3 subsection (1), or Section 7-2 subsection (1) or Section 7-3 subsection (1), or to the matters to be observed by members that have been notified under the provisions of Section 11 subsection (2), or that have been laid down by obtaining approval as mentioned in subsection (4) of the said Section, Section 19-4 subsection (2), or Section 23 subsection (1), or to a collective agreement that has been entered into by obtaining approval as indicated in Section 11 subsection (4), or Section 19-4 subsection (2) or to a method of business operation that has been determined by obtaining approval under Section 27-9 subsection (1) or Section 27-11 subsection (1) and such acts as may be carried out thereunder: Provided that this shall not apply to such cases as mentioned hereunder:

i) Where unfair business practices are employed, or where it causes enterprises to do such acts as come within unfair business practices;

ii) Where a month has passed after public notice has been given under the provisions of subsection (11) of the following Section (excluding cases where the Minister of International Trade and Industry has, upon request under subsection (8) or (9) of the said Section, taken the measure provided for in Section 5 subsection (2) or Section 6 subsection (1) [including cases where this applies mutatis mutandis under Section 11 subsection (3); hereinafter the same in this Part] or subsection (2) of the

said Section [including cases where this applies mutatis mutandis under Section 7-2 subsection (3), including cases where this applies mutatis mutandis under Section 19-4 subsection (3), Section 7-3 subsection (3), Section 11 subsection (5), or Section 23 subsection (4); hereinafter the same in this Part but excluding Section 35 subsection (1), or of Section 27-12, or the Minister of International Trade and Industry and the competent Minister for the said commodities has, upon request under subsection (10) of the following Section, taken such measure as is provided for in Section 6 subsection (3)].

(2) Where a request under the provisions of subsections (8) to (10) of the following Section has been made in respect of any part of an agreement, the matters to be observed by the members, or a collective agreement or a method of business operation as provided in subsection (1), the provisions of the Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade shall not, notwithstanding the provisions of paragraph (ii) of the said subsection, apply to any part of such agreement, or matters to be observed by the members, or collective agreement, and any acts carried out thereunder, other than that to which the request relates.

(3) The provisions of the Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade shall not apply to proper acts performed by a designated agency in connection with the designated business: Provided that this shall not apply to cases wherein unfair business practices are employed

Proceedings in *United States v. Continental Forwarding Company*, 463 F.2d. 1129 (C.C.P.A. 1972).

Excerpt from Brief for the United States

[53]

* * *

Every corner of the record in this case thus conclusively establishes beyond any peradventure that the rebates in question constituted flagrant violations of Japanese criminal law. It is clear that even in Japanese civil litigation, contrary to the general rule prevailing in our own system of law (see 3 *Williston on Sales* 663 (Baker, Voorhis & Co. 1948)), an agreement for the payment of such a rebate, in violation of the MITI check price regulations, cannot be prosecuted to judgment and *collection effected*, for collection, too, is dependent upon the licensing authorities; and that, even if the rebate *arguendo* be thus collected, the underlying transaction remains illegal under the criminal laws of Japan. We have of record the interpretation of those laws by competent experts, by responsible Japanese governmental officials, and by the courts of Japan, and to that interpretation, rather than the interpretation our courts were constrained to give those laws in the preceding litigation on this issue, this Court should accord comity. *United States* v. *Pillsbury Flour Mills Co.*, 25 CCPA 351, T.D. 49435 (1938).

* * *

[60]

Respectfully submitted,

L. PATRICK GRAY, III
Assistant Attorney General
ANDREW P. VANCE
Chief, Customs Section
GLENN E. HARRIS
Civil Division, Dept. of Justice
Attorneys for Appellant.

New York, New York
July, 1971

Excerpts from Appendix of the United States

[APPENDIX A]

Defendant's Exhibit F*

United States of America
TREASURY DEPARTMENT
Bureau of Customs
Tokyo, Japan

March 2, 1967
Airmail
Refer to
3-1123

Commissioner of Customs
Bureau of Customs
Washington, D. C. 20226

Attention: Office of Investigations

Dear Sir:

On December 8, 1966, two lists of questions, in both Japanese and English, were submitted through the U.S. Embassy, Tokyo, to the Japanese Ministry of Foreign Affairs. We requested that the questions be answered by the Japanese Ministry of International Trade and Industry (hereinafter "MITI") and the Japanese Ministry of Justice (hereinafter "MOJ") to clarify our understanding of the laws and regulations governing the Japanese export "check price" controls administered by MITI.

Attached as Exhibit A-1 is a copy of the questions to MITI in Japanese, and attached as Exhibit A-2 is a copy of the questions to MITI in English. Attached as Exhibit B-1 is a copy of the questions to MOJ in Japanese, and attached as Exhibit B-2 is a copy of the questions to MOJ in English.

---

* Japanese portions of the exhibit are not reprinted here.

[2a]

On December 13, 1966, a joint meeting was held at the offices of the Japanese Ministry of Foreign Affairs, Tokyo, with the following Japanese officials:

Mr. Yamashita Mr. Ishigaki	))	Ministry of Foreign Affairs, U.S.-Canada Section, Economic Affairs Bureau
Mr. Nozaki Mr. Kawasaki	))	MITI, 1st section, Overseas Markets, Trade Bureau
Mr. Shikita Mr. Tamura	))	MOJ, Criminal Affairs Section, Criminal Affairs Bureau
Mr. Kaya Miss Yamashita	))	Ministry of Finance, International Section, Customs Bureau

Attached as Exhibit C-1 is a copy of cover letter dated December 28, 1966, from Mr. Seiichi Omori, Chief of the U.S.-Canada Section, Economic Affairs Bureau, Ministry of Foreign Affairs to Mr. John C. Leary, First Secretary, American Embassy, Tokyo. Attached as Exhibit C-2 is a copy of the MOJ answers given during the meeting on December 13, 1966, by Mr. Shikita. Mr. Shikita has a masters degree in law from Harvard, and he spoke fluently in English. Mr. Shikita had MOJ statistical ledgers and records with him for reference at the meeting when he answered the questions.

Attached as Exhibit D-1 is a copy of the written answers dated December 24, 1966, given by MITI in Japanese. Attached as Exhibit D-2 is a copy of the English translation of the MITI answers.

Attached as Exhibit E-1 is a copy of an article from the Japanese International Trade Public Bulletin,

#2891, April 1, 1959, concerning export license and approval for contract on binoculars. Attached as Exhibit E-2 is a copy of the

[3a]

English translation of the article. I have asked MITI for copies of the Heavy Industry Bureau Notice #1921, October 18, 1956, and #2499, January 8, 1957, which are referenced in the attached article.

These articles and translations will be forwarded if the notices are still available.

Sincerely yours,

s/ TERRANCE L. SIMPSON
Terrance L. Simpson
Customs Representative

Enclosures—8

Approved:

s/ JOHN A. DRESSER
John A. Dresser

Regional Customs Representative
TLSimpson:ahy

[4a]

[Exhibit A-2]

OUTLINE OF QUESTIONS WHICH U.S. DEPARTMENT OF JUSTICE DESIRES TO ASK OF THE MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY

December 8, 1966

1. What were the general requirements in 1959 which anyone was required to meet in order to obtain a license from MITI to export goods with particular reference to Article 1 of the Export Trade Control Order of 1949 which was then in force and the different categories of goods and areas referred to therein.
2. Were these requirements in force throughout the year 1958?
3. Did these requirements apply to the application for an export license for goods including binoculars destined for export to the United States?
4. Was one of the standards which MITI applied in approving or disapproving an application for a license to export certain categories of goods to the United States referred to in Article 1(1) of the Export Trade Control Order of 1949 the amount of the proposed selling price, as made known to MITI?
5. If so, what documents or information did MITI require to be submitted as evidence of the proposed selling price?
6. Did MITI establish, maintain, or compile from time to time during 1958 lists of minimum selling prices at which it would approve applications for the exportation of certain categories of goods including binoculars to, among other countries, the United States?
7. If so, were these lists known as "check prices"?

[5a]

8. Were these prices based on delivery F.O.B. packed?
9. Were these check prices compiled in writing for all affected categories of goods?
10. Were these prices ever made public? If so, in what form?
11. What section of MITI was responsible for insuring that goods proposed to be exported to the United States were sold at prices at least equal to the applicable check prices?
12. When did MITI first establish check prices with respect to any category of goods? Which section or sections or what person or persons of MITI did so?
13. Did MITI establish any other method of enforcing minimum export prices under any laws or orders other than the Foreign Exchange & Foreign Trade Control Law? What was that method?
14. When the check prices were first established, did MITI determine under what particular provisions of the Foreign Exchange & Foreign Trade Control Law, the Cabinet Orders, and the Ordinances of MITI it was acting in the establishment and application of check prices? If so, under which of the provisions of the above were the check prices established?
15. Is the above determination evidenced by any written document or documents in the files of MITI, and if so, would you be agreeable to furnishing a copy thereof?
16. When the check prices were first established, what provisions of the Foreign Exchange & Foreign Trade Control Law, the Cabinet Orders and MITI

Ordinances did MITI consider were available for enforcement of the check prices and for punishment of violators thereof?

[6a]

17. Is that understanding evidenced by any written document or documents in the files of MITI, and if so, would you be agreeable to furnishing a copy thereof?

18. Has MITI ever instituted any formal or informal investigation with the purpose of determining whether certain Japanese sellers of certain goods subject to check prices may have been giving rebates or partial refunds to the American purchasers of such goods, with the result that the prices actually retained by Japanese exporters were less than the prescribed check prices?

19. If so, did the investigation ever result in any instance in the application of sanctions against any person or company under Article 53 of the Foreign Exchange & Foreign Control Law? In how many instances?

20. If no sanctions were ever imposed under the above Article 53, was it because MITI did not consider Article 53 to be available for enforcement of the check prices, or for other reasons?

21. Has there even been any proceeding under Article 56 of the Foreign Exchange & Foreign Trade Control Law challenging the refusal of an export license because the prospective selling price did not meet the minimum check price?

22. Has any investigation such as is referred to in question 18 resulted in the referral by MITI of a violation of the check price requirement to police officials or to a procurator for criminal prosecution? In how many instances?

23. Were there any such prosecutions as referred to in question 22? Did any of them result in conviction?

24. Is the intent of the check price system, as conceived by MITI, fulfilled or not fulfilled simply by the transmittal of foreign exchange to Japan in the amount of the prescribed check price for the affected goods?

25. What provisions, if any, of the Foreign Exchange &

[7a]

Foreign Trade Control Law would MITI consider to be violated if the Japanese exporter should rebate in Japanese yen to the U.S. importer in the U.S. or to a Japanese person in Japan acting for the U.S. importer a portion of the agreed purchase price as represented to MITI without obtaining from MITI a separate license to do so, assuming that the amount of the rebate should reduce the actual price for the affected goods to below the prescribed check price?

26. Does MITI consider that a rebate in Japanese currency to an American buyer of a portion of American dollar exchange originally transmitted to the Japanese seller as the ostensible purchase price of goods adversely affects the foreign exchange position of Japan to the detriment of the objectives of Article 1 of the Foreign Exchange & Foreign Trade Control Law?

[8a]

[Exhibit B-2]

OUTLINE OF QUESTIONS WHICH
U.S. DEPARTMENT OF JUSTICE
DESIRES TO ASK OF THE MINISTRY OF JUSTICE

December 8, 1966

1. Is the Ministry of Justice (hereinafter "MOJ") authorized to keep the statistics and other records of the criminal cases indicted or not indicted by the prosecutor's office?
2. Is MOJ authorized to render the interpretation by the Japanese Government of the criminal laws and regulations in response to inquiry from outside the Government?
3. Does MOJ keep the records of criminal cases in violation of the Foreign Exchange and Foreign Trade Control Law (hereinafter Foreign Exchange Control Law) and have authority to give the Japanese Government's interpretation of the provisións concerning penalties under the Foreign Exchange Control Law?
4. Does MOJ know that MITI enforced what is called the check price system in connection with the export from Japan of certain goods during the period of 1955 to 1959? Are there any court judgments in connection with criminal cases in violation of the check price system which resulted in violation of penalty provisions of the Foreign Exchange Control Law? If there are any, would MOJ cite those cases?
5. In the above-cited cases, did the courts hold the defendants guilty or not guilty?
6. If there are any cases of those cited by MOJ in Question 5 in which the court held the defendants guilty,

what were the provisions of law cited by the courts as the charge against the defendants?

[9a]

7. In the cases in which the courts held the defendants guilty, were the violations of check prices as such the basis on which the defendants were held by the court to be guilty?
8. Assuming a Japanese exporter has exported binoculars to the United States in 1958 in accordance with sale agreement thereof which provides for a selling price lower than the check price in force at that time, the U.S. importer opens a letter of credit in the same amount as the check price, the Japanese exporter applies for the approval under Article 1 of the Export Control Order and obtains the MITI's approval of said export at the check price, and the Japanese exporter pays the U.S. importer without a special license the difference between the check price and sale price in Japanese yen by means of (A) direct remittance of Japanese yen to the U.S. importer in the United States or (B) payment of Japanese yen to a person in Japan acting for the U.S. importer. Then in such event, is said remittance of Japanese yen to the U.S. or payment of Japanese yen in Japan or both, in violation of the Foreign Exchange Control Law? What is the provision of the Foreign Exchange Control Law of which such action is in violation? Does such an export as such constitute a violation of the Foreign Exchange Control Law, and if so, of what provision?

[10a]
[Exhibit C-1]

Tokyo, December 28, 1966

Dear Mr. Leary,

Attached herewith you will find the answer prepared by the Ministry of International Trade and Industry to your questionnaire of December 6, 1966 which U.S. Department of Justice desired to ask of the said Ministry. We hope your Department of Justice would be satisfied with it.

As to making an affidavit of this answer and the answers given by the Ministry of Justice at the 13 December meeting, we have arrived at the conclusion that it is not desirous for us to agree to your request.

We hope the answers themselves would serve your purpose in your juricial *[sic]* proceedings.

Sincerely yours,

SEIICHI OMORI
Chief of the United States
and Canada Section,
Economic Affairs Bureau,
Ministry of Foreign Affairs.

Mr. John C. Leary,
First Secretary,
Embassy of the United
States of America,
Tokyo

Reply of Ministry of Justice to Inquiry by Department of Justice of the United States of America

[11a]
[Exhibit C-2]*

When inquiries are made by a foreign government, the Ministry of Foreign Affairs is required, as an established procedure, to dispose of such aspects of the matter as would involve the relations with the foreign government.

2. As a part of his position and duties, he has access to the statistical records officially maintained by the Ministry of Justice relating to criminal prosecutions instituted by the various prosecutors' offices in Japan under the criminal laws of this country, including the penal provisions of the laws above named. At the request of the Department of Justice of the United States, and with the concurrence of the Foreign Ministry of Japan and authorization of the Ministry of Justice, he had examined those statistical records relating to criminal indictments returned during the calendar year 1957 under the penal provisions of the Foreign Exchange and Foreign Trade Control Law. During 1957, 340 indictments were returned for violation of the various penal provisions of the Foreign Exchange and Foreign Trade Control Law. Of these 340 indictments, 62 were returned for violation of the said Article 27, approximately half of which violations were charged to have arisen as an incident to the making of rebates or refunds of Japanese currency to or for the account of exchange non-residents (including United States importers) in connection with the sale and exportation from Japan of merchandise subject to the "check prices" administered by MITI, or as an incident to similar violations of maximum prices specified by MITI in respect of imported merchandise. Only the records of the courts in which these indictments were

*The response of the Ministry of Justice.

returned, which records are not immediately available to him, would reflect the final dispositions of the above indictments; however, there are five decisions known to him

[12a]

which are reported in the official court reports in which indictments returned under Article 27, Paragraph 1, Items (2) and (3), of the Foreign Exchange and Foreign Trade Control Law for the making of rebates or refunds on MITI "check price" merchandise in the manner prescribed by the above penal provisions were successfully prosecuted and the defendants found guilty. Those five reported decisions are:

1. The Supreme Court, Decided January 20, 1965, Case (A) No. 624 of 1962, Defendant Okura Shoji Kabushiki Kaisha
2. The Supreme Court, Decided September 10, 1965, Case (A) No. 2728 of 1964, Defendant Nomura Homki Kabushiki Kaisha
3. Tokyo District Court, Decided April 9, 1959, Case (Special Wa.) No. 222, Defendant Gosho Kabushiki Kaisha and six others
4. Tokyo District Court, Decided July 14, 1959, Case (Special Wa.) No. 71 of 1956, Defendant Kabushiki Kaisha Takahashi Aiji Shoten and five others
5. Kobe District Court, Decided February 25, 1961, Case (Wa) No. 401 of 1957, Defendant Sekiya Sangyo Kabushiki Kaisha and another.

3. Article 113-2 of, the Customs Law proscribes among other things filing false documents in an application for permission pursuant to Article 67 of the Customs Law to export merchandise from Japan. Violations of the said Article 113-2 may be punishable by an administrative

fine, in which event they would not come to the attention of the Ministry of Justice, and they may also be punishable through indictment and prosecution upon a complaint lodged by the Customs Authority.

[13a]

4. The following is the official interpretation given under authorization of the Ministry of Justice and coordination with the ministries concerned, of Article 27, Paragraph 1, Items (2) and (3), of the Foreign Exchange and Foreign Trade Control Law and of Article 113-2 of the Customs Law.

If in 1958 a Japanese exporter should have entered into a sale agreement with a United States purchaser calling for the exportation of merchandise to the United States which was subject to a MITI check price, but at a price less than the prescribed check price, and if the United States importer should have opened a letter of credit in the amount of the check price and the Japanese exporter presented an ostensible invoice in the amount of the check price in an application for a license to export the merchandise under the Foreign Exchange and Foreign Trade Control Law, and if after obtaining the license the Japanese exporter should have refunded or rebated in Japanese currency the difference between the check price and the sale price to the United States importer without a special license to do so, then such payment or rebate would have been in violation of Article 27, Paragraph 1, Item (1) or (2) and/or Article 45 of the Foreign Exchange and Foreign Trade Control Law if made directly to the United States importer in the United States or to the United States importer in Japan as an exchange non-resident and in violation of Article 27, Paragraph 1, Item (3) of the said Law if made to a Japanese resident (i.e. exchange resident) on behalf of the United States importer. In either event, such a violation is punishable, if subject to proof acceptable to the courts,

under the criminal provisions of Article 70 of the said Law. The filing of the application for an export permit under Article 67 of the Custom Law through the use of a purported invoice which misrepresented the sales

[14a]

price actually agreed upon between the Japanese exporter and the United States importer would also have been in violation of Article 113-2 of the Custom Law. The foregoing are the interpretations unanimously agreed upon between the Ministry of Justice and the affected administering ministries.

His search of the files of the Ministry of Justice had failed to reveal that any information was ever brought to the attention of the Ministry of Justice concerning the circumstances of the transaction which is in issue in the United States Customs Court under the title *Continental Forwarding Co.* v. *United States*, Reap. No. R58/23790.

[15a]

(TRANSLATION)

[Exhibit D-2]

MINISTRY OF INTERNATIONAL TRADE & INDUSTRY

Reply to Inquiry By Department of Justice of the United States of America

December 24, 1966

Export Business Section

1. The commodities referred to in Article 1 of the Export Trade Control Order are Cocom goods, goods under export ban such as narcotics, and goods the export of which should be controlled from various views such as stabilization of order in transactions.

   Accordingly, the requirements for obtaining an export license differ according to the respective reasons for control, and with regard to goods concerned with maintaining order in transactions, the requirements involving quantity, value and others as demanded are enforced respecting each item.

2. The general requirements as above mentioned were in force in 1958.

3. With respect to binoculars destined for export to the United States, screening was made in respect of requirements concerning quantity, value, etc., as deemed necessary from the viewpoint of maintenance of order in export transactions. The same type of requirements were in force with respect to other items which were under control from the same viewpoint.

4. Judgment of whether or not the price of the goods was appropriate was made on the bais [*sic*] of the price mentioned in the applications.

[16a]

5. Presentation of the export contract, letter of credit, etc. was required as evidence of the declared sale price. Additionally, since the export license of MITI was to be presented to the Customs House together with the invoice, certificate of method of payment and others, whether or not such price was the same as the sale price mentioned in other documents was checked also by the Customs House.
6. In order to deal with the approval of applications for export licenses on an objective basis, MITI prepared and used a sale price list which served as a standard for approval.
7. This list was generally known as the "check price" list.
8. The prices mentioned in said list were on an FOB basis but they were "prices" exclusive of packing charges.
9. The prices mentioned in said list covered all kinds of goods in respect of those of general specifications in which trading took place in quantity, but goods of special specifications or goods made to special orders were not included in said list.
10. The fact that price control was in force was made public, but the prices themselves were not published. However, in actuality, prices themselves were known, for in many cases, most of exporters had entered into export transaction agreements in accordance with the Import & Export Transactions Law, and such agreed prices and the prices in the

list were the same. Further, even parties not participating in such agreements also eventually learned of such prices through their own experience in filing applications for approval.

[17a]

11. The export section of each bureau in charge of the respective commodities took charge of such business. Binoculars were under the jurisdiction of the Heavy Industry Products Export Section.
12. The check price system was first adopted in 1951. Such was essentially decided at a meeting at which various sections concerned were assembled and was then carried into effect.
13. A minimum export price system was once in force in accordance with Article 28, Paragraph 2, of the Export & Import Transactions Law. The method thereof is the same as that under the Export Trade Control Order.
14. Article 48 of the Foreign Exchange & Foreign Trade Control Law provides that parties desiring to export goods of certain categories may be required to obtain approval by the Minister of International Trade & Industry. The Export Trade Control Order was established in compliance with the above provision. Article 1, Paragraph 1, of the above Order provides that when goods of certain categories as provided thereunder are to be exported, an approval of the Minister of International Trade & Industry is required to be obtained, and further, Paragraph 6 of the same Article provides that "the Minister of International Trade & Industry may not grant approval referred to in Paragraph 1 hereof, or may attach conditions to said approval when he deems such necessary for the maintenance of the balance of

international payments and sound development of foreign trade and national economy." Check price system was maintained pursuant to this provision.

15. The above decision was based on the interpretation of laws and regulations.

[18a]

16. It was considered that with respect to violations of orders in accordance with the provisions of the Foreign Exchange & Foreign Trade Control Law, the sanctions of Article 53 of said law or the penalty under Article 70 (Article 21) of the same law was applicable.

17. The above decision was based on the interpretation of the laws and regulations.

18. When respect to goods to which the check price system was applied, investigation was effected appropriately by imposing upon exporters the obligation to file reports of shipment and by obtaining reports through export associations.

19. Several suspicious cases turned up, but no sanctions were imposed due to insufficient evidence.

20. It was not because we thought that Article 53 was not applicable, but because it was extremely difficult to link by competent evidence the connection between the facts of payment of rebates or refund of a part of proceeds and the export of the goods concerned.

21. There were a few cases where approval of exports was refused, but no step for objection was ever taken.

22. We never referred violations of check price as such to the police or the Public Procurator's Office for criminal prosecution.

23. There was no such case charged as violation of check price. However, cirminal [*sic*] prosecution was effected in some cases under the charge of forgery of documents, illegal remittance, etc.

24. The purpose of the check price system lay primarily in the establishment of a stabilized order in export transactions, and it should not be considered that the

[19a]

same system attained its objective merely because of the flow of foreign currencies into Japan based upon the check prices.

25. If it is clearly evidenced that a part of the proceeds of sale was refunded, we are of the opinion that such a case violates the provisions of Articles 27, 45 or 48 of the Foreign Exchange & Foreign Trade Control Law, or the dispositions of orders in accordance therewith.

26. The acts to rebate in Yen a part of the proceeds of export of goods without obtaining a license under the Foreign Exchange & Foreign Trade Control Law is in violation of the purpose of Article 1 of the same law.

* * * * *

Letter from Hon. Robert S. Strauss, Office of the Special Representative for Trade Negotiations, to F. Togo, Ambassador Extraordinary, Embassy of Japan, dated May 20, 1977

THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS
WASHINGTON

May 20, 1977

His Excellency
Fumihiko Togo
Ambassador Extraordinary and
Plenipotentiary of Japan
Embassy of Japan
Washington, D.C.

Excellency:

I wish to confirm the following position of the Office of the Special Representative for Trade Negotiations in response to the concerns of the Government of Japan on the current investigation under Section 337 of the Tariff Act of 1930, as amended, and other pending issues on television receivers imported from certain firms in Japan expressed at the time of our recent negotiation:

In regard to the concerns of the Government of Japan on the current Section 337 investigation on television receivers imported from certain firms in Japan, I can assure the Government of Japan that the Office of the Special Representative for Trade Negotiations will urge the USITC to confine its investigation to allegations of practices that are clearly not within the scope of the Antidumping Act of 1921 and the countervailing duty law. I intend to convey to the USITC our view that those segments of the complaint which involve unresolved questions under those laws should be referred to the Treasury Department for further consideration should any further action be warranted by that Department.

In regard to the conspiracy and monopolization charges added to the complaint, the Department of Justice has stated in respect to this particular case that to hold the Japanese Government liable for sovereign conduct relating to normal policies involving domestic taxation, domestic investment and Japanese commerce, or to hold Japanese firms acting pursuant to governmental directives implementing such policies within sovereign Japanese territory, liable under Section 337, would raise serious problems of sovereign immunity, act of state and comity. With regard to the issue of predatory pricing, the Department of Justice is of the view that this issue is not separable from an antidumping complaint and is within the jurisdiction of the Treasury Department. I fully concur and will reiterate that opinion to the USITC.

It is our view that Section 337 investigations should not duplicate other existing remedies under law and should avoid any harassment that might occur to those parties under investigation. We strongly believe that the fostering of duplicative legal investigations by separate agencies was not the intent of the Congress under the Section 337 statute. I can further assure the Government of Japan that I will strongly urge the USITC to consider the adverse effect of this investigation in its current form upon the international trading relations of the United States, pointing out that the potential for harassment in such an investigation is clear and should be avoided.

I will recommend to the USITC that they limit their present investigation to matters not falling within the scope of the Antidumping Act and the countervailing duty law, and that if it would be determined that matters falling within those two statutes constitute necessary elements in a broader investigation of unfair practices, the USITC rely upon the determination of the Secretary of the Treasury to establish those particular unfair trade practices, rather than conduct a separate independent investigation on these matters.

We are deeply concerned about the ruling of the Customs Court that found, in Zenith Radio Corporation *v.* the United States, that the remission or rebate of consumption taxes by the Goverment of Japan on consumer electronic exports is a "bounty or grant" and that the Secretary of the Treasury should levy countervailing duties. The Department of Justice has already filed an appeal which will be pursued quickly and vigorously. I can assure you that it is the belief of the Executive Branch of the Government of the United States of America that the exemption or remission on exports by the Government of Japan of such domestic commodity taxes is in accord with international trading rules and that countervailing duties should not be applied because of such exemption or remission. Should it become necessary I would urge that the decision be appealed to the Supreme Court.

With respect to pending antidumping duties, the Treasury Department has assured me that it will make a special effort to liquidate promptly all entries on which appraisement has been withheld. In administering the antidumping law, the Treasury Department will attempt to resolve promptly all outstanding issues relating to the appraisement of exports from Japan in order to reduce uncertainty. We recognize that it is in the best interest of all parties to such action that this case be resolved expeditiously. The Treasury Department also has assured me that it will promptly inform the Government of Japan of any significant developments that may arise from such investigations. If requested, the Treasury Department will provide information on such developments and will receive any information that the Government of Japan wishes to provide. The Treasury Department will carry out these efforts in strict conformity with the international Antidumping Code.

Sincerely,

s/
Robert S. Strauss

Office of the Secretary, United States Department of Commerce, News Release, Re: Commerce Department Reaches Agreement on TV Import Cases

CONTACT: Dan Landa (202) 377-2253 G 80-79

FOR RELEASE MONDAY,
APRIL 28, 1980

COMMERCE DEPARTMENT REACHES
AGREEMENT ON TV IMPORT CASES

The Secretary of Commerce today announced that the Commerce Department and Treasury Department have reached agreement with all the major importers covering outstanding claims on television receivers imported from Japan prior to April 1, 1979. Under the terms of the agreements, the Commerce Department has agreed to drop claims for dumping duties. The Treasury Department has agreed that it will cease penalty investigations in preparation and not bring any formal charges.

If all importers agree to settlement, the Commerce and Treasury Departments will receive in excess of $75 million. Agreements already executed include settlement amounts in excess of $70 million. The Commerce and Treasury Departments accept these payments as settlement of Government claims; the companies pay the amounts in settlement but do not admit that dumping duties or penalties are owed.

As a part of these settlements, the Justice Department has agreed to terminate actions for collection of unpaid duty assessments, which were filed last year.

The agreements provide that the Commerce Department will insure that all future assessments of antidumping duties on television receivers are conducted on a timely basis, and that the importers will cooperate with the Commerce Department in submitting data and making information available for verification. With this cooperation, future reviews will be based upon the traditional procedures prescribed in the Trade Agreements Act, and not the Commodity Tax approach that was adopted by the Treasury Department in 1978 and 1979.

The Commerce Department will now transfer resources committed to the assessment backlog in the television dumping proceeding to the preparation of prompt future liquidations within the terms of the 1979 Trade Agreements Act.

No. 83-2004

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,
v.
ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
WEIL GOTSHAL & MANGES
New York, New York
Counsel for the Matsushita Petitioners

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
METZGER SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the Hitachi Petitioners

PETER J. GARTLAND
WENDER MURASE & WHITE
New York, New York
Counsel for the Sharp Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, New York
Counsel for the Mitsubishi Petitioners

DONALD J. ZOELLER
Counsel of Record
JOHN L. ALTIERI, JR.
HAROLD G. LEVISON
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7000
Counsel for the Toshiba Petitioners

DONALD F. TURNER
WILMER CUTLER & PICKERING
Washington, D.C.

HENRY T. REATH
DUANE MORRIS & HECKSCHER
Philadelphia, Pennsylvania
Counsel for the MELCO Petitioners

JAMES S. MORRIS
KEVIN R. KEATING
WHITMAN & RANSOM
New York, New York
Counsel for the Sanyo Petitioners

October 24, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

In an effort to discourage any meaningful analysis of their conspiracy claims, respondents have filled their brief with conclusory allegations, string citations to thousands of documents, and characterizations of what the record allegedly shows. This diversionary tactic, however, cannot obscure the fact that respondents seek to infer the alleged predatory export conspiracy from conduct that is indistinguishable from competition, that the alleged conspiracy makes no economic sense, and that there is no evidence in the record capable of satisfying this Court's conspiracy inference standards. (P. Br. 23-35).

Thus, as we show below (pp. 13-22, *infra*), despite respondents' attempt to convince this Court that there must be *some* documents hidden *somewhere* in the record which support their conspiracy claims, they are unable to point to any evidence capable of overcoming the following critical failures of proof which the district court found and the court of appeals did not question:

(i) there is no "direct evidence" of the "low price" export conspiracy alleged (Pet. App. 259a-260a, 621a);

(ii) there is no evidence showing any "connection" between the alleged price stabilization in Japan and defendants' exports to the United States (Pet. App. 421a-463a, 615a);

(iii) there is no evidence that defendants ever discussed among themselves their prices to United States customers (other than the Japanese Government-compelled *minimum* export prices) (Pet. App. 421a-422a, 613a);

(iv) there is no evidence that defendants sold at uniform prices or price levels in the United States; instead, the record shows that they sold at every price level ranging "from the lowest to the highest" (Pet. App. 476a n.202, 613a);

(v) there is no evidence of "any agreement among defendants concerning rebates" (Pet. App. 500a);

(vi) there is no evidence of an exchange of export price information or economic data relevant to the alleged "low price" export conspiracy (Pet. App. 421a-422a, 613a);

(vii) there is no evidence that the minimum "check prices" were used by defendants as "reference prices" (Pet. App. 327a-328a, 380a-381a);

(viii) there is no evidence that the "five-company rule" prevented defendants from registering the same United States import customers or registering their United States sales subsidiaries, which in turn sold to hundreds of other customers in the United States (Pet. App. 383a-385a);

(ix) there is no evidence of any mechanism to share profits and losses among the defendants (Pet. App. 483a, 615a-616a); and

(x) there is no evidence that defendants could have acquired or maintained the monopoly power necessary to recoup the "losses" which would have been generated by the alleged predatory export scheme (Pet. App. 484a).

It is because of these failures that respondents have been forced to construct their export conspiracy claims from conduct that mirrors competition. Unable to dispute that defendants sold their products in the United States at every price level, "ranging from the lowest to the highest" (Pet. App. 476a n.202), respondents argue that petitioners entered into a conspiracy to sell at "whatever price was necessary to make the sale." (Pet. App. 301a, 478a-479a & n.204). Under this theory, "variations in petitioners' pricing [become] immaterial" (R. Br. 69) and evidence that individual petitioners granted "secret rebates" and charged "low" competitive prices becomes evidence of conspiracy. (R. Br. 30-42). Respondents offer nothing to dispute that petitioners' alleged export pricing behavior was perfectly consistent with each petitioner's independent economic self-interest in entering and becoming established in the U.S. television market. Far from supporting an inference of an antitrust conspiracy, such conduct reflects vigorous competition.

Similarly, respondents' brief cannot cover up the economic implausibility of the alleged predatory export conspiracy. Faced with an undisputed record demonstrating that petitioners would not have had any hope of acquiring and maintaining the monopoly power necessary to recoup the "losses" which would have resulted from such a scheme (P. Br. 24-27), respondents' brief simply ignores this fundamental defect in their claims. No rational firm, however, would have a motive to pour money into a loss-generating, predatory export conspiracy unless there were some realistic possibility of recoupment through the exercise of monopoly power.

It is thus difficult to imagine a more compelling case for application of this Court's safeguards against speculative inferences of conspiracy. Although respondents seek to distinguish and limit *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), they are unable to avoid the commonsense principle underlying that decision, *i.e.*, that an antitrust conspiracy may not be inferred in the absence of "significant probative evidence" that defendants' conduct is rationally *more* explainable as the product of conspiracy than as independent action. *Cities Service*, 391 U.S. at 280. And, despite respondents' assertion that the court of appeals' decision "is fully consistent with" this Court's ruling in *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S. Ct. 1464 (1984) (R. Br. 82), they fail to identify *any* conspiracy inference standard applied by the court of appeals or to explain how evidence of export pricing "all over the lot" (Pet. App. 613a) which is indistinguishable from competition can "exclude the pos-

sibility of independent action." *Monsanto*, 104 S. Ct. at 1473.

Respondents also fail to advance any valid justification for the court of appeals' treatment of the Japanese Government-compelled export control arrangements as a "feature" of the alleged conspiracy. Disregarding the ruling of this Court in *United States v. Pink*, 315 U.S. 203 (1942), the court of appeals ignored the official representations of the Japanese Government that petitioners' participation in the export control arrangements was compelled by that Government as an integral part of its foreign trade policy. Respondents' assertions that the "Japanese government communications in this case . . . are entitled to no legal effect" (R. Br. 94), and that "[n]o 'compulsion' claim can be recognized as *bona fide*" in this case (R. Br. 91), invite precisely the type of judicial encroachment upon U.S. foreign policy that the sovereign compulsion and act of state doctrines are intended to prevent. (U.S. Gov. Br. 15-27).

For all of these reasons, respondents' brief only confirms that the decisions of the court of appeals should be reversed and that summary judgment should be reinstated. If summary judgment is to have any utility in antitrust conspiracy cases, it is essential that it be reinstated in a case like this, in which competitors are trying to use the antitrust laws to penalize price competition, the alleged conspiracy makes no economic sense, the district court has spent years reviewing all of the proffered evidence and found nothing to support respondents' allegations, and neither respondents nor the court of appeals have been able to point to any evidence which would satisfy this Court's conspiracy inference standards.

I. RESPONDENTS CANNOT JUSTIFY THE COURT OF APPEALS' FAILURE TO APPLY THIS COURT'S CONSPIRACY INFERENCE STANDARDS

In our opening brief (P. Br. 17-23), we demonstrated that the court of appeals refused to apply this Court's conspiracy inference standards, holding that the normal "limitations of the inference-drawing process" do not

apply to this case. (Pet. App. 165a). Respondents' brief does not dispute this point or identify *any* conspiracy inference standard applied by the court of appeals. Instead, respondents advance several alternative legal arguments in an effort to justify the court of appeals' decision.

First, respondents argue that this Court's decision in *Cities Service* is "inapposite" because it is a narrow and insignificant pronouncement which should be "limited to its particular and unusual facts." (R. Br. 72). *Second*, respondents argue that, even if *Cities Service* is apposite, the court of appeals' rulings on "motive" are "not inconsistent" with that decision. (R. Br. 74-81). *Third*, respondents argue that to the extent this Court's decision in *Monsanto* applies, the court of appeals' decision is "fully consistent" with *Monsanto*. (R. Br. 82). *Fourth*, respondents assert that the rule which permits a trial judge to determine on summary judgment that a requested inference of conspiracy is impermissible (the *Cities Service* standard) is somehow inconsistent with authority which permits a fact finder to choose between competing reasonable inferences. (R. Br. 67, 74 n.65). *Fifth*, respondents argue that a conspiracy may be inferred from the combination of petitioners' allegedly parallel export pricing behavior and other circumstantial evidence, even though such behavior is entirely consistent with the independent economic self-interest of each petiitoner. (R. Br. 82-85). *Finally*, respondents suggest that the court of appeals' failure to apply any conspiracy inference standard was proper because of the existence of "direct evidence" of certain "aspects" of the alleged conspiracy. (R. Br. 64). As we show below, all of these arguments are baseless.

1. *Cities Service.* This Court's decision in *Cities Service* was not some narrow ruling limited to its "particular and unusual facts." It was a basic statement of the need to guard against speculative antitrust conspiracy claims and a recognition that not every "antitrust

complaint setting forth a valid cause of action" warrants a trial. *Cities Service*, 391 U.S. at 290. The fundamental rule established in that decision—that participation in an antitrust conspiracy may not be inferred unless plaintiffs come forward with "significant probative evidence" that defendants' conduct is rationally *more* explainable as the product of a conspiracy than as independent action—is vitally important to prevent meritless antitrust conspiracy claims from burdening the parties and the judicial system with unnecessary trials. 391 U.S. at 280, 290.

Respondents' suggestion that the *Cities Service* safeguards should be relaxed in horizontal price-fixing cases brought by competitors (R. Br. 73-75) turns antitrust policy on its head. Application of the *Cities Service* conspiracy inference standard is unquestionably appropriate in horizontal price-fixing cases.[1] Indeed, it is nowhere more appropriate than in price-fixing cases in which competitors complain of *low pricing* by their rivals. *See* Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 35 (1984). Far from being ill-suited for summary judgment under established inference standards, cases premised on "low pricing" conduct which mirrors competition require the most stringent form of judicial scrutiny to ensure that the antitrust laws are not being misused by firms seeking shelter from the rigors of competition. (P. Br. 21-22 & n.12).[2] There is thus no more

[1] *See, e.g., Proctor v. State Farm Mutual Auto Insurance Co.*, 675 F.2d 308, 334 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982) (alleged horizontal fixing of insurance reimbursement rates); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (alleged horizontal fixing of interest rates).

[2] As recently explained by FTC Commissioner Terry Calvani, non-price predation by firms seeking to exclude or alter the aggressive pricing practices of their rivals, such as by filing burdensome litigation, is far more likely to occur than price predation, which is "costly" and "risky." Calvani, "Non-Price Predation: A New Antitrust Horizon," 5 Trade Reg. Rep. (CCH) ¶ 50,475 (July 9, 1985). Commissioner Calvani's remarks apply precisely to this case.

important situation in which to apply the principles recognized in *Cities Service* than in a "low price" conspiracy case such as this.

2. *Motive to Conspire.* Equally unavailing is respondents' assertion that the court of appeals' decision is "not inconsistent" with *Cities Service* because there is "extensive evidence" of petitioners' "motive" to conspire. (R. Br. 75-81). Neither respondents nor the court of appeals have pointed to *any* evidence capable of satisfying this crucial test.

Respondents assert that the record shows that petitioners had a motive to dispose of their "excess" manufacturing capacity and to do so at prices low enough to beat the competition. (R. Br. 77-78). But this is nothing more than a normal competitive motive for each petitioner to increase sales, not the required motive to enter into the alleged "low price" export conspiracy. *See United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 612 n.1 (1977) ("'increasing sales' and 'increasing market share' are normal business goals" not forbidden by the antitrust laws). The relevant question is not whether petitioners had *individual* motives to export to the United States to secure business, even at "low prices," but whether there is evidence that they had a motive to achieve their objectives through *concerted* predation. There is no such evidence in this case.

As petitioners have shown (P. Br. 24-26, 33), it would have been irrational for petitioners to have entered into the alleged predatory export conspiracy since the undisputed facts establish that there was no possibility that they could have acquired and maintained the monopoly power necessary to recoup the "losses" which would have been generated by such a scheme.[3] Respondents' brief

[3] It is undisputed that after more than twenty years of alleged predatory pricing, the *combined* sales of petitioners and former defendant Sony never exceeded a minority share of the U.S. television market. (Pet. App. 512a-513a, 644a). It is also undisputed that after all those years, Zenith and RCA still maintained their

does not dispute petitioners' inability to recoup through the exercise of monopoly power.

Respondents' only response to the economic illogic of their claim is to assert that petitioners have overlooked "the subsidization of petitioners' coordinated dumping in the United States made possible by their price-fixing in the Japanese market." (R. Br. 60). But we did not overlook respondents' subsidization theory; we demonstrated why it had no merit. (P. Br. 24-27, 33). As the Second Circuit pointed out in *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 88-89 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), the use of profits from one business or market to "subsidize" predatory pricing in another makes no economic sense unless there is a realistic possibility of earning "supranormal returns" in "the not-too-distant future." *Id.*

The irrationality of respondents' subsidization argument is further underscored by the undisputed absence of any evidence of an "administrative mechanism" to share profits and losses among the alleged conspirators. (Pet. App. 483a). Neither respondents nor the court of appeals attempt to explain why companies like Sanyo and Sharp, whose shares of Japanese exports to the United States were larger than their shares in Japan, would have had a rational motive to enter into a conspiracy in which they would be expected to absorb a major share of the alleged losses in the United States while earning only a small share of the alleged profits in Japan. (Pet. App. 616a).

---

dominant market positions. (Pet. App. 484a, 611a). Moreover, respondents have never come forward with any evidence of high barriers to entry in the highly competitive U.S. television market (Pet. App. 484a), or any explanation of how petitioners could have expected to acquire and maintain monopoly power, particularly when their exports to the United States would be perpetually vulnerable to the imposition of tariffs, quotas and other barriers to trade by the U.S. Government.

In sum, respondents have completely failed to demonstrate the rational motive to conspire which *Cities Service* requires in order to infer an antitrust conspiracy. The "motive" found by the court of appeals and relied upon by respondents amounts to nothing more than *individudl* motives by each petitioner to compete.[4]

3. *Monsanto.* Respondents' suggestion that *Monsanto* —but not *Cities Service*—may provide the appropriate inference standard does not advance their cause. (R. Br. 56, 63, 82). Respondents simply ignore the fact that both *Cities Service* and *Monsanto* embody the same fundamental concern with protecting against speculative inferences of conspiracy. (P. Br. 17-18, 20-23). Indeed, the decision in *Monsanto* expressly recognizes that courts must be particularly vigilant against speculative antitrust conspiracy claims in a case such as this, in which there is a threat that pro-competitive conduct (*i.e.*, the promotion of interbrand competition in *Monsanto*, and the charging of "low" prices here) may be penalized and deterred. *Monsanto*, 104 S. Ct. at 1470-71.

Nor is there any support for respondents' assertion that the court of appeals' decision is "fully consistent" with *Monsanto*. In *Monsanto*, the Court held that antitrust plaintiffs seeking to infer a conspiracy from marketplace behavior must adduce evidence that logically tends "to exclude the possibility of independent action." 104 S. Ct. at 1473. The court of appeals applied no such standard

---

[4] In addition to its logical invalidity, the factual predicate for the court of appeals' "motive" analysis has been effectively repudiated by respondents' brief. Apparently speculating that excess capacity was created *prior* to the alleged conspiracy, the court of appeals opined that such capacity would have provided petitioners with a motive to enter into the alleged scheme to export to the United States at low prices. (Pet. App. 176a-177a). Respondents, however, acknowledge that the alleged excess capacity was created in the 1960's and 1970's (R. Br. 76, 78, 80 n.67), *well after* the alleged formation of the conspiracy in the 1950's. (R. Br. 13).

and respondents' evidence of export pricing by petitioners at "whatever price was necessary to make the sale" cannot satisfy the *Monsanto* test.

4. *"Competing Inferences."* There is also no merit in respondents' contention that the "more probable" inference standard (established in *Cities Service*) conflicts with decisions holding it to be within the province of the fact finder to choose between competing *reasonable* inferences. (R. Br. 67, 74 n.65). The *Cities Service* standard simply recognizes that, on a motion for summary judgment, courts must determine whether a proffered inference of conspiracy could be found by the fact finder to be *more* probable than not, and hence one of the competing *reasonable* inferences that may be drawn. *Cities Service*, 391 U.S. at 280. As Judge Weinfeld explained in *Miller v. Schweickart*, 413 F. Supp. 1062 (S.D.N.Y. 1976):

> "[T]he inference to be drawn from an established fact must be left to the fact finder. But a precondition is that 'the inference, to qualify as a fact found, *must be reasonable*, and, in the context of the known facts, be one that springs readily and logically to mind and . . . *not one of two or more inferences, both or all of which are about equally probable.'"* *Id.* at 1066 (*quoting NLRB v. Gleason*, 534 F.2d 466, 474 (2d Cir. 1976) and citing *Cities Service*, 391 U.S. at 281-84) (emphasis added).

The inference of a predatory export conspiracy which respondents seek in this case is not supported by evidence which would enable a fact finder to conclude that it is more probable than not. Hence, it is not one of the competing *reasonable* inferences which a fact finder may draw.

5. *Conduct Contrary to Independent Economic Self-Interest.* Respondents also argue (R. Br. 82-88) that a fact finder should be permitted to infer the alleged conspiracy from the combination of petitioners' allegedly parallel export pricing activities and other circumstantial

evidence (such as meetings in Japan),[5] even though the alleged export pricing behavior was not contrary to each petitioner's independent economic self-interest. But, as the United States has explained, an antitrust conspiracy can be inferred from parallel marketplace behavior only if the conduct is "inconsistent with the independent competitive interests of the defendants and therefore unlikely to occur in the absence of collusion." (U.S. Gov. Br. 9). This is particularly true in a case such as this, in which the defendants' conduct mirrors competition, the alleged conspiracy is economically implausible, and a speculative inference of conspiracy would penalize and deter procompetitive behavior that benefits American consumers. (P. Br. 21-22).

The "contrary to independent economic self-interest" test is derived from economic logic and common sense. Under competitive conditions, each seller seeks to secure sales through unilateral decisions concerning output and price. This competitive process frequently results in "parallel" unilateral responses to prevailing market conditions.[6] In order to prevent parallel competitive actions from being treated as conspiratorial, therefore, the test

[5] It is well established that mere attendance at industry meetings and exchanges of general economic data are legitimate activities which do not support a permissible inference of an antitrust conspiracy. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975); *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 584-86 (1928) (exchanges of general industry information on costs, production and prices); *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 323, 334-35 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 460-65 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359-60 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) (attendance at industry meetings).

[6] *E.g., Weit v. Continental Illinois National Bank & Trust Co.*, 467 F. Supp. 197, 210-13 (N.D.Ill. 1978), *aff'd*, 641 F.2d 457, 462-63 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963).

requires plaintiffs to show that the challenged conduct would not be in the economic self-interest of each defendant if it acted independently, but would be in its self-interest if it participated in a conspiracy.

Neither respondents nor the court of appeals have shown that the alleged parallel export pricing behavior was in any way contrary to each petitioner's independent economic self-interest. For this reason alone, the decision of the court of appeals should be reversed.

6. *"Direct Evidence."* Despite respondents' contention that this is a "direct evidence" case, both courts below recognized this to be an *inference* case. (Pet. App. 165a-166a, 179a, 259a-260a). Respondents have never been able to point to, nor has the district court or the court of appeals ever found, any "direct evidence" of the predatory export conspiracy alleged. Rather, as respondents' brief makes clear (R. Br. 59, 64, 69), the so-called "direct evidence" upon which respondents rely relates only to two "aspects" of the alleged conspiracy (*i.e.*, alleged price stabilization in Japan and the Japanese Government-compelled *minimum* export prices and "five-company rule"). But neither of these "aspects" provides any support, direct or otherwise, for the actionable "low price" export conspiracy alleged. (P. Br. 19-20, 32-33, 34-35).

"Direct evidence" that petitioners allegedly agreed to stabilize prices in Japan (which would have been beneficial to them without regard to exports) does not directly or inferentially suggest that petitioners also agreed to enter into a predatory, "low price" export conspiracy. Nor does "direct evidence" that petitioners participated in the Japanese Government-compelled arrangements establishing *minimum* export prices directly or inferentially suggest that petitioners also formed a predatory conspiracy to *depress* export prices. Respondents' rhetorical argument that non-actionable conduct is somehow part of a broader "unitary" conspiracy does not provide the required logical or evidentiary basis for establishing that such a unitary conspiracy existed. (Pet. App. 463a, 616a).

II. RESPONDENTS HAVE FAILED TO ADDUCE ANY EVIDENCE CAPABLE OF SATISFYING THIS COURT'S CONSPIRACY INFERENCE STANDARDS

Respondents' extensive citations and conclusory allegations are an attempt to create the illusion that there are genuine issues of material fact which preclude summary judgment. But there are no such issues in this case. The district court carefully analyzed all of respondents' proffered evidence and concluded that it did not support their allegations of a predatory export conspiracy. (Pet. App. 243a-244a). The court of appeals did not disturb the factual predicates relied upon by the district court and did not base its reversal of summary judgment upon its disagreement over the admissibility of evidence. Rather, the court of appeals found a permissible inference of the alleged conspiracy because it disagreed with the district court over the proper legal standards to be applied and the permissible inferences which could be drawn under those standards.

In their brief, respondents reassert conclusory allegations which neither the district court nor the court of appeals accepted.[7] In doing so, respondents characterize their evidence as coming within the traditional type of circumstantial proof which courts have found to be probative in antitrust conspiracy cases, asserting that:

> "Circumstantial evidence of conspiracy traditionally recognized in antitrust cases has included evidence of (1) *'things actually done,'* such as parallel business behavior, other business behavior, or a course of dealing; [and] (2) *'an exchange of words,'* such as communications at meetings, telephone discussions or correspondence among competitors." (R. Br. 84).

---

[7] Respondents' predilection toward relying upon documents which "do not support the conclusory propositions for which they are cited" (Pet. App. 367a) was frequently criticized by the district court during its review of respondents' evidence (*e.g.*, "[a]s is so often the case, plaintiffs' FPS contains conclusory statements about what the evidence shows without support in the evidence itself" (Pet. App. 400a)). (*See also* Pet. App. 416a-417a, 442a).

But, as we show below, the record facts disclose neither "things actually done" nor any "exchange of words" by petitioners capable of satisfying this Court's conspiracy inference standards.

1. *"Things actually done."* Respondents point to evidence of "things actually done" which they contend supports their predatory export conspiracy claims. However, as the district court's careful analysis shows, the record does not disclose any conduct by petitioners in the U.S. market contrary to their independent economic self-interests, or in any other way probative of the alleged export conspiracy.

a. *Petitioners charged lower prices in the United States than in Japan.* (R. Br. 30-31). This evidence does not suggest conspiracy. Charging different prices in two different geographic markets with different supply, demand and other marketing conditions is precisely the behavior that would be expected as a result of competition, not conspiracy. (P. Br. 29). Indeed, respondents' experts have vehemently argued that competitive conditions in Japan and the United States differed dramatically (*e.g.*, Rec. 2291a-2323a, vol. 6) in a way which would naturally tend to cause prices to be higher in Japan than in the United States. Moreover, as the district court observed, petitioners had well-established brand names in Japan, but were unknown in this country when they began to compete against well-entrenched U.S. firms. (Pet. App. 479a, 610a). The charging of "lower prices," particularly by new entrants trying to establish themselves in a market, is precisely the result that competition would produce under such circumstances. (Pet. App. 478a-480a, 610a).

b. *Petitioners granted rebates and concealed those rebates from the authorities.* (R. Br. 31-53). Respondents' allegations that there is evidence of *collusive* rebating and concealment have been flatly rejected by the district court, and the court of appeals did not disturb those findings.

The district court expressly found, after reviewing all of respondents' rebating evidence (whether admissible or not) (Pet. App. 494a), that respondents "have been unable to adduce any direct evidence as to collusive activity by [petitioners] with respect to rebates, nor have they cited any facts to support their claim that [petitioners] adopted a common rebating strategy, or that there was any agreement among [petitioners] concerning rebates." (Pet. App. 500a). To the contrary, the district court found that respondents' own evidence showed that:

(i) "[t]he pattern of rebating was variegated, with at least 25 different rebating techniques considered or employed by various of the [petitioners]" (Pet. App. 612a);

(ii) "the prices at which various [products] were sold under the different rebate schemes were very different, . . . the amounts of rebates given by individual [petitioners] differed, and hence . . . the net prices charged by the individual [petitioners] were significantly different" (Pet. App. 612a-613a); and

(iii) "[d]espite [respondents'] contentions to the contrary, there is also no evidence that [petitioners] had knowledge of each other's rebates except insofar as they might have learned of them from an American customer using another Japanese [petitioner's] prices as a vehicle to extract a better bargain" (Pet. App. 613a).

The court of appeals did not question these findings. Rather, it concluded only that there was evidence which would permit a finding that various petitioners "engaged in various schemes to rebate part of the sales price to a number of mass marketing retail customers in the United States"; that efforts were made by individual manufacturers and importers "to conceal this activity both from MITI and from the United States Customs Service"; and

that "at least some of the [petitioners] knew that others were engaged in rebating but did not report it . . . ." (Pet. App. 179a).

Accordingly, when respondents' conclusory allegations are stripped away, all that remains is a record of *individual* secret rebating suggestive only of independent and competitive behavior.[8] As the district court correctly found, rebating to get the business and concealing that rebating from the authorities would have been in the independent economic self-interest of each petitioner and "sounds more in competition than in antitrust conspiracy." (Pet. App. 496a).[9]

c. *The "check prices" served as "reference prices."* (R. Br. 29). Neither the district court nor the court of appeals ever found any support for this allegation. As the district court pointed out: "[petitioners] are said to have sold above, at, and below the check price, but we are never told of the relationship between the check price and the actual price." (Pet. App. 265a). Indeed, the district court found a "total absence of evidence (or even of any credible theory)" to support respondents' "reference price" allegation, noting that "the actual prices

[8] In an effort to point to some evidence of rebating "collusion," respondents repeatedly cite documents which purportedly show discussions about rebates between individual Japanese television manufacturers and their "co-conspirators." (R. Br. 34, 38, 42, 45, 49-52). These so-called "co-conspirators," however, turn out to be U.S. customers, who were demanding secret rebates as part of the competitive process. (Pet. App. 495a n.219, 496a, 502a).

[9] Respondents' assertion that the alleged rebating violated other American and Japanese laws (R. Br. 15, 31-34, 44, 57, 61, 70) adds nothing to their claims of a conspiracy in violation of the U.S. antitrust laws. As the district court explained:

> "The question . . . is only whether or not [the acts complained of] give rise to an inference of conspiracy in violation of the Sherman Act, and not whether . . . [they] violate some other law, American or Japanese, which does not require proof of collusion." (Pet. App. 481a).

(and the rebates) were 'all over the lot' . . . ." (Pet. App. 613a; *see also* Pet. App. 259a).

Far from disagreeing with the district court on this issue, the court of appeals never even mentioned the possibility that the "check prices" could have served as "reference prices." This is not surprising, since the documents cited by respondents in support of their "reference price" allegation (R. Br. 29 n.37) show only that, despite their awareness of the "check prices," individual U.S. customers were bargaining for the lowest prices they could obtain from their Japanese suppliers.[10]

In short, the "check prices" were *minimum* prices and there is no evidence to suggest that they were "reference prices" in a "low price" predatory scheme.

d. *Petitioners' U.S. sales produced "losses."* (R. Br. 61, 81). Respondents fail to reply to the showing in our opening brief (P. Br. 29-30) that their alleged evidence of "losses" by *some* of the petitioners on *some* of their sales during their early years of entry into the U.S. television market (1967-70) would have been perfectly consistent with each petitioner's independent economic self-interest. (Pet. App. 481a-483a, 611a). Respondents' related contention that petitioners' American sales subsidiaries sustained "losses" (R. Br. 61) is equally unavailing and, indeed, was not even mentioned by the court of appeals. Respondents rely on taxable income figures which show that various of petitioners' sales subsidiaries lost money in certain years and made money in others and that some of these subsidiaries were successful and others were not. (Rec. 4171a-4173a, vol. 11). Indeed, according

[10] Respondents' evidence of sales below the check prices consists of nothing more than their evidence of rebates and, as the district court found, "there is no evidence of rebates for any sales other than those to private label or OEM purchasers." (Pet. App. 265a n.28; *see also* R. Br. 33). Thus, there is no evidence of sales below the check prices on petitioners' "branded products" (*i.e.*, those sold under their own name) which the district court described as constituting a "massive portion of [respondents'] case." (Pet. App. 265a n.28).

to respondents' own figures, Matsushita Electric Corporation of America, the sales subsidiary with by far the greatest amount of business in the United States, was also the most successful, realizing significant profits. (*Id.*). Such facts do not suggest a predatory conspiracy.

e. *The "five-company rule" served as a customer allocation device.* (R. Br. 25-26). As we showed in our opening brief (P. Br. 35), the district court found, and the court of appeals did not question, that respondents' own evidence demonstrated that: (i) such mass merchant retailers as Sears, J. C. Penney, W. T. Grant, Montgomery Ward and Western Auto were all supplied by two or more of the petitioners; (ii) the "five-company rule" did not limit the number of U.S. customers to whom petitioners' products could be resold; and (iii) most of the petitioners sold to hundreds of other customers in the United States through their American sales subsidiaries who were registered as one of their five direct customers. (Pet. App. 383a-385a). Unable to dispute that showing, respondents now speculate that the alleged allocation agreement must have permitted several of the largest mass merchant customers to have more than one Japanese supplier (R. Br. 71), while also leaving "room for [petitioners] to compete with each other for small accounts and local dealers that were not specifically allocated." (R. Br. 71 n.63). But respondents do not cite any *evidence* to show that such a "flexible" allocation agreement existed.

Even assuming, *arguendo,* that the "five-company rule" could nonetheless be found to have allocated U.S. customers among petitioners (as the court of appeals hypothesized), neither respondents nor the court of appeals have advanced any basis for *inferring* a predatory conspiracy from such an "allocation" scheme. Indeed, as the district court found, eliminating competition among petitioners for specific U.S. customers would have tended to *raise,* not lower, export prices. (Pet. App. 303a, 323a-326a, 601a).

2. *"Exchange of words."* Although respondents hint darkly throughout their brief that there was some "exchange of words" among petitioners suggestive of a predatory export conspiracy, they fail to cite a single document which would support such an allegation. Rather, as the district court concluded after carefully reviewing the entire record (admissible or not) (Pet. App. 422a), there is *no evidence* of any exchange "which refers or relates to the setting or coordination of export prices, the exchange of export price information relative to the claimed conspiracy, the impermissible dissemination of other export-related economic data, or any other aspect of the 'export' component of the 'unitary' conspiracy claimed by [respondents]." (Pet. App. 421a-422a, 606a-608a). The court of appeals never disturbed this finding. Although it referred to alleged conversations and exchanges of data as supporting a finding of collusive price stabilization *in Japan,* the court of appeals did not purport to find any evidence of "exchanged words" or information suggestive of the alleged predatory export conspiracy.[11]

Ultimately, respondents are reduced to referring to or quoting from statements by *non-petitioners* which are somehow characterized as exchanges of information among the petitioners themselves. For example, a non-petitioner Japanese trading company's internal memorandum, reporting to its management on the status of the U.S. Government's antidumping investigation (Rec.

---

[11] Respondents cite certain documents as allegedly supporting the claim that, at meetings of the Television Export Council, petitioners "discussed their United States prices, and agreed upon their United States pricing strategy." (R. Br. 27). The cited documents, however, show no such discussions or agreements. As the documents show on their face, the only price-related discussions pertained to minimum check prices required by the Government of Japan's export control arrangements. Similarly, documents cited to show exchanges of "export" information (R. Br. 22, 61) were found by the district court to relate either to *domestic* shipments or to *aggregate* export statistics with no individual company breakdowns of exports to the United States. (Pet. App. 418a, 421a-430a). Thus, the court of appeals never accepted any of these contentions.

6361a, vol. 15), is quoted in respondents' brief as proof of "*petitioners*' mutual awareness of each other's dilemma." (R. Br. 47) (emphasis added). Similarly, an internal memorandum by non-petitioner Sears, describing the conflicting information one of its employees received in separate conversations with two petitioner-suppliers, is characterized by respondents as proof that "Toshiba and Sanyo [were] devising a strategy through their joint customer, Sears . . . in furtherance of petitioners' conspiracy." (R. Br. 45). Here, once again, as the district court stated, "numerous documents do not support the conclusory propositions for which they are cited." (Pet. App. 367a).

3. *"Fragmenting."* Unable to adduce any evidence of acts or communications by petitioners which could permissibly support an inference of the predatory export conspiracy alleged, respondents seek to salvage their case by arguing that any effort to logically evaluate their mass of documentary materials under this Court's inference standards amounts to a "fragmenting" and "dismembering" of the alleged conspiracy in violation of the teaching of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962). (R. Br. 64-67). Respondents, however, are not objecting to fragmentation; they are objecting to *any* analysis of their claims.

Respondents have good reason to fear such analysis. For, taking all of their evidence together, as did the district court (Pet. App. 338a-343a, 621a), it is clear that there is no evidence of rational conspiratorial motive, conduct against independent economic self-interest, or anything else which would tend to support a reasonable and non-speculative inference of the predatory export conspiracy alleged. To the contrary, respondents' evidence, taken together, shows nothing more than hard competition by new entrants seeking to establish themselves in the United States market.[12]

---

[12] Nor can respondents circumvent this Court's conspiracy inference standards by relying upon the opinions of their economists that

Indeed, as respondents' brief illustrates, their approach is to simply assume that a conspiracy among petitioners must have existed, and then to speculate how the assumed conspiracy can be adapted to accommodate any evidence they find. Thus, according to respondents' reasoning, sales made by any petitioner at *any* price in the U.S. market—right up to the highest price level—were artificially low and predatory; prices that were "all over the lot" (Pet. App. 613a) were "parallel" and suggestive of conspiracy; and rebates on sales from Japanese television manufacturers to American television manufacturers (such as General Electric and Magnavox) were evidence that both the purchasers and the sellers were "co-conspirators" plotting the destruction of the U.S. television industry.[13] It is because respondents' case has always been a theory in search of supporting facts that it has constantly been amended and revised by respondents, causing them to describe it as "protean." (Pet. App. 266a).[14] It is for this same reason that respondents seek to rely upon string citations to non-probative materials, while invoking *Continental Ore* to avoid any analysis of what their evidence actually shows. *Continental Ore* pro-

---

the alleged conspiracy occurred. (R. Br. 62, 75-81). If respondents' evidence cannot pass muster under *Cities Service* and *Monsanto*, an expert's opinion based upon that same evidence must necessarily fail or else those standards would be rendered meaningless. *See United States v. Various Slot Machines*, 658 F.2d 697, 700-01 (9th Cir. 1981); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977). Indeed, the court of appeals affirmed the summary judgment in favor of defendant Sony because it concluded that the evidence against Sony was too "speculative" (Pet. App. 183a-185a), even though respondents' experts had opined that Sony was a participant in the alleged scheme. (Rec. 1746a-1761a, vol. 6).

[13] Respondents make this last charge notwithstanding the fact that NUE itself demanded and received secret rebates from Japanese suppliers. (Pet. App. 489a n.212, 495a n.219).

[14] For a discussion of the multiple variations of respondents' "protean" conspiracy theory, see the district court's opinion at Pet. App. 256a-268a.

vides no such exemption from this Court's conspiracy inference standards.

III. RESPONDENTS HAVE FAILED TO ADVANCE ANY VALID REASON FOR NOT APPLYING THE SOVEREIGN COMPULSION AND ACT OF STATE DOCTRINES TO THE JAPANESE GOVERNMENT-COMPELLED EXPORT CONTROL ARRANGEMENTS

Respondents do not dispute (or even discuss) the authorities cited by petitioners which establish that the act of state and sovereign compulsion doctrines prevent petitioners' Japanese Government-compelled participation in the export control arrangements from being treated as a "feature" of the alleged antitrust conspiracy. (P. Br. 38-44). Instead, respondents advance a series of arguments against applying these doctrines which are irrelevant, non-responsive or incorrect.

1. Respondents' assertion that petitioners may have merely been encouraged, rather than compelled, to participate in the export control arrangements (R. Br. 95-97) directly contradicts the official representations of the Government of Japan contained in the 1975 Japanese Government Statement. (P. Br. 36-38). Under this Court's decision in *United States v. Pink*, 315 U.S. 203, 218-21 (1942), such representations must be given "conclusive" effect. (P. Br. 38-41; U.S. Gov. Br. 22-23, 24-27). Respondents do not discuss the authorities which establish the conclusivity principle; they simply ignore them. But the conclusivity doctrine was formulated to prevent the very result that respondents seek here—a judicial inquiry into a foreign government's official pronouncement concerning its own sovereign acts, laws and policies.[15]

[15] Respondents' allegation that petitioners were not "compelled" because they were allegedly free to "withdraw" from the export control arrangements (R. Br. 96-97) has been refuted by the Government of Japan, which pointed out that if such a withdrawal had been attempted, petitioners would not have been permitted to export to the United States. (J. Gov. Br. 6).

2. There is similarly no merit in respondents' anomalous assertion that the court of appeals accepted the 1975 Japanese Government Statement "at face value." (R. Br. 89). The court of appeals completely disregarded the 1975 Japanese Government Statement, leading it to conclude that a fact finder could treat petitioners' participation in the export control arrangements as a "feature" of the alleged antitrust conspiracy. (Pet. App. 177a-178a, 188a-189a). Had the court of appeals accepted the 1975 Japanese Government Statement "at face value," as it should have, under its own analysis the sovereign compulsion doctrine would have applied. (Pet. App. 188a).

3. Respondents' attack upon the "specificity" and timeliness of the communications by the Japanese Government is also without foundation. Those communications clearly set forth the role of the Japanese Government in the establishment and implementation of the export control arrangements. (P. Br. 36-38). As the U.S. Government has stated, the "detailed" 1975 Japanese Government Statement:

> (i) "clearly establishes that the Japanese government both compelled petitioners to agree on minimum export prices for televisions and supervised implementation of those check price agreements" (U.S. Gov. Br. 25); and
>
> (ii) "affirmed that both the check price agreements and certain regulations of the Japan Machinery Exporters Association (which included the five-company rule) 'have come into existence pursuant to the direction of MITI.'" (U.S. Gov. Br. 24).

Although, as the Solicitor General has noted, the 1975 Japanese Government Statement did not expressly iden-

tify the particular part of those regulations embodying the "five-company rule," the Japanese Government has transmitted a Note Verbale to the State Department and to this Court in which "it stated unequivocally that it had compelled adoption of the five-company rule." (U.S. Gov. Br. 26 n.26). For this reason, the United States has urged this Court to treat this "clear, definitive statement of the Japanese government as dispositive on this point." (*Id.*).

There is also no merit to respondents' assertion that the Government of Japan's Note Verbale was not submitted in a timely fashion. (R. Br. 88). The Note Verbale was submitted by the Japanese Government in May 1984 in order to "express its deep concern" about the December 5, 1983 court of appeals ruling and to correct the court of appeals' mistaken view of the role of the Japanese Government in the export control arrangements. (J. Gov. Br. App. 1a-5a). The timely nature of the Note Verbale is confirmed by this Court's ruling in *Pink*, in which the Court afforded conclusive effect to a foreign government statement which was not made part of the record until *after* all of the lower court proceedings in the case had been concluded. 315 U.S. at 220-21.

4. Respondents' assertion that they are challenging conduct by petitioners *other* than that compelled by the Government of Japan, which conduct allegedly formed "a broader unlawful arrangement" (R. Br. 89-92), is of no significance in determining whether the sovereign compulsion and act of state doctrines should be applied to the specific conduct that *was* indisputably compelled by the Japanese Government (*i.e.*, petitioners' participation in the export control arrangements). (J. Gov. Br. 8). Such government-mandated behavior cannot be treated as a "feature" of an alleged antitrust violation, even though the violation is also alleged to have other aspects which are not government-compelled. *See United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965) (immunized conduct is not "illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.").[16]

Despite respondents' contentions to the contrary (R. Br. 89-90), petitioners *do not* claim that the sovereign compulsion and act of state doctrines shield from antitrust liability any larger unlawful scheme. Our position is that, if respondents wish to challenge a "broader" conspiracy premised on non-government-compelled conduct, they must adduce "significant probative evidence" of that broader scheme without relying upon the export control arrangements as the foundation for their claims.[17]

5. Respondents' attempt to characterize the export control arrangements as "[m]ere *commercial* acts" actionable under the antitrust laws (R. Br. 92-93) disregards both the nature of those arrangements and the applicable law. To the extent that a "commercial" exception to the act of state doctrine exists, that exception applies only to acts of a foreign government undertaken in its *proprietary* capacity, not to regulatory acts by a government undertaken pursuant to its foreign trade policies. *See, e.g., Braka v. Bancomer S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (exercise of sovereign regula-

---

[16] *Accord, City of Cleveland v. Cleveland Electric Illuminating Co.*, 734 F.2d 1157 (6th Cir.) (conduct immune from the antitrust laws under the *Noerr-Pennington* doctrine cannot be used as the basis for inferring a broader violation of the Sherman Act), *cert. denied*, 105 S. Ct. 253 (1984); *Bass v. Boston Five Cent Savings Bank*, 478 F. Supp. 741, 746 (D. Mass. 1979) ("that the [defendants] joined together for a lawful [immunized] purpose is not evidence that they joined together for an unlawful one. Therefore no inference may be drawn from the existence of such an agreement....").

[17] The various cases cited by respondents (R. Br. 90) do not suggest otherwise. For example, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702-07 (1962), this Court allowed the conduct at issue to be considered a feature of an antitrust conspiracy only *after* it had determined that the conduct at issue was *not* "compelled" by the Canadian Government or otherwise protected by the sovereign compulsion doctrine.

tory powers "trigger[s] no commercial exception").[18] A similar limitation on any "commercial" exception would apply *a fortiori* to the sovereign compulsion doctrine, whose very purpose is to protect private commercial behavior that is compelled pursuant to the policy of a foreign government.

The 1975 Japanese Government Statement and the Japanese Government's Note Verbale amply attest to the sovereign character of the export controls at issue here. (Pet. App. 9a-11a; J. Gov. Br. App. 2a-3a). As explained by the Japanese Government, "[o]ne of the fundamental attributes of national sovereignty is the conduct of foreign relations, including foreign economic and trade relations." (J. Gov. Br. 8). Indeed, nothing could intrude more "sharply" on the Government of Japan's "national nerves," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), than a determination by a U.S. court that Japanese Government-mandated export controls, imposed upon Japanese nationals, pursuant to Japan's foreign trade policies, may be found to be a "feature" of a violation of U.S. law. (J. Gov. Br. 8).

6. There also is no merit in respondents' contention that the sovereign compulsion and act of state doctrines should not apply to this case because the course of conduct alleged to be unlawful did not occur wholly within the territorial boundaries of Japan. (R. Br. 92-93). As the Government of Japan has stated, the export controls at issue involved "only [the Japanese Government's] control of the activity of its own nationals within its territory with respect to its own export trade." (J. Gov. Br. 7). The Japanese Government, no less than the United States Government, is entitled to restrain and control the

[18] *See also MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984) (regulation of imports and exports is a "sovereign prerogative" not within the commercial activity exception to the sovereign immunity doctrine).

exportation of goods from its own territory.[19] Such "control of foreign trade . . . involves a decision of a government acting within its own territory." *Van Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977).

7. Finally, if respondents' arguments concerning the sovereign compulsion and act of state doctrines were accepted, *all* export controls imposed on foreign companies by their governments as instruments of trade policy with the United States would be subject to private challenge under the U.S. antitrust laws. (P. Br. 44-46). As recognized by this Court's precedents, and as strongly urged by the Government of the United States and its principal trading partners as *amici curiae* in this case, such a judicial intrusion upon foreign trade policies would interfere with the Executive Branch's conduct of foreign relations and is precisely the type of action that the sovereign compulsion and act of state doctrines are designed to prevent. (U.S. Gov. Br. 16-20; J. Gov. Br. 8-10; Br. of Aust., Can., Fr. and U.K. 2-5).

IV. RESPONDENTS CANNOT DIVORCE THEIR 1916 ANTIDUMPING ACT CLAIMS FROM THE COURT OF APPEALS' ANTITRUST CONSPIRACY ANALYSIS

Respondents argue that they have presented sufficient evidence of predatory intent under the Antidumping Act of 1916, and that, regardless of this Court's disposition of the antitrust conspiracy issue, their "individual" Antidumping Act claims should survive. (R. Br. 97-98).[20]

[19] The United States, like Japan, exercises mandatory control over its exports in order to achieve foreign policy objectives. *See, e.g.*, Export Administration Act of 1979, *as amended*, 50 U.S.C.A. app. § 2401 *et seq.* (West Supp. 1985).

[20] In their attempt to resurrect their "individual" 1916 Act claims, respondents ignore the fact that, as noted by the district court, they have never attempted to show any injury or damages, apart from the alleged conspiracy, attributable to *individual* dumping by *individual* petitioners. (Pet. App. 652a, 653a n.396).

However, respondents disregard the fact that, as to both their conspiracy and *individual* 1916 Act claims, the court of appeals relied *exclusively* upon its erroneous antitrust conspiracy analysis in finding a genuine issue of material fact with respect to the specific predatory intent required under that statute. (P. Br. 46-47).

Respondents nonetheless argue that they have evidence of individual predatory intent which must be considered on remand. (R. Br. 97-98). No such remand is required. As we have shown, respondents' evidence of purported price differentials between national markets, concealment of rebates, and "losses" by petitioners (R. Br. 97-98) does not indicate anything other than normal competitive behavior in the individual economic self-interest of each petitioner. Similarly, respondents' putative evidence of "specific statements evincing an intention to restrain and monopolize the United States market or injure United States industry" (R. Br. 98) was carefully scrutinized by the district court, which concluded that these "statements," on their face, showed nothing more than a legitimate business objective to increase sales and engage in hard competition. (Pet. App. 463a-473a). The court of appeals did not disturb this finding. Accordingly, the district court's dismissal of respondents' 1916 Act claims (individual and conspiratorial) should be reinstated.

V. COMPELLING POLICY CONSIDERATIONS WARRANT REINSTATEMENT

Respondents close their brief with a plea for a remand to the court of appeals (rather than a reinstatement of summary judgment) in the event of reversal. Their sole justification is that the court of appeals reversed some evidentiary rulings by the district court and left other evidentiary issues open, thereby redefining the summary judgment record. (R. Br. 98). But that "redefinition" and those evidentiary issues are irrelevant to this Court's disposition of this case. The factual predicates relied upon by the court of appeals, following its admission of further evidence, add nothing to the facts

assumed by the district court and do not support a permissible inference of the predatory export conspiracy alleged.

As we have pointed out (P. Br. 6 n.4), the district court analyzed all of respondents' contentions about what the proffered evidence might show, consistently assumed the admissibility of respondents' key evidence, and found that none of the facts that any of the proffered evidence could support was sufficient to give rise to an inference of the alleged conspiracy. *There is not one reference in respondents' 99-page brief to a specific fact the significance of which was not analyzed by the district court in its exhaustive opinion.*

We recognize that this Court possesses broad discretion to decide whether to remand this case or to reinstate the district court's judgments. We respectfully submit that the most compelling considerations of public policy require the latter course. Respondents had a full and fair opportunity to conduct discovery and submitted all of their evidence in a documentary record which the district court likened to a complete "trial record." (Pet. App. 270a, 294a & n.56). After exhaustively reviewing this preclusive record for "months and months" (Pet. App. 255a), the district court concluded that, "notwithstanding all its sound and fury," this lawsuit contains "nothing which justifies . . . [it going to a] trial which will last a year or more, with countless untold further burdens and expense upon the parties, their counsel, and the court system." (Pet. App. 666a). Similarly, the Antitrust Division, after conducting its own "detailed review" of respondents' "best evidence," found "no evidence" to support respondents' charges. (Pet. App. 21a-23a).

After fifteen years, and after the massive effort expended by the district court, the interests of sound judicial administration require that this meritless litigation be brought to an end. Any other disposition would endanger consumer welfare by encouraging protectionist-minded competitors to use the antitrust laws to entangle

their rivals in enormously burdensome and costly litigation. It would also chill the conscientious application of Rule 56 in large antitrust cases that call most imperatively for its application, and strip away a vitally necessary tool of judicial administration at precisely the time when federal judges require the greatest flexibility in managing their caseloads.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the decisions of the court of appeals be reversed and that the judgments of the district court be reinstated.

October 24, 1985

Respectfully submitted,

DONALD J. ZOELLER
Counsel of Record

JOHN L. ALTIERI, JR.
HAROLD G. LEVISON
ROBERT A. JAFFE
ADRIAN H. VON HASSELL
BART TIMOTHY SCHECTMAN

MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
Tel.: (212) 510-7000

PATRICK T. RYAN

DRINKER BIDDLE & REATH
1100 Phila. Nat. Bank Bldg.
Philadelphia, Pa. 19107
Tel.: (215) 988-2700

Attorneys for Toshiba Corporation and Toshiba America, Inc.

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
MARTIN S. HYMAN
ELIZABETH A. JAFFE
JEFFREY P. BIALOS
LAURIE LINTON

WEIL GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
Tel.: (212) 310-8000

RAYMOND T. CULLEN

MORGAN LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, Pa. 19103
Tel.: (215) 963-5650

Attorneys for Matsushita Electric Industrial Co., Ltd.; Matsushita Electric Corporation of America; Matsushita Electric Trading Co.; and Matsushita Electronics Corporation

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
STEPHEN P. MURPHY
PAUL J. PANTANO, JR.

METZGER SHADYAC & SCHWARZ
1275 K Street, N.W.
Washington, D.C. 20005
Tel.: (202) 289-4520

CHARLES J. BLOOM

KLEINBARD, BELL & BRECKER
1550 United Engineers Bldg.
30 South 17th Street
Philadelphia, Pa. 19103
Tel.: (215) 568-2000

Attorneys for Hitachi, Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; and Hitachi Sales Corporation of America

JIRO MURASE
PETER J. GARTLAND
GENE Y. MATSUO
PETER A. DANKIN
LANCE GOTTHOFFER

WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022
Tel.: (212) 832-3333

MATTHEW J. BRODERICK

DECHERT PRICE & RHOADS
1500 Market Street
Philadelphia, Pa. 19102
Tel.: (215) 972-3400

Attorneys for Sharp Corporation and Sharp Electronics Corporation

Hoken S. Seki
David A. Dopsovic

Seki & Jarvis
520 Madison Avenue
New York, N.Y. 10022
Tel.: (212) 759-2303

Henry T. Reath
Frank A. Luchak
Judith N. Renzulli

Duane Morris & Heckscher
1500 One Franklin Plaza
Philadelphia, Pa. 19102
Tel.: (215) 854-6300

John T. Dolan
Arnold B. Calmann

Crummy, Del Deo, Dolan, Griffinger & Vecchione
Gateway One
Newark, N.J. 07102
Tel.: (201) 622-2235

Donald F. Turner

Wilmer Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 872-6000

Attorneys for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

Charles F. Schirmeister
Peter C. Williams

Reid & Priest
40 West 57th Street
New York, N.Y. 10019
Tel.: (212) 603-2000

Stephen W. Armstrong

Montgomery McCracken Walker & Rhoads
Three Parkway
Philadelphia, Pa. 19102
Tel.: (215) 563-0650

Attorneys for Mitsubishi Corporation and Mitsubishi International Corporation

James S. Morris
Kevin R. Keating
Michael S. Press

Whitman & Ransom
522 Fifth Avenue
New York, N.Y. 10036
Tel.: (212) 575-5800

Charles J. Bloom

Kleinbard, Bell & Brecker
1550 United Engineers Bldg.
30 South 17th Street
Philadelphia, Pa. 19103
Tel.: (215) 568-2000

Attorneys for Sanyo Electric Co., Ltd.; Sanyo Electric Trading Co., Ltd.; Sanyo Electric, Inc.; and Sanyo Manufacturing Corporation

(5)

No. 83-2004

In the Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF THE GOVERNMENT OF JAPAN AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

YOSHIO OKAWARA
Ambassador Extraordinary
Plenipotentiary of Japan
Embassy of Japan
2520 Massachusetts Ave., N.W.
Washington, D.C. 20008

STEPHEN M. SHAPIRO
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600
Counsel of Record for The Government of Japan

July 6, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners
v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.1 of the Rules of this Court, the Government of Japan respectfully moves for leave to file the attached brief as amicus curiae in support of the Petition for Writ of Certiorari filed herein. The Petition raises issues of great importance to the relationship between the United States and Japan, and the Japanese Government wishes to ensure that the Court is fully apprised of its views, as set forth in the attached amicus curiae brief. Petitioners have consented to the filing of this brief; respondents have not.

For the reason stated, and in the interest of strengthening bilateral relations between Japan and the United States, the Government of Japan requests that the Court receive and consider the attached brief.

Respectfully submitted,

STEPHEN M. SHAPIRO
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600
Counsel of Record for
The Government of Japan

July 6, 1984

QUESTIONS PRESENTED

The Government of Japan will address the following questions:

Whether a court of the United States may make a decision on foreign corporations' actions which were taken in foreign territory pursuant to directions given by the foreign government for the implementation of its important trade policy; and

Whether a duly issued statement of a foreign government, attesting that it directed its citizens to pursue certain conduct restricting export trade as an exercise of its sovereign power, may be disregarded by a court of the United States and, if not, whether that court may adjudicate the veracity of such a foreign government statement.

TABLE OF CONTENTS

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners
v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE GOVERNMENT OF JAPAN AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Government of Japan submits this brief as amicus curiae in support of the Petition for Writ of Certiorari which has been filed herein and wishes to inform the Court as follows:

INTEREST OF THE AMICUS CURIAE

In order to assure that Japanese exporting activity is carried on in as orderly a manner as possible, the Japanese Government has from time to time required Japanese nationals to enter into agreements and observe regulations restricting exports from Japan to the United States and elsewhere. In the instant case, the Japanese Government formally advised the District Court that such agreements and

regulations, challenged in this proceeding, were required by the Government of Japan, pursuant to Japanese law, as an exercise of Japan's sovereign regulatory power over Japanese exports. On appeal, the Court of Appeals disregarded the Japanese Government's Statement and questioned whether the export agreements and regulations in fact originated with the Japanese Government.

The Court of Appeals, by taking the position as stated above, determined in effect that conduct by Japanese nationals restricting Japanese exports, undertaken within Japanese territory pursuant to the direction of the Japanese Government, may constitute or be a "feature" of a violation of the United States antitrust laws, and may be considered as such by an American finder of fact in determining whether to subject those Japanese nationals to the punitive remedy of treble damages and an injunction. Such a result would, in effect, penalize these Japanese defendants for the sovereign acts of their government and would adversely affect the smooth implementation of Japan's trade policy. The Government of Japan is deeply interested in the prompt and proper resolution of this matter.

STATEMENT

The Ministry of International Trade and Industry, an agency of the Japanese Government, which is empowered and responsible for the implementation and enforcement of the basic international trade policies of Japan under Japanese law, including the Law Concerning the Establishment of the Ministry of Foreign Trade and Industry, the Foreign Exchange and Foreign Trade Control Law, and the Export and Import Transaction Law, has directed Japanese manufacturers and exporters to enter into agreements and to

adopt and observe regulations controlling and limiting the price, quantity or other terms and conditions of exports from Japan to certain foreign markets. The agreements and regulations relating to the exportation of radios (1958-1973), television receivers (1963-1973), and tape recorders (1965-1967), came into existence pursuant to the above direction.

In 1975, after becoming aware of the lawsuits filed by National Union Electric Corporation and Zenith Radio Corporation against a number of Japanese consumer electronic product manufacturers and exporters under the United States antitrust and antidumping laws, lawsuits which directly challenged the agreements and regulations concerning the consumer electronic products described above, the Government of Japan transmitted a formal statement to the United States District Court for the Eastern District of Pennsylvania. (App. *infra*, 5a-16a).[1] That statement, certified directly to the District Court in 1980 by the Ambassador of Japan as amicus curiae (*id.* at 15a-16a), is a matter of record in this proceeding.

In its 1975 Statement, the Japanese Government clearly established that the agreements and regulations concerning the exportation of television receivers from Japan, which were in effect from 1963 to 1973, came into existence pursuant to the direction of the Government of Japan in order to assure the orderly development of Japan's export trade, and that those agreements and regulations constituted an integral aspect of the foreign economic and trade policy of the Japanese Government. (App. *infra*, 12a-13a). In March of 1981, the District Court granted summary judgment for the defendants in all respects

[1] "App." refers to the Appendix attached to this brief.

because it found no evidence from which the alleged conspiracy to fix low export prices could be found or inferred.

On December 5, 1983, the United States Court of Appeals for the Third Circuit, never mentioning the 1975 Statement of the Government of Japan and disregarding its contents, reversed and remanded the case for trial. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3921 (June 7, 1984) (No. 83-2004). The Court of Appeals held that there was some doubt as to whether the minimum export prices and customer registration requirements (the so-called "five-company rule"), which were the subject of the agreements and regulations, had, in fact, been determined by the Japanese Government and remanded the case for trial. *Id.* at 315. The Court of Appeals stated that those agreements and regulations may only have been sponsored or "encouraged" by the Japanese Government, *id.* at 310, and that at trial the finder of fact could conclude that the Japanese Government's export control arrangements "merely provided an umbrella under which the defendants . . . fixed their own export prices." *Id.* at 315. This decision directly contradicted the 1975 Japanese Government Statement.

DISCUSSION

As declared in the 1975 Japanese Government Statement and in the diplomatic Note Verbale transmitted to the United States Government in May of 1984 (App. *infra*, 1a-4a), the Japanese Government hereby reaffirms that the export activities of the defendants, which the Court of Appeals cited as a "feature" of the alleged conspiracy to sell television

receivers at predatory low prices, were specifically required and comprehensively supervised by the Japanese Government to effectuate its foreign economic and trade policies. The Court of Appeals' conclusion that "there is no record evidence suggesting that the five-company rule originated with the Japanese Government," 723 F.2d at 315, and that there is some doubt whether the minimum export prices "were in fact determined by the Japanese Government," *ibid.*, is directly contradicted by the plain language of the 1975 Statement of the Government of Japan.

One of the fundamental characteristics of national sovereignty is the conduct of foreign relations, including foreign economic and trade relations. The Government of Japan, like the Government of the United States, is entitled to exercise its sovereignty in this regard according to its own law and policy, particularly when its exercise involves only control of Japanese nationals' activity within Japanese territory, with respect to Japan's export trade. The Court of Appeals' conclusion that there are triable issues of fact concerning the role of the Japanese Government in directing and effectuating the export control agreements and regulations, 723 F.2d at 310, 315, and that those export controls might be found to constitute or be a "feature" of the alleged conspiracy, *id.* at 305-306, directly contradicts the 1975 Statement of the Japanese Government.

It is the position of the Japanese Government that the formal representations of foreign governments concerning their sovereign acts are to be given conclusive effect, and that when the exercise of a state's sovereignty involves only control of the activity of its own nationals within its territory, with respect to

its own export trade, foreign governments and foreign courts should not question or punish such activity. Therefore, business conduct by Japanese nationals pursued within Japanese territory relating to Japanese exports and required by the Japanese Government can neither constitute nor be considered by American courts and juries as a "feature" of an alleged unlawful antitrust conspiracy.

CONCLUSION

The Government of Japan wishes to ensure that the Court is fully apprised of its view that the decision of the Court of Appeals raises most serious questions and may directly affect the future economic and trade relations between our countries. For the reasons stated, and in the interest of close bilateral economic relations between the United States and Japan, the Government of Japan respectfully requests that the Petition for Writ of Certiorari filed herein be granted in order that the contents of the 1975 Statement of the Government of Japan and the attached Note Verbale may be given proper consideration, consideration which was totally absent in the Court of Appeals' decision.[2]

Respectfully submitted.

YOSHIO OKAWARA
Ambassador Extraordinary
Plenipotentiary of Japan
Embassy of Japan
2520 Massachusetts Ave., N.W.
Washington, D.C. 20008

STEPHEN M. SHAPIRO
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600
Counsel of Record for The Government of Japan

July 6, 1984

---

[2] The Court may wish to request the views of the United States concerning the questions discussed in this brief amicus curiae.

APPENDIX

APPENDIX

EMBASSY OF JAPAN
WASHINGTON

May 29, 1984

Note Verbale

E-43

The Embassy of Japan presents its compliments to the Department of State, and, with reference to the decision of December 5, 1983, by the United States Court of Appeals for the Third Judicial Circuit, in *IN Re: Japanese Electronic Products Antitrust Litigation* (D.C. MDL. No. 189), has the honor to state the views of the Government of Japan on this subject as follows:

1. The Government of Japan has possessed a keen interest in this case, not only because it is highly questionable that a United States court should make a decision on Japanese corporations' actions which were taken within Japanese territory pursuant to the directions given by the Government of Japan for the implementation of its important trade policy, but also because a decision of U.S. court on this case could seriously hamper the smooth execution of the trade policy of the Japanese Government.

The Government of Japan wishes to express its deep concern for the above-mentioned U.S. court decision of December 5, 1983, and to clarify its position regarding the decision. The Japanese Government also requests the Government of the United States to lend its kind cooperation as stated in paragraph 4 below from the viewpoint of developing further the amicable, cooperative trade relations between Japan and the United States.

2. In connection with the proceedings of this case, the Government of Japan transmitted a formal Statement in April, 1975, to the Federal District Court for the Eastern District of Pennsylvania through the Embassy of Japan and the U.S. Department of State. The Statement established the fact that the price agreements among certain Japanese manufacturers of consumer electronic products and the regulations on registration of related distributors by the Japan Machinery Exporters Association (hereinafter referred to as "JMEA") in question came into existence pursuant to the mandatory directions given by the Government of Japan in accordance with the Export and Import Transaction Law and the Foreign Exchange and Foreign Trade Control Law.

Despite the transmission of the said Statement by the Government of Japan, the Court of Appeals, in its decision, made no reference to the Statement, or the related supplementary documents transmitted thereafter, and seemed to question the above-mentioned fact confirmed in the Statement by the Government of Japan.

The Government of Japan hereby reaffirms that, by entering into minimum price agreements with respect to export of television receivers and by adopting the JMEA regulations (including the so-called "five-company rule", which, among other things, served to control the quality of exported products), the Japanese corporations in question were acting pursuant to specific mandatory directions of the Government of Japan, and also that the Television Export Council, the Television Export Examination Committee and the Television Division of the JMEA were established, pursuant to the directions of the

Government of Japan, for carrying out and administering those agreements and regulations.

3. Moreover, the decision, of the Court of Appeals is not consistent with the view of the Antitrust Division of the United States Department of Justice that the agreements and regulations, as ordered by the Government of Japan, would not give rise to violations of United States law. Such view was expressed, for example, in the letter of answer from Mr. Donald I. Baker (then Assistant Attorney General, Antitrust Division) to Senator Edward M. Kennedy (then Chairman of Subcommittee on Administrative Practice and Procedure) dated February 16, 1977. The decision is also inconsistent with the policy of the Antitrust Division that international comity should be taken into account in applying U.S. antitrust law.

Therefore, if the Japanese firms in question should be held liable, it means imposing improper penalties on those who followed the directions of the Government of Japan and contributed to prevent "torrential increase" of exports into the United States. They have, in fact, already been improperly penalized by the action itself. Besides, this unfortunate situation could very well create extensive feelings of frustration among the Japanese public.

4. The decision of the Court of Appeals, which has considerably increased uncertainty in the trade relations between Japan and the United States, needs to be reviewed promptly by the United States Supreme Court. The Government of Japan understands that the defendants in the proceeding will file a joint petition for *certiorari* on or before June 7, 1984.

The Government of Japan expects that the Government of the United States fully understands the

position and concerns of the Government of Japan as stated above, and, requests the Government of the United States to file an *amicus curiae brief* before the United States Supreme Court in order to secure a proper conclusion by the Supreme Court, and also request it to take all other appropriate measures for the solution of this unfortunate situation.

The Embassy of Japan avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Letter From the Department of State to the United States District Court for the Eastern District of Pennsylvania, June 9, 1975

Department of State
Washington, D.C.

June 9, 1975

Clerk
United States District Court
U.S. District Court House
9th and Market Street
Philadelphia, Pennsylvania 19107

Dear Sir:

The Embassy of Japan has requested in a diplomatic note that the Department of State transfer to the court a statement of the Ministry of International Trade and Industry (MITI) of the Government of Japan in connection with two cases before the court, namely, *National Union Electronic Corp.* v. *Matsushita Electric Industrial Co., Ltd. et al.* (Civil Action *No. 74-3247*) *and Zenith Radio Corp.* v. *Matsushita Electric Co., Ltd. et al.* (Civil Action *No. 74-2451*). Copies of MITI's statement and the diplomatic note received from the Japanese Embassy are enclosed.

In carrying out this request of the Embassy of Japan, neither the Department of State nor the United States Government takes any position on the content of the statement or on any other aspect of the litigation in question.

Sincerely,

/s/ *Phillip R. Trimble*
Phillip R. Trimble
Assistant Legal Adviser for
Economic and Business Affairs

Enclosures:

(1) Statement of the Japanese Ministry of International Trade and Industry

(2) Diplomatic Note from the Embassy of Japan dated April 25, 1975.

Letter From the Embassy of Japan to the Department of State, April 25, 1975

April 25, 1975

E-21

The Embassy of Japan presents its compliments to the Department of State and has the honor to ask the latter to transfer to the United States District Court for Eastern District of Pennsylvania the attached statement concerning the two lawsuits between National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd. et al. (Civil Action No. 74-3247); and Zenith Radio Corporation v. Matsushita Electric Co., Ltd. et al. (Civil Action No. 74-2451).

Attachment

Statement of the Ministry of International Trade and Industry (MITI Statement)

The Ministry of International Trade and Industry of the Japanese Government ("MITI") has become aware that a number of Japanese television manufacturers and exporters are being sued by National Union Electric Corporation and Zenith Radio Corporation in the United States District Court for the Eastern District of Pennsylvania for alleged violations of various United States antitrust and antidumping laws in connection with their sales of television sets for export to the United States. (National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd., et al., Civil Action No. 74-3247 and Zenith Radio Corporation v. Matsushita Electric Co., Ltd., et al., Civil Action No. 74-2451.) In these lawsuits, questions have been raised concerning certain agreements entered into among the Japanese defendants, as well as certain regulations of the Japan Machinery Exporters Association, both such agreements and regulations have come into existence pursuant to the direction of MITI.

MITI has the honor to express its deep interest and serious concern regarding these lawsuits which involve issues related to its foreign trade policy and to call your attention to the following:

1. In order that Japanese exports do not cause unnecessary disruptions in the national economies of Japan's trading partners, one of the basic trade policies is to assure that Japanese exporting is carried on in as orderly a manner as possible. MITI is the government organ empowered and responsible for the detailed implementation of the said basic trade policy.

Thus, Article 3 of the Law Concerning the Establishment of MITI (Law No. 275, 1952) sets forth the following administrative activities as being under the responsibility of MITI:

(1) Promotion and adjustment of international trade and control of foreign exchange relating to international trade (Article 3, Paragraph 1);

(2) Promotion of international cooperation in international trade and economic relations (Article 3, Paragraph 1-2).

Further, Article 4 of the Establishment Law defines the role of MITI as follows:

(1) Planning and programing of basic policies concerning production, distribution, consumption, trading, etc. of goods (included is electric power) under its jurisdiction (Article 4, Sub-section 1, Paragraph 13);

(2) To export and import (Article 4, Sub-section 1, Paragraph 16);

(3) To restrict or prohibit export or import (Article 4, Sub-section 1, Paragraph 17);

(4) To take the steps necessary to execute agreements and arrangements concerning international trade (Article 4, Sub-section 1, Paragraph 18);

(5) To prohibit or restrict transactions, etc. in foreign exchange relating to international trade (Article 4, Sub-section 1, Paragraph 20);

(6) To sanction exporters' agreements, importers' agreements and agreements of either

manufacturers or distributors concerning export products, to sanction matters to be complied with members of export associations or import associations (hereinafter referred to as "Association Regulations"), to sanction collective agreements among the said members and matters to be complied with members of export-import associations, and to supervise designated agencies. (Article 4, Sub-section 1, Paragraph 24);

(7) To exercise such powers, other than those mentioned in the above items, as are placed under the jurisdiction of MITI by law (including orders issued thereunder) (Article 4, Sub-section 1, Paragraph 51).

2. Endowed with the said responsibilities and powers, MITI has developed under the law two basic procedures to achieve the aims of trade policy of the Government of Japan. The first procedure relates to MITI's regulatory powers provided for under the Export and Import Trading Law (Law No. 299, 1952) and the second relates to regulatory powers under the Foreign Exchange and Foreign Trade Control Law (Law No. 228, 1949). The purpose of the Export and Import Trading Law is to promote the sound development of foreign trade by preventing unfair export trading and by establishing an orderly system for export and import trading. The purpose of the Foreign Exchange and Foreign Trade Control Law is to promote the proper development of foreign trade by providing for the control of foreign exchange, foreign trade and other foreign transactions.

In order to promote the sound development of foreign trade MITI applies both laws as follows: If

some measures are deemed necessary to achieve the purposes mentioned above, MITI will generally first direct the relevant Japanese industry or trade association to enter into Arrangements (which include both manufacturers' agreements and association regulations) pursuant to the Export and Import Trading Law.

Where this procedure is deemed to be insufficient for the purpose of achieving these trade policy objectives (for example, where there is insufficient time to complete the contemplated arrangements), MITI will exercise its powers provided for in the Export Trade Control Order (Cabinet Order No. 378, 1949) under the Foreign Exchange and Foreign Trade Control Law, without prior direction to the industry or trade associations to enter into such Arrangements.

As stated above, such Arrangements concluded under the Export and Import Trade Law and carried out under the direction of the Minister of International Trade and Industry in order to assure orderly Japanese exportation activities are the actual implementation of MITI's trade policy itself. And since such direction by MITI, if disregarded, can be enforced by the power pursuant to the said Cabinet Order, it has in fact a compulsory power equivalent to law.

Once MITI has decided upon the trade policy measures to be taken and has directed the establishment of appropriate Arrangements under the Export and Import Trading Law for this purpose, the Japanese industries involved have in fact no alternative but to establish them. Therefore the Arrangements entered into under the Export and Import Trading Law in compliance with the direction of MITI are not private

agreements in effect and are no less than the implementation of the foreign trade policy of MITI, despite their form as agreements made among private parties.

3. With respect to the export of television sets to the United States, in 1962 MITI accurately recognized, in view of the importance of televisions as one of Japan's export products, the need for assuring their orderly exportation to avoid the possibility of trade conflicts.

Thus, MITI directed Japanese television manufacturers including the present Japanese defendants to enter into an agreement under Article 5-3 of the Export and Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States, and further, directed the exporters to establish a new regulation to be observed by the members of the export association with respect to filing of export prices and other related matters, pursuant to the association's functions under Article 11, Sub-paragraph 2 of the same law regarding the same exports. MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected. Such direction and supervision concerning minimum prices at which televisions could be sold for exportation to the United States and other matters were exercised continuously from 1963 until February 28, 1973 when such exporting arrangements were terminated.

4. Had the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the

Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy.

Therefore, when MITI decided the above-mentioned policy with respect to such sales and directed the television manufacturers and exporters to conclude, under the Export and Import Trade Law, such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction.

Certification by the Embassy of Japan, April 23, 1979

EMBASSY OF JAPAN
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008
(202) 234-2266 April 23, 1979

I Toshihiko Tanabe, Counselor, Embassy of Japan, hereby certify that the attached document is a true and correct copy of the official statement that was transmitted by the Embassy of Japan to the Department of State on April 25, 1975.

/s/ *T. Tanabe*
Toshihiko Tanabe
Counselor
Embassy of Japan
Washington, D.C.
April 23, 1979

Letter from the Embassy of Japan to the United States District Court for the Eastern District of Pennsylvania, July 11, 1980

EMBASSY OF JAPAN
WASHINGTON, D.C.

July 11, 1980

The Honorable
Edward R. Becker
United States District Court
for the Eastern District of Pennsylvania
United States Courthouse
601 Market Street
Room 16614
Philadelphia, Pennsylvania 19106

Dear Sir:

I have the honor, on behalf of the Government of Japan, to inform you, Sir, of the views of the Government of Japan as *amicus curiae* in reference to the proceedings IN RE: Japanese Electronics Products Antitrust Litigation, M.D.L. 189.

This letter is to certify and reaffirm that the Ministry of International Trade and Industry ("MITI") has been, since at least 1960, and continues to be the government organ empowered and responsible for the detailed implementation of the basic trade policies of the Japanese Government.

As such, MITI was and is empowered and authorized to act for the Government of Japan in making the statement as attached to the Note Verbale dated April 25, 1975 which was delivered to the Depart-

ment of State of the United States by the Embassy of Japan.

Accept, Sir, the assurances of my highest consideration.

Sincerely yours,

/s/ *Yoshio Okawara*
Yoshio Okawara
Ambassador Extraordinary
Plenipotentiary of Japan

MOTION FILED

JUL 7 1984

No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

On a Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Third Circuit

MOTION OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ROBERT HERZSTEIN
Counsel of Record
LAWRENCE A. SCHNEIDER
HADRIAN R. KATZ
STEPHAN E. BECKER
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700
Counsel for American Association of Exporters and Importers and Consumers for World Trade

July 7, 1984

PANDICK WASHINGTON, D.C.—1801 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-6000

No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

**On a Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Third Circuit**

MOTION OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, the American Association of Exporters and Importers ("AAEI") and Consumers for World Trade ("CWT") respectfully move for leave to file the accompanying brief as *amici curiae*. Petitioners have consented to the filing of this brief; respondents have not.

INTEREST OF AAEI AND CWT

AAEI represents the interests of nearly 1,400 United States companies nationwide, and is the only organization in the country specifically representing the interests of exporters and importers. Member companies sell a broad range of products, including electronics, chemicals, machinery, textiles and apparel, footwear, food, and automobiles. AAEI members also include businesses serving the trade community, such as customs brokers, freight forwarders, air and shipping lines, banks, and insurance firms. The promotion of fair and open world trade has been the primary mission of AAEI for the entire 62 years of its existence. For the reasons set forth below and in the accompanying brief, AAEI is concerned that the decision below threatens to create a new and substantial barrier to free international trade, thereby threatening the business of AAEI members.

CWT is a national, nonprofit association devoted to promoting free international trade for the economic benefit of consumers in the United States and worldwide. CWT is a leading spokesman for the interests of consumers in opposing trade restraints such as those created by the decision below.

AAEI and CWT have direct and substantial interests in the preservation of free and open markets in which importers may sell high-quality goods to consumers at reasonable prices. To this end, they have consistently opposed policies which erect protectionist trade barriers that threaten to deny to importers the ability to compete, and to American consumers the benefits of unfettered interbrand competition.

In submitting the accompanying brief supporting the petition for a writ of certiorari, AAEI and CWT emphasize that they have no direct interest in the outcome of this litigation. However, they believe that the issues raised by the decision of the Court of Appeals for the Third Circuit are of such overriding importance to importers and consumers that they require review by this Court. The fundamental purpose of the antitrust laws is to foster and promote price competition for the benefit of consumers. Yet the decision below—by permitting U.S.

producers to pursue burdensome antitrust claims against foreign producers because the latter are selling in the United States at *low* prices—would inevitably tend to inhibit price competition. The accompanying brief addresses the concern of AAEI and CWT over the potential misuse of the antitrust laws for protectionist purposes permitted by the lower court's decision. We submit that AAEI and CWT are in a better position than the petitioners or any other party to set forth the significance of the decision below upon importers generally and upon consumers.

AAEI and CWT therefore move for leave to file the accompanying brief as *amici curiae.*

Respectfully submitted,

ROBERT HERZSTEIN
Counsel of Record

LAWRENCE A. SCHNEIDER
HADRIAN R. KATZ
STEPHAN E. BECKER

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

Counsel for American Association of Exporters and Importers and Consumers for World Trade

July 7, 1984

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 36 of the Rules of this Court, the American Association of Exporters and Importers ("AAEI") and Consumers for World Trade ("CWT") respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

INTRODUCTION

In this lawsuit, two domestic manufacturers have accused an entire foreign industry of engaging in a twenty-year conspiracy to destroy the American consumer electronic products industries by setting parallel low prices in the United States in violation of the antitrust laws. AAEI and CWT submit that it would be extremely harmful to the interests of importers and consumers, as well as contrary to established judicial interpretation, if low pricing—*i.e.*, behavior entirely consistent with unrestrained price competition—was deemed evidence of an antitrust conspiracy.

The decision below departs from established Supreme Court authority and threatens to deter foreign producers from engaging in the very conduct that the antitrust laws are designed to encourage. The lower court held that a predatory export conspiracy among foreign manufacturers may be inferred from evidence of allegedly parallel low prices, rebating, and new market entry—without regard to whether the challenged conduct is consistent with independent economic self-interest. In an ordinary competitive market, however, a new entrant charges low prices, and other competitors cut their prices to match. To view this behavior as evidence of an antitrust conspiracy is to turn antitrust law on its head. Indeed, it is behavior *varying* from this pattern that would indicate a possible conspiracy to restrain price competition. If not reviewed by this Court, the decision below could deter aggressive price competition and cause sharp increases in the prices of imported products and of products subject to import competition—results that would be wholly at odds with basic antitrust policy.

In addition, we note that domestic firms being injured by low-priced foreign competition have ample relief available under the United States trade laws. These laws were designed after extensive multilateral negotiations to take into account the international obligations of the United States in the trade area and to create procedures that provide swift and fair remedies. The lower court's interpretation of the antitrust law will permit domestic firms to evade this established trade remedy system

and allow them to burden foreign competitors with expensive and time-consuming litigation under laws that were never intended to apply to those circumstances.

INTEREST OF THE AMICI CURIAE

The interests of AAEI and CWT in this matter are set forth in the accompanying motion for Leave to File Brief as Amici Curiae.

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THE QUESTION PRESENTED: IF AN ANTITRUST CONSPIRACY COULD BE INFERRED FROM PRICE COMPETITION—AS THE LOWER COURT CONCLUDED—PRO-COMPETITIVE CONDUCT WOULD BE DETERRED AND CONSUMERS AND IMPORTERS WOULD SUFFER

The antitrust laws have been described by this Court as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958). Those laws were never intended, nor should they be invoked, to promote protectionist ideologies. The courts must be vigilant to distinguish meritorious antitrust claims from vexatious claims asserted by firms seeking shelter from the rigors of competition.[1]

The controlling standard for evaluating the claims in a case such as this was enunciated in *First Nat'l Bank of Arizona* v. *Cities Service Corp.*, 391 U.S. 253, 280 (1968), which required

[1] *See Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1470 (1984) ("Permitting an agreement to be inferred merely from the existence of [ambiguous evidence] could deter or penalize perfectly legitimate conduct."); *Buffalo Courier-Express, Inc.* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition."); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) (courts must "be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition"), *cert. denied*, 444 U.S. 1093 (1980).

a plaintiff to demonstrate, among other things, acts by the alleged conspirators *in contradiction of their independent economic self-interest.*[2] This rule provides an important analytical safeguard for distinguishing *bona fide* conspiracy claims from meritless ones. It means that a competitor may engage in price competition without fear of vexatious litigation brought by high-cost competitors.

In the present case, the lower court ignored the *Cities Service* doctrine and created a new standard under which an antitrust conspiracy could be inferred from normal, pro-competitive conduct such as low prices and market expansion. This anomalous result poses a significant threat to competition in United States markets. If, as the lower court suggests, an actionable antitrust conspiracy may be inferred from parallel conduct which is perfectly consistent with the independent economic self-interest of foreign manufacturers, aggressive price competition will inevitably be chilled, and both importers and consumers will be harmed.[3]

[2] *See, e.g., Proctor* v. *State Farm Mut. Auto Ins. Co.*, 675 F.2d 308, 327 (D.C. Cir.) ("Only when the observed parallel behavior is inconsistent with the behavior to be expected from each actor individually pursuing its own economic interest may an agreement be inferred from the parallel conduct."), *cert. denied*, 594 U.S. 839 (1982). *Cf. Monsanto* v. *Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1471 (1984) (to infer a vertical price fixing conspiracy, "there must be evidence that tends to exclude the possibility of independent action").

[3] The Third Circuit further suggests that an actionable conspiracy may be inferred from evidence that various foreign producers may have charged parallel higher prices in their home market than in the United States. We are aware of no basis, however, for the proposition that an absence of price competition in an overseas market violates the United States antitrust laws. To the contrary, it is the absence of antitrust laws in foreign countries that frequently has led to higher prices than in the free, competitive United States market. High-cost domestic producers may yearn for the freedom from competition that prevails in some foreign markets, but they should not be permitted to employ, of all things, the antitrust laws to inhibit competition here.

A foreign producer seeking to enter the United States market with an unknown and unproven product has a special incentive to respond to the demands of American customers.[4] It is, therefore, hardly surprising that such producers may find it necessary to sell at low prices and grant price concessions to break into the market. Such practices are neither sinister nor indicative of collusion; to the contrary, they constitute normal, pro-competitive behavior which should be encouraged by the antitrust laws.[5] *Cf. Great Atl. & Pac. Tea Co.* v. *Federal Trade Commission*, 440 U.S. 69, 80 (1979) ("In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices."). The ultimate beneficiary of such competition is, of course, the American consumer.

[4] This is particularly true in an industry populated by large domestic suppliers, such as Zenith, General Electric, and RCA, whose products have achieved substantial consumer recognition and loyalty.

[5] If United States companies believe that low-priced imports result from "dumping" by or "subsidies" to foreign competitors, there is ample relief available under the United States unfair trade laws. *See* 19 U.S.C. §§ 1671, *et seq.* (countervailing duties); 19 U.S.C. §§ 1673, *et seq.* (antidumping duties). Moreover, relief in the form of quotas or additional duties may be available even when there is no evidence of unfair competition. *See, e.g.*, 19 U.S.C. §§ 2251, *et seq.* (relief from injury caused by import competition). The novel interpretation of antitrust law proposed by the lower court is not needed to provide relief from such low-priced foreign competition.

CONCLUSION

For the foregoing reasons, AAEI and CWT respectfully urge that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

ROBERT HERZSTEIN
Counsel of Record

LAWRENCE A. SCHNEIDER
HADRIAN R. KATZ
STEPHAN E. BECKER

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Counsel for American Association of Exporters and Importers and Consumers for World Trade

July 7, 1984

10

No. 83-2004

In the Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.,
ET AL., PETITIONERS

v.

ZENITH RADIO CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES F. RULE
Deputy Assistant Attorney General

CAROLYN F. CORWIN
Assistant to the Solicitor General

CHARLES S. STARK
ROBERT B. NICHOLSON
EDWARD T. HAND
SPENCER W. WALLER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID H. SMALL
Assistant Legal Adviser

ELIZABETH M. TEEL
RONALD W. KLEINMAN
Attorney-Advisers

Department of State
Washington, D.C. 20520

25 pp

QUESTIONS PRESENTED

1. Whether a court of appeals may reverse summary judgment for the defendants in an antitrust conspiracy case without considering whether all of defendants' allegedly culpable actions were more consistent with an inference of conspiracy than with an inference of independent action.

2. Whether the court of appeals erred in concluding that a finder of fact could find Japanese companies liable for a violation of the Sherman Act based on conduct compelled by the Government of Japan.

3. Whether a district court may exclude expert testimony it finds to be untrustworthy when the data on which the experts relied are "of the type" on which other experts in the field reasonably rely.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., PETITIONERS

v.

ZENITH RADIO CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In this 14-year-old lawsuit, respondents Zenith Radio Corporation and National Union Electric Corporation, American television manufacturers, charge that 24 companies (21 of which are petitioners here) participated in a 20-year conspiracy to drive American television manufacturers out of business by selling televisions at artificially high prices in Japan and at artificially low prices in the United States.[1] Respondents named as defendants all Japanese television manufacturers, their United States subsidiaries, and several Japanese trading companies, as

[1] Respondents also alleged that the purported conspiracy involved the sale of consumer electronic products other than television sets. However, the case has focused almost entirely on television sets. See Pet. App. 247a n.7.

well as Sears Roebuck & Co. and Motorola, Inc., which were major customers of the Japanese companies. Respondents claimed that various aspects of the alleged conspiracy violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2; Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a); Section 7 of the Clayton Act, 15 U.S.C. 18; Section 73 of the Wilson Tariff Act, 15 U.S.C. 8; and the Antidumping Act of 1916, 15 U.S.C. 72.

During eight years of discovery the parties produced hundreds of thousands of documents and took hundreds of depositions. However, respondents took no substantive deposition of any Japanese businessman alleged to have been involved in the conspiracy (see Pet. App. 402a-406a, 795a-799a).

Petitioners filed motions for summary judgment. The district court adopted a comprehensive case management procedure for resolving these motions on the enormous record. The court required respondents to identify—with preclusive effect—all the evidence on which they planned to rely at trial;[2] the court then held a five-week evidentiary hearing and ruled on the admissibility of that evidence before considering the summary judgment motions. In brief, the court ruled that, for various reasons, a large part of the evidence on which respondents chiefly relied was inadmissible and thus could not be used to defeat summary judgment (see Pet. App. 668a-776a, 777a-987a, 988a-1110a). The district court subsequently ruled, in a 430-page opinion, that all petitioners were entitled to summary judgment on all antitrust counts, primarily because respondents had failed to present any admissible, probative evidence that would establish the existence of the alleged conspiracy (*id.* at 236a-667a). The district court found it unnecessary to rule on petitioners' contention that much of their allegedly anticompetitive conduct was compelled by the Government of

[2] Respondents' Final Pretrial Statement, which constituted their complete offer of proof on the antitrust claims, exceeded 17,000 pages. See Pet. App. 268a.

Japan and thus could not form the basis of an antitrust violation (*id.* at 255a n.19, 387a-394a).[3]

In an earlier opinion the district court rejected most of respondents' dumping claims on the ground that the products sold in the United States and the products sold in Japan were not sufficiently comparable to support such claims (Pet. App. 1111a-1214a). In its opinion granting summary judgment on the antitrust claims the district court rejected the remaining dumping claims (*id.* at 632a n.372).

2. The court of appeals reversed the district court's grant of summary judgment on all antitrust counts, except as to defendants Sony, Sears, and Motorola (Pet. App. 34a-197a). The court of appeals explicitly approved the innovative procedure used by the district court to resolve the summary judgment motions on the massive record (*id.* at 60a-66a). The court of appeals concluded, however, that many of the district court's evidentiary rulings were wrong. In particular, the court of appeals concluded that the district court had erred in excluding certain records of Japanese administrative proceedings against some petitioners in connection with resale price maintenance activities in Japan, various internal documents of petitioners (*e.g.*, diaries and memoranda), and the testimony of respondents' experts based on those records and documents. *Id.* at 64a-162a.

After thus augmenting the body of evidence to be weighed in deciding the summary judgment motions, the court of appeals proceeded to consider whether respondents' antitrust theory could withstand scrutiny in light of

[3] In 1977 and 1978, at respondents' request, the Antitrust Division conducted a thorough examination of what respondents characterized as the most probative evidence of the alleged conspiracy. Like the district court, the Division found "no evidence of concerted predatory conduct intended to destroy and supplant the U.S. color TV industry, either at an earlier period of time or at the present time." Pet. App. 23a (statement of Assistant Attorney General John H. Shenefield).

that body of evidence. In the court of appeals' view, a fact-finder reasonably could conclude from the admissible evidence that: (a) petitioners agreed to stabilize prices of televisions in Japan; (b) the domestic and international competitive situation of the Japanese television manufacturing industry gave petitioners a motive to enter into the alleged conspiracy; (c) petitioners entered into formal written agreements that established minimum prices (or "check prices") for television sets sold for export to the United States; (d) petitioners allocated customers in the United States by means of the "five-company rule," pursuant to which each petitioner agreed to sell directly to only five customers in the United States (including each manufacturer's United States sales subsidiary); (e) petitioners' prices for televisions sold in the United States were substantially lower than their prices for comparable televisions in Japan and, in fact, were "dumping prices" from which a fact-finder could infer predatory intent; and (f) petitioners deceived the Japanese and American governments as to the prices being charged in the United States, by systematically giving secret rebates to United States purchasers, in a context in which each petitioner knew that its Japanese rivals were systematically giving rebates (Pet. App. 169a-180a). The court of appeals concluded that this amounted to sufficient evidence of the alleged conspiracy to preclude the entry of summary judgment for petitioners on the antitrust counts (*id.* at 180a).

The court of appeals rejected petitioners' contention that they were entitled to summary judgment because the Japanese Ministry of International Trade and Industry (MITI) had compelled the check price agreement and the five-company rule, both of which the court regarded as key evidence of the conspiracy alleged by respondents (Pet. App. 188a-189a). In support of their contention, petitioners had cited a formal statement submitted by MITI to the district court in 1975 (*id.* at 6a-14a). The court of appeals "assume[d], without deciding, that a

government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act" (*id.* at 188a) and also "assume[d]" that MITI in fact had mandated the check price agreement (*id.* at 220a). The court nevertheless relied on the check price agreement as one of the crucial pieces of evidence of the alleged conspiracy that would preclude the grant of summary judgment (*id.* at 179a). The court stated that it was unclear whether the check prices "were in fact determined by the Japanese Government" and asserted that there was "no record evidence suggesting that the five-company rule originated with the Japanese Government" (*id.* at 188a-189a).[4]

The same panel of the court of appeals issued a separate opinion reversing the district court's dismissal of the dumping charges except as to Sony, Sears, and Motorola. Pet. App. 198a-223a. The court concluded that the products sold in Japan and the products sold in the United States were sufficiently comparable for purposes of the Antidumping Act (*id.* at 211a-214a); that there was evidence of a significant price differential between the two categories of products (*id.* at 21Ca-218a); and that there was a genuine issue as to whether petitioners acted with the requisite specific intent (*id.* at 218a-223a).[5]

---

[4] The court of appeals affirmed the grant of summary judgment in favor of defendants Motorola and Sears because there was no evidence that either company was aware of the resale price maintenance conspiracy in Japan, the five-company rule, or the alleged concerted action by the other defendants to evade the check price agreements imposed by MITI (Pet. App. 176a, 180a-183a). The court also affirmed summary judgment in favor of defendant Sony on the grounds that Sony never gave rebates, never sold at dumping prices, and occupied the high end of the price spectrum (*id.* at 183a-185a).

[5] None of the questions presented in the petition explicitly addresses the antidumping charges. However, petitioners state that they challenge the antidumping decision insofar as it rests on the same conspiracy evidence as the antitrust charges. Pet. 8.

DISCUSSION

The decision below is one that has significant practical implications for both antitrust policy and the conduct of our nation's foreign trade policy. In evaluating evidence of the antitrust conspiracy alleged in this case, the court of appeals failed to adhere to this Court's precedents, in particular *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968). The immediate result of that error is that this massive, 14-year-old case must proceed to trial, although the district court's grant of summary judgment in favor of petitioners very likely should have been affirmed. That consequence in itself may tend to discourage foreign companies from engaging in vigorous price competition in the United States for fear of incurring treble damages liability under United States antitrust laws. In addition, the court of appeals' failure to apply the proper standard in evaluating evidence of conspiracy is likely to discourage district courts from resolving complex antitrust claims on motions for summary judgment in appropriate cases.

The court of appeals also erred in rejecting petitioners' contention that certain aspects of their conduct were compelled by the Government of Japan and therefore could not serve as a predicate for antitrust liability. On this record, the court of appeals should have given dispositive weight to the statement submitted to the district court by the Japanese Government, which indicated explicitly that part of petitioners' conduct was compelled. The court's rejection of petitioners' sovereign compulsion defense has caused deep concern to the Government of Japan and to the governments of other countries that are significant trading partners of the United States and threatens to affect adversely the foreign policy of the United States.

In view of these important practical considerations, we believe review by this Court is warranted on the first two questions presented by the petition.[6] We recognize

[6] We take no position on the third question raised by the petition, involving the admissibility of expert testimony.

that this case comes to the Court in an interlocutory posture. In our view, however, this is one of those unusual cases that warrant plenary review in such a posture. The question whether respondents' evidence of conspiracy suffices to avert summary judgment must necessarily be resolved in the present posture of the case if it is to be resolved at all. Guidance from this Court on that issue could materially assist in efficient resolution of this litigation, which has already consumed extraordinary amounts of the time and resources of the parties and the judicial system. See, *e.g.*, *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153-154 (1964). If the Court were to agree with our submission that the court of appeals erred in failing to analyze the evidence of conspiracy in light of the *Cities Service* standard, we believe it would be proper for the court of appeals on remand to conclude that the district court's grant of summary judgment in favor of petitioners on the antitrust claims should be affirmed.[7] Moreover, the foreign trade policy concerns raised by the court of appeals' decision on the sovereign compulsion issue are of immediate and practical importance, regardless of the procedural posture of the case.

1. The court of appeals' approach to analysis of the evidence in this case is inconsistent with this Court's

[7] Although the court of appeals held admissible much of the evidence the district court excluded, the two courts appear to have considered essentially the same body of evidence, since the district court was willing to assume the admissibility of much of respondents' evidence (see Pet. App. 253a-254a n.18). Even if the district court failed to consider evidence the court of appeals held admissible, the court of appeals on remand could conclude that this was harmless error because application of the *Cities Service* standard to the admissible evidence leads to the conclusion that petitioners were entitled to summary judgment in any event.

The antitrust claims form the greater part of this litigation and present the more significant legal issues; moreover, guidance from this Court concerning the evaluation of evidence of the alleged antitrust conspiracy would assist on remand in dealing further with the issue of specific intent in connection with the antidumping claims.

precedents. In *First National Bank* v. *Cities Service Co.*, 391 U.S. at 280, 285-288, this Court ruled that an antitrust plaintiff who seeks to prove the existence of an anticompetitive conspiracy solely on the basis of circumstantial evidence in the form of parallel conduct can survive a motion for summary judgment only by showing that the evidence to be introduced is more consistent with the inference that the conduct resulted from the alleged conspiracy than with the inference that it resulted from independent action. Indeed, evidence of parallel conduct normally will be probative of an anticompetitive agreement only if it is shown to be inconsistent with the independent competitive interests of the defendants and therefore unlikely to occur in the absence of collusion. See *Kreuzer* v. *American Academy of Periodontology*, 735 F.2d 1479, 1487-1488 (D.C. Cir. 1984); *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462-465 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).[8]

The *Cities Service* rule safeguards against the possibility that parallel behavior that manifests only the workings of a competitive market might be deemed illegal. It is particularly important that courts adhere strictly to that rule when it is alleged that defendants have violated the antitrust laws by charging prices that are too *low*, in order to avoid imposing penalties on independent, unilateral conduct that has the effect of reducing prices, increasing competition, and thereby directly benefiting consumers. Just last Term, the Court admonished in *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984), slip op. 8, that permitting the inference of an anticompetitive agreement from highly ambiguous evidence "could deter or penalize perfectly legitimate conduct."

Here respondents alleged that petitioners engaged in a broad conspiracy to maintain high prices for television sets sold in Japan and low prices for sets exported to the United States. The district court applied the *Cities Service* standard to evidence of petitioners' parallel conduct (Pet. App. 346a-357a) and concluded that that conduct—involving alleged dumping prices and secret rebates—was more reasonably explained as independent competitive behavior than as collusion (*id.* at 494a-502a). The court of appeals implicitly conceded the general validity of the *Cities Service* standard.[9] It concluded, however, that the standard was inapplicable here because respondents had adduced not merely evidence of parallel conduct, but also "direct" evidence that petitioners colluded in some ways, including a resale price maintenance agreement in connection with sales in Japan and the check price agreement and five-company rule in connection with exports to the United States (Pet. App. 164a-166a). In evaluating the evidence of parallel conduct, the court of appeals focused only on whether the alleged conspiracy was a plausible explanation for petitioners' conduct, not on whether a fact-finder reasonably could find it to be the *more* probable explanation.

The existence of the "direct" evidence cited by the court of appeals does not justify its failure to apply the *Cities Service* standard. That evidence was "direct" only with respect to agreements concerning resale prices in Japan and use of check prices (*i.e.*, minimum prices) and the

[8] In *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541-542 (1954), this Court rejected the contention that a conspiracy must be inferred where the plaintiff proved only parallel conduct and the defendants showed that their behavior was consistent with individual self interest. In cases in which this Court has approved inference of a conspiracy from parallel behavior, that behavior was inconsistent with the hypothesis that each defendant made an independent business decision to act as it did. See, *e.g.*, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 800-808 (1946); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 222-225 (1939).

[9] See Pet. App. 164a. Although the court of appeals did not mention *Cities Service*, it cited several Third Circuit decisions that applied the *Cities Service* principle.

five-company rule for exports to the United States. Those agreements did not have any necessary tendency to prove the alleged agreement to charge low, predatory prices in the United States, which the court of appeals found that respondents were required to prove in order to establish antitrust injury (see Pet. App. 167a-168a, 178a);[10] at best, agreements concerning resale prices in Japan, check prices, and the five-company rule would constitute circumstantial evidence of the existence of the alleged agreement involving pricing at predatory levels. Thus, the "direct" evidence cited by the court of appeals does not obviate the need for the central inquiry required by *Cities Service* —whether the parallel low pricing behavior the court viewed as the crucial element of the alleged conspiracy (see Pet. App. 177a-179a) was more reasonably viewed as the result of independent business decisions by petitioners than as the result of collusion.[11]

Had the court of appeals correctly focused on the *Cities Service* inquiry, we believe it should have concluded—as did the Antitrust Division in its 1977-1978 investigation of the evidence in this case (see page 3 note 3, *supra*)—that petitioners' parallel pricing conduct was at

[10] For example, the court of appeals recognized that an agreement among petitioners that fixed minimum prices for the United States market (*i.e.*, the check price agreement) would tend to keep prices up and would "in isolation protect * * * competitors like [respondents] from competition," so that respondents could not, "absent other circumstances," maintain this lawsuit "because they could not show the requisite injury to their business or property." Pet. App. 178a. In order to prove antitrust injury under their theory, respondents were required to prove that petitioners agreed to set *predatory* prices. See *id.* at 177a-179a.

[11] We agree with the court of appeals that "direct evidence of some kinds of concert of action like price fixing in Japan may be circumstantial evidence of a broader conspiracy" (Pet. App. 165a). The issue here, however, is whether the existence of such evidence changes the standard under which ambiguous evidence consisting of consciously parallel conduct is evaluated on motions for summary judgment.

least as consistent with independent conduct as with the alleged conspiracy. As the district court found (Pet. App. 473a-503a), the alleged secret rebates and sales at dumping prices were fully consistent with independent efforts by petitioners to penetrate a new market by offering low prices that evaded regulatory constraints imposed by Japan and the United States (*i.e.*, check prices and antidumping laws). It was not inconsistent with petitioners' independent self interest for them to keep their own rebates secret or to fail to report the secret rebates given by their Japanese rivals, since detection of the rebates could have exposed each petitioner to liability for violations of antidumping laws. Although such independent conduct might support a claim for damages under the Antidumping Act of 1916 (as respondents contend),[12] it is insufficient to support a finding of conspiracy to violate the antitrust laws under the *Cities Service* standard.

Moreover, the court of appeals' failure to apply the *Cities Service* standard led it to disregard the economic logic of respondents' allegations. Respondents' antitrust conspiracy theory turns on the claim that petitioners agreed to charge low prices in the United States market in order to drive United States manufacturers out of business. If petitioners priced in such a way that their sales in the United States market were unprofitable in the short run in the hope that long-run sales at monopoly prices would make their alleged strategy profitable overall, then a conspiracy might be the most probable explanation of the evidence.[13] On the other hand, if petitioners

[12] The court of appeals determined that petitioners were not entitled to summary judgment on respondents' Antidumping Act claims. See page 5, *supra*. We take no position on the correctness of that conclusion.

[13] One commentator has concluded that such a theory makes no sense in the circumstances of this case. See Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 26-27 (1984) ("The predation-recoupment story [in this case] * * * does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition.").

sold at prices that were below respondents' costs but nonetheless were still profitable, then petitioners' behavior would be perfectly consistent with their independent self interest.[14] The court of appeals never analyzed respondents' evidence of below-cost pricing (which consisted almost entirely of expert testimony based on assumptions about petitioners' costs, see Pet. App. 473a, 1056a-1077a) to see whether the evidence of parallel pricing behavior supported a viable theory of anticompetitive collusion.[15]

---

[14] Such considerations have led the courts of appeals to conclude that strong evidence of below-cost pricing is vital to a determination that a low-price strategy amounts to unlawful predation that violates Section 2 of the Sherman Act. See, *e.g.*, *Southern Pacific Communications Co.* v. *American Telephone & Telegraph Co.*, 740 F.2d 980, 1002-1007 (D.C. Cir. 1984); *Adjusters Replace-A-Car, Inc.* v. *Agency Rent-A-Car, Inc.*, 735 F.2d 884, 888-891 (5th Cir. 1984); *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050, 1056-1058 (6th Cir. 1984); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1031-1039 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982); *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76, 86-88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982). The Federal Trade Commission has reached a similar conclusion. See, *e.g.*, *International Telephone & Telegraph Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,188, at 23,081-23,085 (July 25, 1984); *General Foods Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,142, at 22,974-22,976 (Apr. 6, 1984).

[15] Indeed, the court of appeals never considered whether respondents had adduced any evidence that petitioners' prices were below *any* measure of cost. Rather, the court merely summarily characterized respondents' evidence as indicating that petitioners sold "at prices * * * below the prices at which [respondents] could successfully compete" and that "produced losses" for petitioners. Pet. App. 167a, 179a.

The district court's opinions indicate that respondents' evidence of "below cost" sales consisted solely of the testimony of their chief expert, Dr. DePodwin, that four petitioners sometimes sold their products in the United States at prices below some measure of their costs. Pet. App. 473a, 1065a. Dr. DePodwin's testimony, in turn, was "a mathematical construction" based on certain assumptions about petitioners' costs (*ibid.*). The district court noted that "far more reliable evidence of [petitioners'] costs was available to [respondents] in discovery, but * * * they had not availed themselves of it" (*id.* at 473a n.200; see *id.* at 1065a-1069a).

The court of appeals' failure to apply the *Cities Service* standard in this case is an error of considerable significance to the maintenance of competition. *Cities Service* teaches that even the most complicated antitrust cases may be resolved on summary judgment when the plaintiff has failed to adduce sufficient evidence of an anticompetitive conspiracy. The district court here devoted an extraordinary effort to devising an innovative and efficient method that would allow a responsible resolution of this massive case without the delay and expense of a trial. The court of appeals' rejection of the *Cities Service* inquiry in a case like this one is likely to discourage district courts from making the effort necessary to develop and apply such exemplary case management procedures. We believe the court of appeals' approach ultimately will diminish the willingness of district courts to attempt to resolve complex antitrust litigation on motions for summary judgment in appropriate cases, thus reducing the opportunities for efficient handling of such litigation, including efficient disposition of unmeritorious claims against lawful competitors.

Indeed, the court of appeals' decision has aroused deep concern in Japan that other Japanese manufacturers attempting to penetrate the United States market will be subject to burdensome litigation and the possibility of an award of treble damages if they engage in vigorous price competition. We agree that the decision may encourage United States companies to use the antitrust laws as a weapon to deter lawful price competition by foreign companies. To the extent the decision is perceived and applied in this manner, it would defeat the basic purpose of the antitrust laws—enhancement of consumer welfare through preservation of a competitive economic system.[16]

---

[16] Respondents mistakenly suggest (*e.g.*, Br. in Opp. 5, 22) that if the Court grants review in this case it will be required to sift through the entire record. In fact, the Court would be required to decide only whether the court of appeals failed to apply the proper legal standard in evaluating the evidence of conspiracy. If the Court should reverse on this point, it could remand the case to

2. The court of appeals erred in concluding that a fact-finder could find Japanese companies liable for a Sherman Act violation based on conduct compelled by the Government of Japan. The courts have properly recognized that anticompetitive private conduct that is compelled by a foreign sovereign does not give rise to antitrust liability under United States law. See, *e.g.*, *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 606-607 (9th Cir. 1976); *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1297-1298 (D. Del. 1970). Cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-707 (1962).[17] This sovereign compulsion defense is based largely on considerations of international comity and fairness to antitrust defendants who have been constrained to obey the mandates of a foreign sovereign.[18] It also constitutes judicial recognition that conduct compelled by foreign sovereigns often raises foreign policy concerns that are primarily the province of the Executive Branch.

Petitioners contended below that certain aspects of their conduct—the check price agreement and the five-company rule—were compelled by the Government of Japan and therefore could not serve as the basis for imposition of antitrust liability.[19] Petitioners relied on a written statement sent to the district court by the Ministry of International Trade and Industry of the Government of Japan. That statement (the "MITI Statement") addressed "certain agreements entered into among [petitioners], as well as certain regulations of the Japan Machinery Exporters Association [JMEA]" (Pet. App. 8a). The MITI Statement began by affirming that both the check price agreement and the JMEA regulations (which included the five-company rule) "have come into existence pursuant to the direction of MITI" (*ibid.*). After a detailed discussion of MITI's powers and its involvement in the creation and implementation of the agreements and regulations at issue, the MITI Statement declared (*id.* at 12a) that when MITI

> directed [petitioners] to conclude * * * such agreement and regulation relating to the minimum prices at which televisions could be sold for the United

---

the court of appeals for further proceedings consistent with the Court's opinion.

[17] In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, antitrust defendants contended that the Canadian government had compelled them to engage in the anticompetitive acts at issue there. This Court concluded, however, that the defense was not available because there was "no indication that [any] official within the * * * Canadian Government approved or would have approved of" the anticompetitive conduct, or that any Canadian law otherwise compelled the conduct. 370 U.S. at 706-707. The Court had no occasion to discuss a situation in which, as here, the record includes a statement by a foreign government that it has compelled some or all of the allegedly anticompetitive conduct at issue.

It appears that only one court has found that the facts of the case before it would support a sovereign compulsion defense. See *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*, *supra*. Other courts have concluded that the defendants involved failed to prove that their conduct was compelled. See, *e.g.*, *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d at 608; *Linseman* v. *World Hockey Ass'n*, 439 F. Supp. 1315, 1324 (D. Conn. 1977); *United States* v. *Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,456-77,457 (S.D.N.Y. 1962).

[18] The sovereign compulsion defense differs from the act of state doctrine, which "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). It differs also from the state action doctrine applicable to domestic antitrust disputes, which reflects the view that, while the Sherman Act's proscription of anticompetitive conduct is the supreme law of the land, Congress generally did not intend by its silence in the Sherman Act to prohibit action of a state that may restrain competition. See *Parker* v. *Brown*, 317 U.S. 341, 351 (1943).

[19] Respondents contend (Br. in Opp. 22-23) that petitioners have not preserved their argument concerning sovereign compulsion. However, the pleadings make it plain that petitioners did raise the argument in the court of appeals (see pages 37-44 & n.34 of the petitioners' brief filed in the court of appeals) and that respondents disputed it at length (see pages 79-88 of the respondents' reply brief filed in the court of appeals).

States market and other matters, [petitioners] had no alternative but to establish the agreement and regulation in compliance with the said direction.

The district court found it unnecessary to decide whether petitioners had established their sovereign compulsion defense (Pet. App. 255a n.19, 387a-394a). However, the court of appeals reached that question and concluded that summary judgment could not be granted on the defense (*id.* at 188a-189a). The court of appeals never referred explicitly to the MITI Statement. The court "assume[d], without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of" the Sherman Act (*id.* at 188a). The court also noted (*id.* at 178a) that petitioners check price agreement appeared "to have been encouraged, if not mandated, by MITI." The court nevertheless stated that it could not "be said with any degree of certainty that the minimum prices, claimed by [respondents] to be dumping prices, were in fact determined by the Japanese Government," because "[i]t is possible to conclude that the government merely provided an umbrella under which [petitioners] * * * fixed their own export prices." In addition, there was "abundant evidence suggesting that many [petitioners] departed from the agreed-upon minimums and took steps to conceal their departure from MITI." Finally, the court asserted that there was "no record evidence suggesting that the five-company rule originated with the Japanese Government." *Id.* at 188a-189a. In its discussion of the evidence of conspiracy, the court of appeals expressly cited both the check price agreement and the five-company rule as supporting a possible inference of illegal conspiracy, which would preclude the grant of summary judgment for petitioners. *Id.* at 179a.

The court of appeals erred in rejecting petitioners' sovereign compulsion defense. The Government of Japan explained in the MITI Statement that it "directed" petitioners "to enter into" the check price agreement (Pet. App. 11a), supervised the establishment of the agreement to ensure that MITI's intention was correctly reflected,

exercised continuous direction and supervision of the terms of the agreement,[20] and was empowered and prepared to enforce Japanese government policy as embodied in that agreement (*id.* at 8a-11a).[21] On this record, that explicit and detailed statement by a foreign sovereign that it mandated the check price agreement in accordance with its laws (*id.* at 12a) should have been given dispositive weight.[22] It follows that the sovereign compulsion defense

---

[20] The court of appeals held that a fact-finder could conclude that the Government of Japan did not "determine" the minimum price levels under the check price agreement and apparently rejected petitioners' sovereign compulsion defense on that basis. See Pet. App. 188a-189a. In so holding, the court erred in failing to give weight to the explanation in the MITI Statement that MITI exercised "direction and supervision concerning minimum prices at which televisions could be sold for exportation to the United States * * * continuously from 1963 until February 28, 1973" (*id.* at 11a).

[21] In conveying this explanation to the district court, the Japanese Government properly sought to present its showing on the sovereign compulsion issue directly to the court. This Court has approved a procedure under which a foreign government may convey its views to the Court directly in cases in which it has an interest by the filing of a brief as amicus curiae. See 73 Am. J. Int'l L. 124 (1979). The State Department has encouraged foreign governments to communicate their views directly to United States courts. See *ibid.*; *id.* at 678-679.

The court of appeals nevertheless appears to have wholly disregarded the MITI Statement in rejecting petitioners' foreign sovereign compulsion defense. In declining to give weight to, or even to acknowledge, the MITI Statement, the court of appeals failed to accord the proper respect due a foreign government that has taken appropriate steps to convey its views to a United States court in connection with litigation.

[22] The MITI Statement also explained that MITI had directed the regulations of the Japan Machinery Exporters Association, which included the five-company rule. The court of appeals therefore erred in concluding that there was "no record evidence" (Pet. App. 189a) suggesting that the five-company rule was compelled by the Japanese Government. The MITI Statement did not explicitly single out the five-company rule as an example of conduct required by MITI. The Government of Japan recently transmitted a diplomatic Note Verbale that states unequivocally that the Japanese Government did mandate the five-company rule. See Br. of

precluded use of the check price agreement as a basis for liability under the Sherman Act. The court of appeals therefore erred in leaving open the possibility that on remand liability might be predicated on that agreement. See Pet. App. 179a.[23]

The court of appeals' disregard for the explicit assurance of the Japanese Government that it required export restraints at issue in this case threatens to do serious damage to the foreign trade relations of the United States. Restrictions imposed by governments in connection with exports by their national companies are a significant feature of contemporary international trade. In some instances, foreign governments have imposed such restrictions on exports to the United States at the request of our government, acting to implement our international trade policy.[24] Such restrictions have assumed a special importance in our trade relations with Japan, as evidenced by, *e.g.*, the controls on automobile exports to the United States imposed by MITI in 1981, in a manner similar to imposition of the check price agreement at issue here (see Pet. App. 25a-26a).[25]

---

the Gov't of Japan 2a. However, the court of appeals did not have the benefit of the Note Verbale.

[23] We do not suggest that a court is precluded from considering compelled conduct for all purposes in an antitrust case. There are circumstances in which it would be appropriate, *e.g.*, to consider the existence of compelled conduct as evidence that some other alleged event has taken place. However, the court of appeals erred in relying on the compelled conduct in this case as a possible predicate for liability, rather than merely as evidence of the existence of some other fact.

[24] For example, in establishing a government policy for the steel industry, President Reagan recently directed the United States Trade Representative to "negotiate 'surge control' arrangements or understandings and, where appropriate, suspension agreements with countries whose exports to the United States have increased significantly in recent years due to an unfair surge in imports" and to "reaffirm existing measures with countries that have voluntarily restrained their exports to our market." 49 Fed. Reg. 36813 (1984).

[25] In imposing those controls, the Government of Japan may well have relied on the view that the defense of sovereign compulsion

The Japanese Government and other important United States trading partners have read the court of appeals' rejection of the sovereign compulsion defense in this case as indicating that imposition of voluntary restraints by foreign governments can readily subject the foreign companies involved to burdensome litigation and possible treble damages liability in this country, despite clear evidence that the foreign sovereign has mandated the allegedly anticompetitive conduct. In response to the decision, these and other foreign governments understandably may be reluctant to accommodate proposals by the United States to resolve trade controversies by the imposition of voluntary restraint agreements on their own manufacturers.[26] Such a response could deprive the United States of a tool that has proved valuable in the resolution of difficult international trade disputes. Review by this Court is warranted in order to make clear that the court of appeals erred in concluding that the compelled conduct

---

would be available to Japanese automobile manufacturers that conformed their conduct to the controls. A letter dated May 7, 1981, from the Attorney General of the United States to the Ambassador of Japan, advised the Government of Japan that the voluntary restraint arrangement involving export of Japanese-built automobiles to the United States "would properly be viewed as having been compelled by the Japanese government, acting within its sovereign powers" and that, in the Justice Department's view, compliance of Japanese automobile companies with the program "would not give rise to violations of United States antitrust laws" (Pet. App. 26a). We are advised by the United States Trade Representative that extension of this arrangement, which has important implications for this country's domestic economic and international trade policies, will be considered in the near future.

[26] In addition to the Government of Japan (see Br. of the Gov't of Japan 1a-4a), the Governments of Australia, Canada, France, the Republic of Korea, Spain, and the United Kingdom have formally advised the Department of State of their serious concern about the potential adverse impact on their trade relations with the United States of the court of appeals' treatment of the sovereign compulsion issue. We are lodging copies of the communications received by the State Department from these governments with the Clerk of the Court and providing copies to counsel.

at issue in this case could form the predicate for a finding of antitrust liability on remand.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first and second questions presented.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES F. RULE
Deputy Assistant Attorney General

CAROLYN F. CORWIN
Assistant to the Solicitor General

CHARLES S. STARK
ROBERT B. NICHOLSON
EDWARD T. HAND
SPENCER W. WALLER
Attorneys

DAVID H. SMALL
Assistant Legal Adviser

ELIZABETH M. TEEL
RONALD W. KLEINMAN
Attorney-Advisers
Department of State

JANUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10144

CORRECTED COPY

(13)

No. 83-2004

Supreme Court, U.S.
FILED
JUN 4 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF FOR THE GOVERNMENT OF JAPAN AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

NOBUO MATSUNAGA
Ambassador Extraordinary
Plenipotentiary of Japan
Embassy of Japan
2520 Massachusetts Ave., N.W.
Washington, D.C. 20008

STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600
Counsel of Record for The Government of Japan

June 4, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

33 pp

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.3 of the Rules of this Court, the Government of Japan respectfully moves for leave to file the attached brief as amicus curiae in support of reversal of the judgments of the United States Court of Appeals for the Third Circuit. This case raises issues of great importance to the relationship between the United States and Japan, and the Japanese Government wishes to ensure that the Court is

fully apprised of its views, as set forth in the attached amicus curiae brief. Petitioners have consented to the filing of this brief; respondents have not.

For the reasons stated, and in the interest of strengthening bilateral relations between Japan and the United States, the Government of Japan requests that the Court receive and consider the attached brief.

Respectfully submitted,

STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600
Counsel of Record for The Government of Japan

June 4, 1985

QUESTIONS PRESENTED

The Government of Japan will address the following questions:

1. Whether a duly issued statement of a foreign government, attesting that it directed its citizens to pursue certain conduct restricting export trade as an exercise of its sovereign power, may be disregarded by a court of the United States and, if not, whether that court may adjudicate the veracity of such a foreign government statement.

2. Whether a court of the United States may treat as features of an unlawful conspiracy actions of foreign corporations taken in their home country pursuant to directions given by their government for the implementation of its foreign trade policy.

TABLE OF CONTENTS

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE GOVERNMENT OF JAPAN AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Government of Japan submits this brief as amicus curiae in support of reversal of the judgments of the Court of Appeals.

INTEREST OF THE AMICUS CURIAE

The Japanese Government has a vital interest in defending the legitimate exercise of its sovereign power in regulating and controlling its foreign trade.

In order to moderate the effects of Japanese exporting activity upon the markets of its trading partners, the Japanese Government has from time to time required Japanese nationals to enter into agreements and to observe regulations restricting exports from Japan to the United States and elsewhere. In the instant case, the Japanese Government formally advised the District Court that the export control agreements and regulations challenged in this proceeding were required by the Government of Japan, pursuant to the relevant Japanese law, as an exercise of Japan's sovereign regulatory power over Japanese exports. On appeal, the Court of Appeals disregarded the Japanese Government's Statement and questioned whether those export agreements and regulations were in fact mandated by the Japanese Government.

In taking this position, the Court of Appeals ruled that the trier of fact on remand could make findings contrary to the Japanese Government Statement and that the agreements and regulations in question could constitute or be treated as "features" of a violation of United States antitrust laws. The court's ruling, by threatening to penalize Japanese nationals with treble damages for complying with sovereign mandates of their government to enter into export control agreements in their home country, would adversely affect the ability of Japan both to implement its own trade policy and to cooperate with the United States Government in the implementation of its trade policy. The Government of Japan is deeply troubled by this intrusion on the exercise of its sovereign powers and respectfully urges this Court to reverse the judgments below.

STATEMENT

The Ministry of International Trade and Industry ("MITI"), an agency of the Japanese Government, has the authority and responsibility to implement and enforce the basic international trade policies of Japan under the Japanese laws concerned, including the Law Concerning the Establishment of the Ministry of International Trade and Industry, the Foreign Exchange and Foreign Trade Control Law, and the Export and Import Transaction Law. Pursuant to its authority, MITI has, at various times, directed Japanese manufacturers and exporters to enter into agreements and to adopt and observe regulations controlling and limiting the price, quantity, number of customers and other terms and conditions of exports from Japan to certain foreign markets, including the United States. Among the many products covered by such export controls were radios (1958-1973), television receivers (1963-1973), and tape recorders (1965-1967).

In 1975, after becoming aware of the lawsuits filed under the United States antitrust and antidumping laws by National Union Electric Corporation and Zenith Radio Corporation against a number of Japanese consumer electronic product manufacturers and exporters, lawsuits which, among other things, challenged the agreements and regulations concerning the consumer electronic products described above, the Government of Japan transmitted a formal statement to the United States District Court for the Eastern District of Pennsylvania. (App. *infra*, 6a-17a) (hereinafter "Japanese Government Statement" or "Statement").[1] That Statement, certified directly to

[1] "App." refers to the Appendix attached to this brief.

the District Court in 1980 by the Ambassador of Japan as amicus curiae (*id.* at 16a-17a), is a matter of record in this proceeding.

By its 1975 Statement, the Japanese Government informed the District Court that the minimum export price and other agreements and regulations concerning the exportation of television receivers from Japan, which were in effect from 1963 to 1973, came into existence pursuant to the direction of the Government of Japan in order to assure the orderly development of Japan's export trade, and that those agreements and regulations constituted an integral part of the foreign economic and trade policy of the Japanese Government. (App. *infra*, 13a-14a.) In March of 1981, the District Court granted summary judgment for the defendants on all counts, finding it unnecessary to reach the "act of state" and "sovereign compulsion" issues raised by the Japanese Government Statement because there was no evidence from which the alleged conspiracy to fix low export prices could properly be found or inferred.

On December 5, 1983, the United States Court of Appeals for the Third Circuit reversed and remanded the case for trial. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 105 S. Ct. 1863 (1985). Never mentioning the 1975 Japanese Government Statement, the Court of Appeals held that there was doubt as to whether the minimum export prices and customer registration requirements (the so-called "five-company rule"), which were the subject of the export control agreements and regulations mentioned above, had in fact been mandated by the Japanese Government. The court also held that those minimum export prices and customer registration requirements could constitute or be "features" of an antitrust violation for

which plaintiffs could obtain an injunction and recover treble damages. The Court of Appeals stated that those agreements and regulations may only have been sponsored or "encouraged" by the Japanese Government, 723 F.2d at 310, that "there is no record evidence suggesting that the five-company rule originated with the Japanese Government," *id.* at 315, and that at trial the finder of fact could conclude that the Japanese Government's export control arrangements "merely provided an umbrella under which the defendants . . . fixed their own export prices." *Id.* These rulings were in direct conflict with the 1975 Japanese Government Statement.

DISCUSSION

1. As declared in the 1975 Japanese Government Statement and in the diplomatic Notes Verbale transmitted to the United States Government in May and October of 1984 (App. *infra*, 1a-4a, 5a), the Japanese Government hereby reaffirms that the export activities of the petitioners which the Court of Appeals cited as central "features" of the alleged conspiracy to export television receivers to the United States at artificially low prices—including the agreements and regulations concerning the minimum export price and the five-company rule—are activities that were specifically directed and comprehensively supervised by the Japanese Government to carry out its foreign economic and trade policies.

The Court of Appeals' rulings that the trier of fact may conclude that the Japanese Government "merely provided an umbrella under which defendants . . . fixed their own export prices," and that there is doubt whether the minimum export prices "were in fact determined by the Japanese Government," 723 F.2d at

315, directly contradict the 1975 Japanese Government Statement that its "direction and supervision concerning minimum prices . . . and other matters were exercised continuously from 1963 until February 28, 1973 when such exporting arrangements were terminated." (App. *infra,* 13a). Moreover, the Court of Appeals' ruling is inconsistent with the Japanese Government Statement that the agreements and regulations concerning the minimum export price and other matters were directed to assure "orderly exportation to avoid the possibility of trade conflicts." (App. *infra*, 13a). Similarly, the court's conclusion that there was "no record evidence" that the five-company rule originated with the Japanese Government directly contradicts the 1975 Japanese Government Statement that all of the export control agreements and regulations involved "in these lawsuits" came into existence "pursuant to the direction of MITI." (App. *infra*, 9a).

As the 1975 Japanese Government Statement makes clear, any attempt by petitioners to avoid the minimum export price schedules or five-company rule by exporting without regard to the applicable controls would have contravened the directive of MITI, a directive that was enforceable, if disregarded, pursuant to Japanese Cabinet Order and which, in fact, had "a compulsory power equivalent to law." (App. *infra*, 12a). Indeed, even if any of the petitioners had attempted to withdraw from the export control arrangements, they would not have been allowed to export to the United States unless they complied with MITI's directive. As the 1975 Statement explains, "[o]nce MITI has decided upon the trade policy measures to be taken and has directed the establishment of appropriate Arrangements under the Export and Import Trading Law for this purpose, the

Japanese industries involved have in fact no alternative but to establish them. Therefore the Arrangements entered into under the Export and Import Trading Law in compliance with the direction of MITI are not private agreements in effect and are no less than the implementation of the foreign trade policy of MITI, despite their form as agreements made among private parties." (App. *infra*, 12a-13a).

2. The export controls in question here only regulated conduct in Japan. They did not limit the customers to whom the U.S. importers (including the U.S. subsidiaries of the petitioners) could resell the exported goods once they reached the United States, or the prices at which such resales could be effected. It is the position of the Japanese Government that, when the exercise of a state's sovereignty involves only control of the activity of its own nationals within its territory with respect to its own export trade, foreign courts should not question or punish such activity. Therefore, such business conduct by Japanese nationals pursued within Japanese territory relating to Japanese exports and required by the Japanese Government can neither constitute nor be considered by American courts and juries as a "feature" of an alleged unlawful antitrust conspiracy.

It is also the position of the Government of Japan that the formal representations of foreign governments concerning their sovereign acts should be entitled to conclusive effect. By holding that the finder of fact may conclude that the actions of petitioners in entering into the minimum export price agreements and export regulations involved herein were voluntary rather than mandated by the Government of Japan, the Court of Appeals has improperly failed to give conclusive effect to the formal declaration of the Japanese Government. Once a friendly foreign

nation has declared the substance and scope of its own domestic law and governmental activity, a United States court is to respect that declaration.

One of the fundamental attributes of national sovereignty is the conduct of foreign relations, including foreign economic and trade relations. The Government of Japan, like the Government of the United States, is entitled to exercise its sovereignty in this regard according to its own law and policy when it controls only the activity of Japanese nationals within Japanese territory with respect to Japan's export trade. This sovereign right would be seriously impaired by the Court of Appeals' ruling that, despite the 1975 Japanese Government Statement, there are triable issues of fact concerning the role of the Japanese Government in directing and effectuating the export control agreements and regulations involved herein, 723 F.2d at 310, 315, and that those export controls might be found to constitute or be a "feature" of the alleged conspiracy in violation of United States laws. *Id.* at 305-06.

Allegations that petitioners also engaged in other conduct, which was not compelled, do not affect this conclusion. Whenever foreign nationals' conduct of entering into export arrangements within their home country compelled by a foreign government acting within its sovereignty forms *any part* of a finding or inference of illegal activity, the sovereignty of the foreign government is improperly challenged.

Government-directed export control arrangements, such as those challenged by respondents in this case, are frequently adopted at the urging of the United States for the purpose of creating a period of trade stability. See Brief for the United States as *amicus curiae* in support of the petition for a writ of

certiorari, at 17. Unless the trading partners of the United States can be confident that such arrangements will not subject their citizens to private antitrust liability before a United States court, the implementation of their trade policies vis-a-vis the United States will be significantly impaired.

Given the necessity of protecting their citizens against such unfair consequences, foreign governments can implement their foreign trade policy through export controls only if their formal representations to United States courts as to their law and sovereign acts are given conclusive effect, and government-mandated restrictions on exports cannot be made the basis or a "feature" of an unlawful conspiracy charge. Failure to accept as conclusive a formal governmental representation that export restraints were government-mandated and treating them as "features" of an unlawful conspiracy would seriously increase the likelihood of private suits against the companies involved, imposing on them the costs and burdens of litigation, the threat of adverse judgments and consequent pressure to settle ill-founded claims, and as a result, threaten the ability of foreign governments to cooperate with the United States in the implementation of U.S. trade policy.

Because this matter goes to the heart of national sovereignty, it is not a concern unique to the Government of Japan. The Court of Appeals' decision has led the Governments of Australia, Canada, France, Korea, Spain and the United Kingdom to submit diplomatic notes to the Department of State, all of which express concern over the court's disregard of a sovereign nation's representations as to the export controls imposed upon its nationals under its own domestic law. See Diplomatic Notes lodged with the

Clerk of the Court by the Solicitor General in connection with the Brief for the United States as *amicus curiae* in support of the petition for a writ of *certiorari*. As those diplomatic communications indicate, such disregard by a United States court would impair the sovereign right of other nations and is harmful to trade relations between the United States and its major trading partners. The Government of Japan fully concurs with the views expressed by those governments, as well as the Government of the United States in its brief *amicus curiae* in support of *certiorari*.

CONCLUSION

The Government of Japan wishes to ensure that this Court is fully apprised of its view that the decision of the Court of Appeals misapprehends Japanese legislation and directly impairs the ability of the Japanese Government, in the exercise of its sovereign power, to promote future economic and trade relations between our countries. For the reasons stated, and in the interest of close bilateral economic relations between the United States and Japan, the Government of Japan respectfully requests that the erroneous judgments of the Court of Appeals be reversed.

Respectfully submitted.

NOBUO MATSUNAGA
Ambassador Extraordinary
Plenipotentiary of Japan
Embassy of Japan
2520 Massachusetts Ave., N.W.
Washington, D.C. 20008

STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600
Counsel of Record for
The Government of Japan

June 4, 1985

APPENDIX

APPENDIX

EMBASSY OF JAPAN
WASHINGTON

May 29, 1984

Note Verbale

E-43

The Embassy of Japan presents its compliments to the Department of State, and, with reference to the decision of December 5, 1983, by the United States Court of Appeals for the Third Judicial Circuit in *IN Re: Japanese Electronic Products Antitrust Litigation* (D.C. MDL. No. 189), has the honor to state the views of the Government of Japan on this subject as follows:

1. The Government of Japan has possessed a keen interest in this case, not only because it is highly questionable that a United States court should make a decision on Japanese corporations' actions which were taken within Japanese territory pursuant to the directions given by the Government of Japan for the implementation of its important trade policy, but also because a decision of U.S. court on this case could seriously hamper the smooth execution of the trade policy of the Japanese Government.

The Government of Japan wishes to express its deep concern for the above-mentioned U.S. court decision of December 5, 1983, and to clarify its position regarding the decision. The Japanese Government also requests the Government of the United States to lend its kind cooperation as stated in paragraph 4 below from the viewpoint of developing further the amicable, cooperative trade relations between Japan and the United States.

2. In connection with the proceedings of this case, the Government of Japan transmitted a formal Statement in April, 1975, to the Federal District Court for the Eastern District of Pennsylvania through the Embassy of Japan and the U.S. Department of State. The Statement established the fact that the price agreements among certain Japanese manufacturers of consumer electronic products and the regulations on registration of related distributors by the Japan Machinery Exporters Association (hereinafter referred to as "JMEA") in question came into existence pursuant to the mandatory directions given by the Government of Japan in accordance with the Export and Import Transaction Law and the Foreign Exchange and Foreign Trade Control Law.

Despite the transmission of the said Statement by the Government of Japan, the Court of Appeals, in its decision, made no reference to the Statement, or the related supplementary documents transmitted thereafter, and seemed to question the above-mentioned fact confirmed in the Statement by the Government of Japan.

The Government of Japan hereby reaffirms that, by entering into minimum price agreements with respect to export of television receivers and by adopting the JMEA regulations (including the so-called "five-company rule", which, among other things, served to control the quality of exported products), the Japanese corporations in question were acting pursuant to specific mandatory directions of the Government of Japan, and also that the Television Export Council, the Television Export Examination Committee and the Television Division of the JMEA were established, pursuant to the directions of the

Government of Japan, for carrying out and administering those agreements and regulations.

3. Moreover, the decision, of the Court of Appeals is not consistent with the view of the Antitrust Division of the United States Department of Justice that the agreements and regulations, as ordered by the Government of Japan, would not give rise to violations of United States law. Such view was expressed, for example, in the letter of answer from Mr. Donald I. Baker (then Assistant Attorney General, Antitrust Division) to Senator Edward M. Kennedy (then Chairman of Subcommittee on Administrative Practice and Procedure) dated February 16, 1977. The decision is also inconsistent with the policy of the Antitrust Division that international comity should be taken into account in applying U.S. antitrust law.

Therefore, if the Japanese firms in question should be held liable, it means imposing improper penalties on those who followed the directions of the Government of Japan and contributed to prevent "torrential increase" of exports into the United States. They have, in fact, already been improperly penalized by the action itself. Besides, this unfortunate situation could very well create extensive feelings of frustration among the Japanese public.

4. The decision of the Court of Appeals, which has considerably increased uncertainty in the trade relations between Japan and the United States, needs to be reviewed promptly by the United States Supreme Court. The Government of Japan understands that the defendants in the proceeding will file a joint petition for *certiorari* on or before June 7, 1984.

The Government of Japan expects that the Government of the United States fully understands the

position and concerns of the Government of Japan as stated above, and, requests the Government of the United States to file an *amicus curiae brief* before the United States Supreme Court in order to secure a proper conclusion by the Supreme Court, and also request it to take all other appropriate measures for the solution of this unfortunate situation.

The Embassy of Japan avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

EMBASSY OF JAPAN
WASHINGTON

October 19, 1984

Note Verbale

E-79

The Embassy of Japan presents its compliments to the Department of State and has the honor to refer to the October 1, 1984 request of the United States Supreme Court to the Solicitor General of the United States requesting the views of the United States with regard to the case styled *Matsushita Electric Industrial Co., Ltd., et al. v. Zenith Radio Corp., et al., No. 83-20003*. The Embassy of Japan has further the honor to re-transmit as per attached the Note Verbale, dated May 29, requesting the Government of the United States to file an *amicus curiae* brief before the United States Supreme Court that will secure a review and a proper conclusion by that Court of the decisions of December 5, 1983 by the United States Court of Appeals for the Third Judicial Circuit in *In Re: Japanese Electronic Products Antitrust Litigation* (D.C. M.D.L. No. 189), and requesting the Government of the United States to take all other appropriate measures for the solution of this unfortunate situation.

The Embassy of Japan avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Letter From the Department of State to the United States District Court for the Eastern District of Pennsylvania June 9, 1975

Department of State
Washington, D.C.

Clerk June 9, 1975
United States District Court
U.S. District Court House
9th and Market Street
Philadelphia, Pennsylvania 19107

Dear Sir:

The Embassy of Japan has requested in a diplomatic note that the Department of State transfer to the court a statement of the Ministry of International Trade and Industry (MITI) of the Government of Japan in connection with two cases before the court, namely, *National Union Electronic Corp.* v. *Matsushita Electric Industrial Co., Ltd. et al.* (Civil Action *No. 74-3247*) *and Zenith Radio Corp.* v. *Matsushita Electric Co., Ltd. et al.* (Civil Action *No. 74-2451*). Copies of MITI's statement and the diplomatic note received from the Japanese Embassy are enclosed.

In carrying out this request of the Embassy of Japan, neither the Department of State nor the United States Government takes any position on the content of the statement or on any other aspect of the litigation in question.

Sincerely,

/s/ *Phillip R. Trimble*
Phillip R. Trimble
Assistant Legal Adviser for
Economic and Business Affairs

Enclosures:

(1) Statement of the Japanese Ministry of International Trade and Industry

(2) Diplomatic Note from the Embassy of Japan dated April 25, 1975.

Letter From the Embassy of Japan to the Department of State, April 25, 1975

April 25, 1975

E-21

The Embassy of Japan presents its compliments to the Department of State and has the honor to ask the latter to transfer to the United States District Court for Eastern District of Pennsylvania the attached statement concerning the two lawsuits between National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd. et al. (Civil Action No. 74-3247); and Zenith Radio Corporation v. Matsushita Electric Co., Ltd. et al. (Civil Action No. 74-2451).

Attachment

Statement of the Ministry of International Trade and Industry (MITI Statement)

The Ministry of International Trade and Industry of the Japanese Government ("MITI") has become aware that a number of Japanese television manufacturers and exporters are being sued by National Union Electric Corporation and Zenith Radio Corporation in the United States District Court for the Eastern District of Pennsylvania for alleged violations of various United States antitrust and antidumping laws in connection with their sales of television sets for export to the United States. (National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd., et al., Civil Action No. 74-3247 and Zenith Radio Corporation v. Matsushita Electric Co., Ltd., et al., Civil Action No. 74-2451.) In these lawsuits, questions have been raised concerning certain agreements entered into among the Japanese defendants, as well as certain regulations of the Japan Machinery Exporters Association, both such agreements and regulations have come into existence pursuant to the direction of MITI.

MITI has the honor to express its deep interest and serious concern regarding these lawsuits which involve issues related to its foreign trade policy and to call your attention to the following:

1. In order that Japanese exports do not cause unnecessary disruptions in the national economies of Japan's trading partners, one of the basic trade policies is to assure that Japanese exporting is carried on in as orderly a manner as possible. MITI is the government organ empowered and responsible for the detailed implementation of the said basic trade policy.

Thus, Article 3 of the Law Concerning the Establishment of MITI (Law No. 275, 1952) sets forth the following administrative activities as being under the responsibility of MITI:

(1) Promotion and adjustment of international trade and control of foreign exchange relating to international trade (Article 3, Paragraph 1);

(2) Promotion of international cooperation in international trade and economic relations (Article 3, Paragraph 1-2).

Further, Article 4 of the Establishment Law defines the role of MITI as follows:

(1) Planning and programing of basic policies concerning production, distribution, consumption, trading, etc. of goods (included is electric power) under its jurisdiction (Article 4, Sub-section 1, Paragraph 13);

(2) To export and import (Article 4, Sub-section 1, Paragraph 16);

(3) To restrict or prohibit export or import (Article 4, Sub-section 1, Paragraph 17);

(4) To take the steps necessary to execute agreements and arrangements concerning international trade (Article 4, Sub-section 1, Paragraph 18);

(5) To prohibit or restrict transactions, etc. in foreign exchange relating to international trade (Article 4, Sub-section 1, Paragraph 20);

(6) To sanction exporters' agreements, importers' agreements and agreements of either

manufacturers or distributors concerning export products, to sanction matters to be complied with members of export associations or import associations (hereinafter referred to as "Association Regulations"), to sanction collective agreements among the said members and matters to be complied with members of export-import associations, and to supervise designated agencies. (Article 4, Sub-section 1, Paragraph 24);

(7) To exercise such powers, other than those mentioned in the above items, as are placed under the jurisdiction of MITI by law (including orders issued thereunder) (Article 4, Sub-section 1, Paragraph 51).

2. Endowed with the said responsibilities and powers, MITI has developed under the law two basic procedures to achieve the aims of trade policy of the Government of Japan. The first procedure relates to MITI's regulatory powers provided for under the Export and Import Trading Law (Law No. 299, 1952) and the second relates to regulatory powers under the Foreign Exchange and Foreign Trade Control Law (Law No. 228, 1949). The purpose of the Export and Import Trading Law is to promote the sound development of foreign trade by preventing unfair export trading and by establishing an orderly system for export and import trading. The purpose of the Foreign Exchange and Foreign Trade Control Law is to promote the proper development of foreign trade by providing for the control of foreign exchange, foreign trade and other foreign transactions.

In order to promote the sound development of foreign trade MITI applies both laws as follows: If

some measures are deemed necessary to achieve the purposes mentioned above, MITI will generally first direct the relevant Japanese industry or trade association to enter into Arrangements (which include both manufacturers' agreements and association regulations) pursuant to the Export and Import Trading Law.

Where this procedure is deemed to be insufficient for the purpose of achieving these trade policy objectives (for example, where there is insufficient time to complete the contemplated arrangements), MITI will exercise its powers provided for in the Export Trade Control Order (Cabinet Order No. 378, 1949) under the Foreign Exchange and Foreign Trade Control Law, without prior direction to the industry or trade associations to enter into such Arrangements.

As stated above, such Arrangements concluded under the Export and Import Trade Law and carried out under the direction of the Minister of International Trade and Industry in order to assure orderly Japanese exportation activities are the actual implementation of MITI's trade policy itself. And since such direction by MITI, if disregarded, can be enforced by the power pursuant to the said Cabinet Order, it has in fact a compulsory power equivalent to law.

Once MITI has decided upon the trade policy measures to be taken and has directed the establishment of appropriate Arrangements under the Export and Import Trading Law for this purpose, the Japanese industries involved have in fact no alternative but to establish them. Therefore the Arrangements entered into under the Export and Import Trading Law in compliance with the direction of MITI are not private

agreements in effect and are no less than the implementation of the foreign trade policy of MITI, despite their form as agreements made among private parties.

3. With respect to the export of television sets to the United States, in 1962 MITI accurately recognized, in view of the importance of televisions as one of Japan's export products, the need for assuring their orderly exportation to avoid the possibility of trade conflicts.

Thus, MITI directed Japanese television manufacturers including the present Japanese defendants to enter into an agreement under Article 5-3 of the Export and Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States, and further, directed the exporters to establish a new regulation to be observed by the members of the export association with respect to filing of export prices and other related matters, pursuant to the association's functions under Article 11, Sub-paragraph 2 of the same law regarding the same exports. MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected. Such direction and supervision concerning minimum prices at which televisions could be sold for exportation to the United States and other matters were exercised continuously from 1963 until February 28, 1973 when such exporting arrangements were terminated.

4. Had the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the

Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy.

Therefore, when MITI decided the above-mentioned policy with respect to such sales and directed the television manufacturers and exporters to conclude, under the Export and Import Trade Law, such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction.

Certification by the Embassy of Japan, April 23, 1979

EMBASSY OF JAPAN
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008
(202) 234-2266

April 23, 1979

I Toshihiko Tanabe, Counselor, Embassy of Japan, hereby certify that the attached document is a true and correct copy of the official statement that was transmitted by the Embassy of Japan to the Department of State on April 25, 1975.

/s/ *T. Tanabe*
Toshihiko Tanabe
Counselor
Embassy of Japan
Washington, D.C.
April 23, 1979

Letter from the Embassy of Japan to the United States District Court for the Eastern District of Pennsylvania July 11, 1980

EMBASSY OF JAPAN
WASHINGTON, D.C.

July 11, 1980

The Honorable
Edward R. Becker
United States District Court
for the Eastern District of
Pennsylvania
United States Courthouse
601 Market Street
Room 16614
Philadelphia, Pennsylvania 19106

Dear Sir:

I have the honor, on behalf of the Government of Japan, to inform you, Sir, of the views of the Government of Japan as *amicus curiae* in reference to the proceedings IN RE: Japanese Electronics Products Antitrust Litigation, M.D.L. 189.

This letter is to certify and reaffirm that the Ministry of International Trade and Industry ("MITI") has been, since at least 1960, and continues to be the government organ empowered and responsible for the detailed implementation of the basic trade policies of the Japanese Government.

As such, MITI was and is empowered and authorized to act for the Government of Japan in making the statement as attached to the Note Verbale dated

April 25, 1975 which was delivered to the Department of State of the United States by the Embassy of Japan.

Accept, Sir, the assurances of my highest consideration.

Sincerely yours,

/s/ *Yoshio Okawara*
Yoshio Okawara
Ambassador Extraordinary
Plenipotentiary of Japan

MOTION FILED

JUN 1 4 1985

15

No. 83-2004

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE and BRIEF OF THE GOVERNMENTS OF AUSTRALIA, CANADA, FRANCE, and THE UNITED KINGDOM OF GREAT BRITAIN and NORTHERN IRELAND AS AMICI CURIAE IN SUPPORT OF PETITIONERS

MARK R. JOELSON
Counsel of Record
JOSEPH P. GRIFFIN
BRUCE R. STEWART
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200
Counsel for the Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland

June 15, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Under Rule 36.3 of the Rules of this Court, the Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland respectfully move for leave to file the attached brief as amici curiae in support of petitioners' position on the foreign sovereign compulsion and act of state defenses. Petitioners have consented to the filing of this brief; respondents have not.

This case presents to this Court for the first time questions relating to the treatment by U.S. courts of the official statements made directly to them by friendly foreign sovereigns, and the relationship between such statements and the defenses of foreign sovereign compulsion and act of state. The decision of the Court of Appeals below refusing to give conclusive effect to, or even to acknowledge, the official statement of the Japanese Gov-

ernment is of great concern to friendly foreign sovereigns, including the Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland.

To the knowledge of the moving Governments, the attached brief represents the first time an amicus curiae brief has been presented to this Court by more than one foreign government. Through the attached brief, these Governments wish to ensure that this Court is fully apprised of their views on the issues before this Court relating to the foreign sovereign compulsion and act of state defenses. They respectfully submit that, in a case presenting the question of the proper treatment to be accorded the official statements of foreign sovereigns by U.S. courts, it would be very unfortunate if these Governments were deprived of the opportunity to present their views directly to this Court.

For this reason, and to enhance relations between the United States and its major trading partners, the Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland respectfully request that the Court accept and consider the attached brief.

Respectfully submitted,

MARK R. JOELSON
Counsel of Record
JOSEPH P. GRIFFIN
BRUCE R. STEWART
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200
Counsel for the Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland

June 15, 1985

QUESTION PRESENTED

The Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland will address the following three-part question upon which this Court granted certiorari:

> May a U.S. court (a) disregard the duly issued statement of a friendly foreign government attesting that certain export controls observed by its nationals were compelled by that government, (b) permit the trier of fact to adjudicate the veracity of such an official government statement, or (c) hold such government-mandated conduct to constitute or be a feature of a conspiracy in violation of the U.S. antitrust laws.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners
v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE GOVERNMENTS OF AUSTRALIA, CANADA, FRANCE, and THE UNITED KINGDOM OF GREAT BRITAIN and NORTHERN IRELAND AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland submit this brief as amici curiae.

INTEREST OF THE AMICI CURIAE

The amici were not involved in the case at bar [1] and take no position on this controversy other than to support petitioners' position on the foreign sovereign com-

[1] Amici did advise the Department of State of their serious concern about the Court of Appeals' treatment of the act of state and foreign sovereign compulsion issues. The Solicitor General lodged copies of amici's statements with the Clerk of the Court in connection with the filing of the petition for a writ of certiorari.

pulsion and act of state defenses. Moreover, the refusal of the Court of Appeals below to give dispositive weight to, or even to acknowledge, the official statement of the Japanese Government is of great concern to amici because it is inconsistent with the fundamental international legal principle of mutual respect for the sovereignty of friendly foreign governments within their own territory. The interest of the amici in these matters is described in detail below.

Amici are among those governments most friendly to the United States. Each considers the United States to be one of its most important trading partners. For many years, each has conducted friendly economic relations with the United States via a carefully fashioned network of multilateral and bilateral agreements, formal and informal arrangements, active participation with the U.S. Government in international organizations, and ad hoc consultations with the Executive Branch.

Trade and investment between the United States and the amici are traditionally and necessarily conducted on the basis of mutual respect for each nation's sovereignty. Principles of international law and comity govern these relationships. One of the fundamental attributes of each nation's sovereignty is the right to control conduct within its borders in the manner it deems appropriate, subject only to such limitations as may be agreed between governments or otherwise required by international law. To the extent that different national policies give rise to international concern or dispute, bilateral or multilateral diplomatic mechanisms, rather than unilateral adjudication, are the appropriate means of seeking resolution. This strongly held position of the amici and other nations on sovereignty has led to difficulty with regard to the application of the antitrust laws of the United States.[2] High level intergovernmental consultations have, from time to time, been held and multilateral understandings have been reached on how conflicting national interests may be reconciled.[3] The Governments of Australia [4] and Canada [5] have entered into bilateral notification, consultation, and cooperation arrangements with the U.S. Government concerning issues arising under the U.S. antitrust laws.

The need for mutual accommodation and comity among co-equal sovereigns has been judicially acknowledged in the U.S. legal doctrines of foreign sovereign compulsion and act of state. In a number of situations, the U.S. Government has advised the amici that the doctrine of foreign sovereign compulsion would constitute a defense

---

[2] For an acknowledgement of these difficulties, *see* Sec. of State George P. Shultz, *Trade, Interdependence and Conflicts of Jurisdiction*, Address before the S. Car. Bar Ass'n in Columbia (May 5, 1984), *reprinted in* Dept. of State Bulletin, June 1984, at 33. *See also Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws* (J. Griffin ed. 1979).

[3] On May 18, 1984, Ministers comprising the Council of the Organization for Economic Cooperation and Development, including the U.S. Secretary of State, agreed to strengthen bilateral and multilateral cooperation in intergovernmental conflicts involving multinational enterprises by strongly encouraging governments to follow an approach of cooperation, moderation and restraint, rather than unilateral action. *See* Organization for Economic Cooperation and Development, *International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decisions* 26 (1984); *see also* Organization for Economic Cooperation and Development, *Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade*, OECD Doc. C (1979) 154 (1979).

[4] Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters (June 29, 1982), *reprinted in* [1969-83 Current Comment Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,440.

[5] Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws (Mar. 9, 1984), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,464.

to liability arising from an antitrust lawsuit in the United States based on conduct affecting U.S. commerce that was mandated by a foreign government. In reliance on such assurances, some of the amici have acceded to requests by the U.S. Government for the imposition of government mandated export restraints on their manufacturers. For example, earlier this year the U.S. Government requested that Australia limit the quantity of certain steel exports to the United States. Pursuant to the Agreement Between the Government of the United States and the Government of Australia Relating to Co-operation on Antitrust Matters, the Australian Government requested the U.S. Government's views on antitrust questions regarding the Australian Government's steel export control system. In response, the then Assistant Attorney General for the Antitrust Division advised the Australian Government, *inter alia*, that

> We also believe that a court would view Australian steel exporters' compliance with the mandatory export limits established by the Australian Government as having been compelled by your government, acting within its sovereign powers and in conjunction with the United States Government under the Trade and Tariff Act of 1984, and consequently as not giving rise to a violation of United States antitrust laws.

Letter from Ass't Att'y Gen. McGrath to Charge d'Affaires, Embassy of Australia, at 3 (January 18, 1985).

In situations other than export restraints, some amici have considered entering into agreements or understandings with the U.S. Government intended to regulate aspects of their bilateral economic relations. In such deliberations, amici have relied upon their understanding of relevant international legal principles and the decisions of this Court and lower U.S. courts relating to the defenses of foreign sovereign compulsion and act of state. The fundamental basis on which relations between the amici and the United States are conducted would be removed if these defenses could not be invoked by private parties that rely upon such intergovernmental understandings in their subsequent conduct. Indeed, U.S. laws purporting to impose liability on conduct mandated by friendly foreign sovereigns would themselves constitute a serious invasion of the sovereignty and prerogatives of such sovereigns.

In addition to the shared interest of the U.S. Government and the amici in the viability and scope of the foreign sovereign compulsion and act of state defenses, amici also have a compelling interest in the treatment that is accorded their official statements made to U.S. courts. In 1978, the Department of State, at the suggestion of the Clerk of this Court,[6] encouraged foreign governments to present their views directly to U.S. courts.[7] Since then, friendly foreign governments have relied on the State Department's position and have presented their views directly to the relevant U.S. court, as did the Japanese Government below. In this case and others, the filing of a statement by a friendly foreign sovereign in a U.S. court has failed to prove satisfactory. For example, the Seventh Circuit's treatment of friendly foreign government amicus briefs in the *Uranium*[8] case

[6] Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *printed in* 1978 Dept. of State *Digest of United States Practice in International Law* 561, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979).

[7] Dept. of State, Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *printed in* 1978 Dept. of State *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979). *See also* Letter from Deputy Legal Adviser Marks (June 15, 1979), *described in* 73 Am. J. Int'l L. 669, 678-79 (1979).

[8] The court described the foreign governments as "surrogates" for non-appearing defendants and added "shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction." *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1256 (7th Cir. 1980).

prompted the Legal Adviser of the State Department to request the Justice Department to inform the court that the court's "language has caused serious embarrassment to the United States in its relations with some of our closest allies." [9] In the instant case, the Court of Appeals below did not acknowledge, let alone give conclusive effect to, the directly relevant filing by the Government of Japan.

ARGUMENT

I. A U.S. COURT MAY NOT DISREGARD THE STATEMENT OF A FRIENDLY FOREIGN GOVERNMENT THAT IT MANDATED PRIVATE CONDUCT.

The related doctrines of foreign sovereign compulsion and act of state are judicial acknowledgements of the fundamental principle of international law that a sovereign's exercise of its authority within its territory is not reviewable by the courts of another nation.[10] In 1962, this Court indicated that conduct compelled by a foreign sovereign does not give rise to U.S. antitrust liability. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (the defense was not available in that case because there was "no indication that [any] official within the . . . Canadian Government approved or would have approved of" the challenged conduct). This Court and lower U.S. courts have offered several well reasoned explanations for the existence and importance of the foreign sovereign compulsion doctrine, including: international comity, judicial noninterference

[9] Letter from Legal Adviser Owen to Assistant Attorney General Shenefield (Mar. 17, 1980). For background and a substantial text of the letter, *see* 74 Am. J. Int'l L. 657, 665-67 (1980).

[10] "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations . . . . The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, *prima facie* exclusive, over a territory . . .; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states . . . ." I. Brownlie, *Principles of Public International Law* 287 (3d ed. 1979).

in the Executive Branch's conduct of international relations, fairness to private parties caught between conflicting sovereign commands, the construction of the Sherman Act,[11] and the concept that conduct compelled by a foreign sovereign should be deemed an act of the sovereign itself.[12] Amici urge this Court to reaffirm the foreign sovereign compulsion doctrine's vitality.

The most reliable evidence of a foreign sovereign's policy, law, method of operation and intention *vis-a-vis* particular challenged conduct is a statement by that sovereign. This Court has relied on statements from subordinate state governments within the domestic legal environment of the United States.[13] In an international context the equality of nations demands that at least the same weight should be given to the statement of a co-equal, friendly foreign sovereign describing its regulatory actions and their significance within its own cultural and legal environment, which often will be unfamiliar to U.S. courts.

As noted above, since 1978 the U.S. Government has encouraged foreign governments to address U.S. courts directly. If this Court now holds that such filings prop-

[11] "Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce." *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

[12] *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 606 (9th Cir. 1976).

[13] In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721, 1730 (1985), this Court was faced with the task of determining whether, in the absence of a Mississippi statute expressly permitting the challenged conduct, the state had clearly articulated a policy to displace competition with a regulatory structure. The Court relied on the State of Mississippi's Amicus Curiae Brief in the District Court to hold that the state commission had actively encouraged collective ratemaking.

erly may be disregarded by U.S. courts, the Executive Branch will have the very difficult task of convincing foreign sovereigns that there is any acceptable mechanism in the U.S. legal system for friendly foreign sovereigns to express the nature and effect of their regulatory actions within their territory. It clearly would not be acceptable to such sovereigns that they be required to submit the determination of such questions of fact to the courts of another sovereign.

Amici therefore urge this Court to hold that official statements made to U.S. courts by friendly foreign governments that they mandated private conduct may not be disregarded.

II. THE TRIER OF FACT MAY NOT ADJUDICATE THE VERACITY OF AN OFFICIAL STATEMENT BY A FRIENDLY FOREIGN SOVEREIGN THAT IT MANDATED PRIVATE CONDUCT.

In 1897, this Court formulated what it later described as the "classic American statement" [14] of the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

The act of state doctrine apparently was first applied by this Court in a suit under U.S. antitrust law in 1909, when it held, citing *Underhill*, that the doctrine barred adjudication of a claim that the defendant persuaded the Costa Rican Government to expropriate a competitor's

[14] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964).

plantation. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-58 (1909).

In analyzing the act of state doctrine in a recent antitrust case, the Ninth Circuit made the following perceptive comments in illuminating the underpinnings of that doctrine:

> The doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.

International Association of Machinists v. Organization of Petroleum Exporting Countries, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

Amici submit that the preceding explanation of the bases of the act of state doctrine, as well as *United States v. Pink*, 315 U.S. 203, 218-21 (1942), and its progeny, explain why U.S. courts may not adjudicate the veracity of an official statement by a friendly foreign

government that it mandated private conduct. Such an adjudication of a friendly foreign sovereign's official statement would be an unacceptable intrusion into the sovereignty of that friendly foreign government. It could, as a practical matter, render the act of state and foreign sovereign compulsion doctrines meaningless and would, at minimum, create uncertainty in international economic relations. Amici believe that the U.S. Government would have the same reaction to such adjudications of its statements by foreign courts.

Another sound policy reason for U.S. courts not to inquire into the veracity of such a statement by a friendly foreign sovereign is that such an inquiry will necessarily involve the difficult task of appraising the manner in which a foreign political and legal system operates. In each case where the question of foreign sovereign compulsion arises, the determinative inquiry for a U.S. court is whether the foreign sovereign exercised its authority to mandate the relevant conduct. The fact that a foreign sovereign may express itself in a manner other than by explicit, compulsory orders may reflect a different style of governance, not a less intense involvement in the issue. Friendly foreign governments should not have their national policies questioned or thwarted by American courts because they do not adopt compulsory formal orders.[15] Inflexibility by U.S. courts in requiring explicit formal orders would discriminate improperly in favor of governments with centrally planned and highly regulated economies and would elevate the form of the foreign sovereign's involvement over the substance of that involvement.

[15] It also should be noted that Section 2-615(a) of the Uniform Commercial Code provides in part that "compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid" excuses non-performance. This section has been held to excuse non-performance based on an *informal* U.S. Government procurement program. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F. 2d 957, 996 (5th Cir. 1976).

Within the context of the U.S. federal system, this Court has recognized that private anticompetitive conduct encouraged, but not compelled, by state governments may be entitled to antitrust immunity.[16] In this case, the Government of Japan has expressly stated that it mandated the challenged private conduct. Amici respectfully submit that in an international context it would be inappropriate for this Court to fail to accord co-equal foreign sovereigns the freedom in choosing regulatory alternatives or in expressing their national policies that it has accorded states in the U.S. federal system.

Amici strongly urge the Court to adopt the Executive Branch's suggestion that statements by friendly foreign governments that they mandated private conduct within their territory be given "dispositive weight." Brief for the United States as Amicus Curiae in Support of the Petition for Certiorari at 17.

III. CONDUCT MANDATED BY A FOREIGN SOVEREIGN MAY NOT CONSTITUTE OR BE A FEATURE OF CONSPIRACY UNDER U.S. ANTITRUST LAW.

As discussed above, the foreign sovereign compulsion and act of state doctrines require a U.S. court to consider and give conclusive effect to the statement of a friendly foreign sovereign that it mandated private conduct. It would be illogical to reach such a result, but then to hold that such conduct may nevertheless constitute or be a feature of conspiracy under U.S. antitrust law. Such a holding could lead to the very exacerbation of interna-

[16] The Court recently held that, in the state action immunity context, a private party acting pursuant to an anticompetitive state regulatory program need not "point to a specific, detailed legislative authorization" of its challenged conduct but may rely on an express intent to displace competition in a particular field with a regulatory structure. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. at 1730-31 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)).

tional conflict that the foreign sovereign compulsion and act of state doctrines are designed to avoid.

Attempts by U.S. courts to hold that conduct mandated by a foreign sovereign constituted a feature of conspiracy under U.S. antitrust law would, in many instances, be resisted by foreign governments as a matter of national sovereignty. This could lead to further foreign governmental measures to counteract what many nations view as assertions of U.S. jurisdiction that are inconsistent with international law.[17] In this case, the Executive Branch has clearly recognized the dangers of such developments. *Id.* at 16-20.

IV. ISSUES IMPINGING ON THE SOVEREIGNTY OF FOREIGN GOVERNMENTS SHOULD BE DECIDED AT AS EARLY A STAGE AS POSSIBLE.

Finally, it is submitted that issues in U.S. legal proceedings that impinge on the sovereignty of other nations should be decided as early in the proceedings as possible.[18] One of the underlying rationales of the act of state and foreign sovereign compulsion doctrines is that, whatever the eventual outcome of the litigation, an inquiry into the actions of a foreign government will disrupt harmonious international economic relations. Moreover, U.S.-style discovery conducted beyond U.S. territory can only exacerbate conflict in such a situation, and is clearly inappropriate where the official statement of a friendly foreign government can resolve the matter conclusively.

---

[17] *See, e.g.*, A. V. Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (1983); Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 Am. J. Int'l L. 783 (1984); Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 Stan. J. Int'l L. 247 (1982).

[18] For a recommendation of swift action, *see* 2 J. R. Atwood & K. Brewster, *Antitrust and American Business Abroad* 348 (2d ed. 1981).

CONCLUSION

Amici urge the Court to reaffirm the vitality of the foreign sovereign compulsion and act of state doctrines by holding that U.S. courts may neither disregard nor adjudicate the veracity of a statement by a friendly foreign sovereign that it mandated private conduct, and to hold that such conduct may not constitute or be a feature of conspiracy under U.S. antitrust law.

Respectfully submitted,

MARK R. JOELSON
Counsel of Record
JOSEPH P. GRIFFIN
BRUCE R. STEWART
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

Counsel for the Governments of Australia, Canada, France, and The United Kingdom of Great Britain and Northern Ireland

June 15, 1985

(16)

No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

MOTION OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

ROBERT HERZSTEIN
Counsel of Record

HADRIAN R. KATZ

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for American Association of Exporters and Importers and Consumers for World Trade

June 16, 1985

13 pp

No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, the American Association of Exporters and Importers ("AAEI") and Consumers for World Trade ("CWT") respectfully move for leave to file the accompanying brief as *amici curiae.* Petitioners have consented to the filing of this brief; respondents have not.

INTEREST OF AAEI AND CWT

AAEI represents the interests of over 1,000 United States companies nationwide, and is the only organization in the country specifically representing the interests of exporters and importers. Member companies produce, sell, and distribute a broad range of products, including electronic goods, chemicals, machinery, textiles and apparel, footwear, food, and automobiles. AAEI members also include businesses serving the trade community, such as customs brokers, freight forwarders, air and shipping lines, banks, and insurance firms. The promotion of fair and open world trade has been the primary mission of AAEI for the entire 64 years of its existence. For the reasons set forth below and in the accompanying brief, AAEI is concerned that the erroneous reasoning of the decision below would create a new, substantial, and unjustified barrier to free international trade, thereby injuring the business of AAEI members.

CWT is a national, nonprofit association devoted to promoting free international trade for the economic benefit of consumers in the United States and worldwide. CWT is a leading spokesman for the interests of consumers in opposing unjustified trade restraints such as those created by the decision below.

AAEI and CWT have direct and substantial interests in the preservation of open, competitive markets in which international traders may sell high-quality goods to consumers at reasonable prices. To this end, they have consistently opposed policies that erect protectionist trade barriers which threaten to impede import competition, and deny the American economy the benefits of unfettered interbrand competition.

In submitting the accompanying brief supporting the position of the petitioners, AAEI and CWT emphasize that they have no direct interest in the outcome of this litigation. However, they believe that the decision of the Court of Appeals for the Third Circuit must be reversed to prevent serious injury to the United States economy and the open trading system. The fundamental purpose of the antitrust laws is to foster and promote price competition. Yet the decision below—by permitting domestic producers to pursue burdensome antitrust

claims against foreign producers because the latter are selling in the United States at *low* prices—would inevitably tend to inhibit price competition. The accompanying brief addresses the concern of AAEI and CWT over the potential for misuse of the antitrust laws for protectionist purposes created by the lower court's decision. We submit that AAEI and CWT are in a better position than the petitioners or any other party to set forth the significance of the decision below upon importers generally and upon consumers.

AAEI and CWT therefore move for leave to file the accompanying brief as *amici curiae.*

Respectfully submitted,

ROBERT HERZSTEIN
Counsel of Record

HADRIAN R. KATZ

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for American Association of Exporters and Importers and Consumers for World Trade

June 16, 1985

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

Pursuant to Rule 36 of the Rules of this Court, the American Association of Exporters and Importers ("AAEI") and Consumers for World Trade ("CWT") respectfully submit this brief as *amici curiae* to urge reversal of the judgments below.

INTEREST OF THE *AMICI CURIAE*

The interests of AAEI and CWT in this matter are set forth in the accompanying Motion for Leave to File Brief as *Amici Curiae*.

SUMMARY OF ARGUMENT

In this lawsuit, two domestic manufacturers have accused an entire foreign industry of engaging in a twenty-year conspiracy to destroy the American consumer electronic products industries by charging parallel low prices in the United States in violation of the antitrust laws. AAEI and CWT submit that it would be extremely harmful to the United States economic marketplace, as well as contrary to established principles of antitrust law, if low pricing—*i.e.*, behavior entirely consistent with unrestrained price competition—was deemed evidence of an antitrust conspiracy.

The decision below departs from established Supreme Court authority and threatens to deter foreign producers from engaging in the very conduct that the antitrust laws are designed to encourage. The court of appeals held that a predatory export conspiracy among foreign manufacturers may be inferred from evidence of allegedly parallel low prices, rebating, and new market entry, without regard to whether the challenged conduct is consistent with independent economic self-interest. In an ordinary competitive market, however, a new entrant charges low prices, and other competitors cut their prices to match. To view this behavior as evidence of an antitrust conspiracy is to turn antitrust law on its head. Indeed, it is behavior *varying* from this pattern that would indicate a possible conspiracy to restrain price competition. The decision below could deter aggressive price competition and cause sharp increases in the prices of imported products and of products subject to import competition—results that would be wholly at odds with fundamental antitrust policy.

In addition, we note that domestic firms being injured by low-price foreign competition have ample relief available under the United States trade laws administered by the Executive Branch. Those laws were designed to protect United States manufacturers against unfair pricing and subsidized competition from foreign producers. Moreover, the trade laws, reflecting the results of extensive multilateral negotiations, take into account the international obligations of the United States in the trade area. The lower court's interpretation of the antitrust laws would permit domestic firms to evade this established trade remedy system and allow them to burden foreign competitors with expensive and time-consuming litigation under laws that were never intended to erect barriers to trade.

ARGUMENT

The Decision of the Court of Appeals Misapplies Antitrust Law in a Manner that is Inconsistent with the Decisions of this Court, and Would Lead to Diminished Competition with Detrimental Effects upon Businesses and Consumers

The petitioners may be expected to argue that the judgments below are inconsistent with this Court's decision in *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968), and we agree. We suggest, however, that one need not go nearly so far as the *Cities Service* rule to conclude that what the court of appeals has done in this case is not merely wrong, but perversely wrong in a manner that threatens not only the interests of businessmen and consumers nationwide, but the system of free competitive trade that has been the foundation of American economic strength for generations.

Under the teaching of *Cities Service*, a successful plaintiff in an antitrust case must demonstrate, among other things, acts by the alleged conspirators *in contradiction of their independent economic self-interest. See* 391 U.S. at 284-88.[1] It is not enough to introduce evidence of normal, pro-competitive conduct such as low prices and market expansion, and then to ask the jury to speculate that such conduct was in fact the product of an anticompetitive conspiracy. If the evidence arrayed is equally

[1] *See also Monsanto Co.* v. *Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1470-71 (1984) ("Permitting an agreement to be inferred merely from the existence of [ambiguous evidence] could deter or penalize perfectly legitimate conduct. . . . There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently"); *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 327 (D.C. Cir.) ("Only when the observed parallel behavior is inconsistent with the behavior to be expected from each actor individually pursuing its own economic interest may an agreement be inferred from the parallel conduct"), *cert. denied*, 459 U.S. 839 (1982).

consistent with pro-competitive and anticompetitive motivations, the plaintiff has presented no basis for allowing the case to go to a jury. AAEI and CWT believe that it would be useful for the Court to reaffirm this principle, so that competitors need not be inhibited in vigorous price competition by the fear that vexatious litigation could be brought by high-cost competitors.

Ironically, however, the instant case is *not* one in which the evidentiary record is equally consistent with pro-competitive and anticompetitive interpretations of the petitioners' conduct. All of the evidence in the record regarding the activities of the petitioners in the United States demonstrates vigorous competition, especially competition on price.[2] Indeed, the conditions in the domestic television industry which are under attack in this litigation have made it perhaps the *most* competitive industry in the United States. Robust competition on price, features, service, and quality are all pervasive throughout the American television marketplace. The $200 television set of today is in every respect a dramatically superior product to the television set of 20 years ago, which cost $500, and the credit must be given to competition.

Moreover, as a result of this wide-open competition, the United States television market has never been healthier—sales hit all-time records in 1984, and will surpass them in 1985. Nor has United States industry been shutting down because of foreign competitors. To the contrary, the last 15 years has seen major new entry into the domestic television market. Perhaps somewhat ironically, each of the petitioning companies here—Matsushita, Hitachi, Mitsubishi, Toshiba, Sharp, and Sanyo—is now a producer of television sets in the United States. Two other Japanese-based companies, two Taiwanese-based companies, and two Korean-based companies have also entered

[2] There is, however, evidence in the record to the effect that the television market *in Japan* is less than perfectly competitive, and the Third Circuit suggests that an actionable conspiracy in the United States may be inferred from such evidence. We are aware of no basis, however, for the proposition that an absence of price competition in an overseas market violates the United States antitrust laws.

into production of television sets in the United States during the period of this litigation. And respondent Zenith and RCA, of course, continue by a wide margin as the market leaders.

A foreign producer seeking to enter the United States market with an unknown and unproven product has a special incentive to respond to the demands of American customers. This is particularly true in an industry populated by large domestic suppliers such as Zenith, the products of which have achieved substantial consumer recognition and loyalty. It is, therefore, hardly surprising that such producers have found it necessary to sell at low prices and grant price concessions to break into the market. Such practices are neither sinister nor indicative of collusion; to the contrary, they constitute normal, pro-competitive behavior which should be encouraged by the antitrust laws. *Cf. Great Atlantic & Pacific Tea Co.* v. *FTC,* 440 U.S. 69, 80 (1979) ("In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices"). The ultimate beneficiary of such competition is, of course, the American consumer.

The creativity of lawyers is great, and the record of this proceeding is a testament to the ability of clever counsel to dream up arguments why almost any sort of behavior, even the most pro-competitive behavior, is really part and parcel of an anticompetitive conspiracy. Yet, to permit antitrust litigation to be brought challenging pro-competitive activity would be highly costly to consumers, in at least two ways. *First,* the cost of the litigation—and in the case of full-scale antitrust litigation, that is a cost in the tens of millions of dollars—ultimately will be passed on to consumers. *Second,* and perhaps even more important, the *in terrorem* effect of litigation may in itself deter robust competition, especially price competition. It would have been easy for the petitioners to have escaped litigation by attempting to sell inferior television sets at higher prices, yet surely that is not the result desired by society, and surely that is not the result intended to be achieved by the antitrust laws.

Accordingly, we submit that there is a need for this Court to state in the clearest possible terms that an antitrust case cannot be made out of a pattern of pro-competitive activity. *See, e.g., Buffalo Courier-Express, Inc.* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition"); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) ("We must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition"), *cert. denied*, 444 U.S. 1093 (1980). When the activity of the defendants is such as to lead to increased output and lower prices, the burden on the plaintiffs should be great to establish some basis for finding an anticompetitive agreement.

Finally, we note that if United States companies truly believe that low-price imports result from "dumping" by or "subsidies" to foreign competitors, there is ample relief available under the United States unfair trade laws administered by the Department of Commerce. *See* 19 U.S.C. §§ 1671, *et seq.* (countervailing duties); *id.* §§ 1673, *et seq.* (antidumping duties). Relief in the form of quotas or additional duties may be available even when there is no evidence of unfair competition. *See, e.g., id.* §§ 2251, *et seq.* (relief from injury caused by import competition). The trade laws were strengthened by Congress in 1979, Trade Agreements Act of 1979, 93 Stat. 144, and strengthened again in 1984, Trade and Tariff Act of 1984, 98 Stat. 2948. As the experience of the last few years has indicated, if the existing trade laws ever appear to be inadequate to secure fair trade, Congress has been ready to act. It should remain the role of the antitrust laws, however, to promote vigorous competition, not to become an all-purpose nontariff barrier to imports.

CONCLUSION

For the reasons set forth above, American Association of Exporters and Importers and Consumers for World Trade respectfully urge that the Court reverse the judgments of the court of appeals, and reinstate the judgments entered by the district court.

Respectfully submitted,

Robert Herzstein
Counsel of Record

Hadrian R. Katz

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for American Association of Exporters and Importers and Consumers for World Trade

June 16, 1985

17

No. 83-2004

In the Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL.,
PETITIONERS

v.

ZENITH RADIO CORPORATION, ET AL.

---

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

LAWRENCE G. WALLACE
Acting Solicitor General

CHARLES F. RULE
Acting Assistant Attorney General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

CHARLES S. STARK
ROBERT B. NICHOLSON
EDWARD T. HAND
RICHARD P. LARM
ROSEMARY T. RAKAS
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

ABRAHAM D. SOFAER
Legal Adviser

DAVID H. SMALL
Assistant Legal Adviser

ELIZABETH M. TEEL
*Attorney-Adviser
Department of State
Washington, D.C. 2052*

QUESTION PRESENTED

1. Whether the court of appeals should have upheld the grant of summary judgment for the defendants in this antitrust conspiracy case on the ground that the defendants' allegedly culpable actions were no more consistent with an inference of conspiracy than with an inference of independent action.

2. Whether the court of appeals erred in concluding that a finder of fact could find Japanese companies liable for a violation of the Sherman Act based in part on conduct compelled by the Government of Japan.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., PETITIONERS

v.

ZENITH RADIO CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcement of the federal antitrust laws, and thus has a substantial interest in assuring that those laws are construed in a manner that advances their objectives. The United States also has exclusive responsibility for the conduct of relations with foreign nations and thus has a substantial interest in assuring that the construction and enforcement of federal laws do not unnecessarily harm international relationships. At this Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. In this 14 year-old lawsuit, respondents Zenith Radio Corporation and National Union Electric Corporation, American television manufacturers, charge that 24 com-

panies (21 of which are petitioners here) participated in a 20-year conspiracy to drive American television manufacturers out of business by selling television receivers at artificially high prices in Japan, and by using the profits thus obtained to finance the sale of televisions at artificially low prices in the United States.[1] Respondents named as defendants all Japanese television manufacturers, their United States subsidiaries, and several Japanese trading companies, as well as Sears Roebuck & Co. and Motorola, Inc., which were major customers of the Japanese companies. Respondents claimed that various aspects of the alleged conspiracy violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2; Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 18; Section 73 of the Wilson Tariff Act, 15 U.S.C. 8; and the Antidumping Act of 1916, 15 U.S.C. 72.

After eight years of discovery, petitioners filed motions for summary judgment.[2] The district court adopted a comprehensive case management procedure for resolving these motions on the enormous record. The court required respondents to identify—with preclusive effect—all the evidence on which they planned to rely at trial;[3] the court then held a five-week evidentiary hearing and ruled on the admissibility of that evidence before considering the summary judgment motions. In brief, the court ruled

[1] Respondents also alleged that the purported conspiracy involved the sale of consumer electronic products other than television sets. However, the case has focused almost entirely on television sets. See Pet. App. 247a n.7.

[2] During discovery the parties produced hundreds of thousands of documents and took hundreds of depositions, although respondents took no substantive deposition of any Japanese businessman alleged to have been involved in the conspiracy (see Pet. App. 402a-406a, 795a-799a).

[3] Respondents' Final Pretrial Statement, which constituted their complete offer of proof on the antitrust claims, exceeded 17,000 pages, with "cross-references [to] approximately 50,000 pages of documents." Pet. App. 268a.

that, for various reasons, a large part of the evidence on which respondents chiefly relied was inadmissible and thus could not be used to defeat summary judgment (see Pet. App. 668a-776a, 777a-987a, 988a-1110a). The district court subsequently ruled, in a 430-page opinion, that all petitioners were entitled to summary judgment on all antitrust counts, primarily because respondents had failed to present any admissible, probative evidence that would establish the existence of the alleged conspiracy (*id.* at 236a-667a). The district court thus found it unnecessary to rule on petitioners' contention that much of their allegedly anticompetitive conduct was compelled by the Government of Japan and for that reason could not form the basis of an antitrust violation (*id.* at 225a n.19, 387a-394a).[4]

In an earlier opinion the district court had rejected most of respondents' dumping claims on the ground that the products sold in the United States and the products sold in Japan were not sufficiently comparable to support such claims (Pet. App. 1111a-1214a). In its opinion granting summary judgment on the antitrust allegations, the district court rejected the remaining dumping claims (*id.* at 632a n.372).

2. The court of appeals reversed the district court's grant of summary judgment on all antitrust counts, except as to defendants Sony, Sears, and Motorola (Pet. App. 34a-197a). The court of appeals explicitly approved the innovative procedure used by the district court to resolve the summary judgment motions on the massive record (*id.* at 60a-66a). The court of appeals concluded,

[4] In 1977 and 1978, at respondents' request, the Antitrust Division of the Justice Department conducted a thorough examination of what respondents characterized as the most probative evidence of the alleged conspiracy. Like the district court, the Division found "no evidence of concerted predatory conduct intended to destroy and supplant the U.S. color TV industry, either at an earlier period of time or at the present time." Pet. App. 23a (statement of Assistant Attorney General John H. Shenefield).

however, that many of the district court's evidentiary rulings were wrong. In particular, the court of appeals found that the district court had erred in excluding certain records of Japanese administrative proceedings against some petitioners in connection with resale price maintenance activities in Japan, various internal documents of petitioners (such as diaries and memoranda), and the testimony of respondents' experts based on those records and documents. *Id.* at 64a-162a.

After thus augmenting the body of evidence to be weighed in deciding the summary judgment motions, the court of appeals proceeded to consider whether respondents' antitrust theory could withstand scrutiny in light of that evidence. In the court of appeals' view, a fact-finder reasonably could conclude from the admissible evidence that: (a) petitioners agreed to stabilize prices of televisions in Japan; (b) the domestic and international competitive situation of the Japanese television manufacturing industry gave petitioners a motive to enter into the alleged conspiracy; (c) petitioners entered into formal written agreements that established minimum prices (or "check prices") for television sets sold for export to the United States; (d) petitioners allocated customers in the United States by means of the so-called "five-company rule," pursuant to which each petitioner agreed to sell directly to only five customers in the United States (including each manufacturer's United States sales subsidiary); (e) petitioners' prices for televisions sold in the United States were substantially lower than their prices for comparable televisions in Japan and, in fact, were "dumping prices" that might support an inference of predatory intent; and (f) petitioners deceived the Japanese and American governments as to the prices being charged in the United States by systematically giving secret rebates to United States purchasers, in a context in which each petitioner knew that its Japanese rivals also were giving rebates (Pet. App. 169a-180a). The court of appeals concluded that this amounted to sufficient

evidence of the alleged conspiracy to preclude the entry of summary judgment for petitioners on the antitrust counts (*id.* at 180a).

The court of appeals also rejected petitioners' contention that they were entitled to summary judgment because the Japanese Ministry of International Trade and Industry (MITI) had compelled them to abide by the check price agreement and make use of the five-company rule, two factors that the court regarded as key pieces of evidence tending to establish the conspiracy alleged by respondents (Pet. App. 188a-189a). In support of their contention, petitioners had cited a formal statement submitted by MITI to the district court in 1975 (*id.* at 6a-14a), which declared that MITI had compelled certain aspects of petitioners' conduct. The court of appeals "assume[d], without deciding, that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act" (*id.* at 188a). But the court added that it "cannot be said with any degree of certainty that" the check prices "were in fact determined by the Japanese Government," and asserted that there was "no record evidence suggesting that the five-company rule originated with the Japanese Government" (*id.* at 188a-189a).[5] The court of appeals accordingly relied on the check price agreement as one of the crucial pieces of evidence of the alleged conspiracy that would preclude the grant of summary judgment (*id.* at 179a).[6]

---

[5] Somewhat inconsistently, the panel's separate opinion on the Antidumping Act issues (Pet. App. 198a-223a) did "assume" that the check price agreements had been "mandated by" MITI (*id.* at 220a).

[6] The court of appeals affirmed the grant of summary judgment in favor of defendants Motorola and Sears because there was no evidence that either company was aware of the resale price maintenance conspiracy in Japan, the five-company rule, or the alleged concerted action by the other defendants to evade the check price agreements imposed by MITI (Pet. App. 176a, 180a-183a). The

The same panel of the court of appeals issued a separate opinion reversing the district court's dismissal of the dumping charges except as to Sony, Sears, and Motorola. Pet. App. 198a-223a. The court concluded that the products sold in Japan and those sold in the United States were sufficiently comparable to satisfy the requirements of the Antidumping Act (Pet. App. 211a-214a); that there was evidence of a significant price differential between the two categories of products (*id.* at 216a-218a); and that there was a genuine issue as to whether petitioners acted with the requisite specific intent (*id.* at 218a-223a).[7]

SUMMARY OF ARGUMENT

A. In setting aside the award of summary judgment, the court of appeals disregarded the import of *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 280, 285-288 (1968). That case establishes that an antitrust plaintiff seeking to prove the existence of an anticompetitive conspiracy on the basis of circumstantial evidence can defeat summary judgment only by showing that the evidence is more consistent with an inference that the challenged conduct resulted from the alleged conspiracy than with an inference that it was the result of independent action. This rule forestalls the possibility that parallel behavior manifesting only the workings of a competitive market will be deemed illegal, an outcome that could well penalize unilateral, procompetitive conduct that is benefitting consumers.

---

court also affirmed summary judgment in favor of defendant Sony on the grounds that Sony never gave rebates, never sold at dumping prices, and occupied the high end of the price spectrum (*id.* at 183a-185a).

[7] None of the questions presented in the petition explicitly addressed the antidumping charges. Petitioners nevertheless state that they challenge the antidumping decision insofar as it rests on the same conspiracy evidence as the antitrust charges. Pet. 8. The United States takes no position on the correctness of the court of appeals' antidumping decision.

The court of appeals believed that it was free to depart from the *Cities Service* standard because respondents had adduced not only evidence of parallel conduct, but also "direct" evidence that petitioners had colluded—that is, evidence that petitioners had entered into a retail price maintenance agreement concerning sales in Japan, and had adhered to the check price agreement and the five-company rule in exporting televisions to the United States. But that evidence did not have any necessary tendency to establish the existence of the alleged agreement to charge predatory prices in the United States. At best, the evidence cited by the court of appeals pointed up the opportunity for collusive activity, and thus constituted only additional circumstantial evidence of the alleged predatory pricing agreement. The "direct" evidence in this case therefore does not obviate the need to address the central inquiry of *Cities Service*: whether the parallel low pricing behavior cited as the crucial element of the alleged conspiracy is more reasonably viewed, in the context of the additional circumstantial evidence, as the result of collusion rather than of independent action.

Here, the evidence is at least as consistent with a theory of independent conduct as it is with conspiracy. As the district court recognized, petitioners' parallel activities were plausibly explained as independent efforts to penetrate a new market. And the economic illogic of respondents' theory also makes it unlikely that petitioners were engaging in concerted predatory conduct. In these circumstances, the district court's award of summary judgment to petitioners was entirely appropriate.

B. The court of appeals also erred by directly predicating its reversal of the district court in part on evidence of conduct by petitioners that had been compelled by the Japanese government. As this and other courts have suggested, activity that is compelled by a foreign sovereign should not lead to liability in a private antitrust suit. This principle follows from two general considerations—comity and separation of powers—that traditionally have

influenced the judicial resolution of claims involving the interests of foreign governments, and that together led to the creation of the act of state doctrine. While nothing in the text or legislative history of the antitrust laws expressly discusses considerations of comity or act of state, those doctrines were a well-accepted part of the legal context in which Congress acted when it adopted the Sherman Act. The compulsion of private anticompetitive conduct by a foreign sovereign therefore presents one of the rare instances in which it is proper to read an implied (and thus necessarily limited) defense into the antitrust laws.

The considerations that underlie the sovereign compulsion defense help to shape its scope. Its operation in the international context distinguishes it from the federalism-based state action doctrine; sovereign compulsion accordingly should be available as a defense when the conduct at issue was in fact compelled by a foreign government, for it is in such cases that the imposition of liability by American courts is likely to touch most sharply on foreign concerns, and thus pose the greatest difficulties for the conduct of our foreign relations. Claims of compulsion are appropriately entertained when the foreign government unambiguously informs the court that the conduct at issue was compelled, because in such instances the depth of that government's interest is most clearly expressed. When such a statement is submitted it generally should be deemed conclusive as to the existence and meaning of the foreign sovereign's domestic law. *United States* v. *Pink*, 315 U.S. 203, 220 (1942). And finally, we submit that the separation of powers concerns that infuse the sovereign compulsion defense make that defense unavailable in suits brought by the United States.

Application of these principles demonstrates that the court of appeals erred in relying on the check price agreements as a partial predicate for liability. The government of Japan clearly informed the district court that it had compelled petitioners to enter into and abide by those

agreements. That communication should have precluded the court of appeals from relying on the agreements as a basis for antitrust liability.

ARGUMENT

THE COURT OF APPEALS APPLIED IMPROPER STANDARDS IN OVERTURNING THE AWARD OF SUMMARY JUDGMENT

A. The Court Of Appeals Misapplied This Court's Decision In *Cities Service*

The court of appeals' analysis of the evidence of the alleged anticompetitive conspiracy in this case is inconsistent with this Court's precedents. In *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 280, 285-288 (1968), this Court ruled that an antitrust plaintiff who seeks to prove the existence of an anticompetitive conspiracy on the basis of circumstantial evidence in the form of parallel conduct can defeat summary judgment only by showing that the evidence is more consistent with the inference that the conduct resulted from the alleged conspiracy than with the inference that it resulted from independent action. It follows from this principle that evidence of parallel conduct normally will be probative of an anticompetitive agreement only if it is shown to be inconsistent with the independent competitive interests of the defendants and therefore unlikely to occur in the absence of collusion. See *Kreuzer* v. *American Academy of Periodontology*, 735 F.2d 1479, 1487-1488 (D.C. Cir. 1984); *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462-465 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).[8]

[8] In *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541-542 (1954), this Court rejected the contention that a conspiracy must be inferred where the plaintiff proved only parallel conduct and the defendants showed that their

The *Cities Service* rule safeguards against the possibility that parallel behavior manifesting only the workings of a competitive market might be deemed illegal, an outcome that "could deter or penalize perfectly legitimate conduct." *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984), slip op. 8. It is particularly important that courts adhere strictly to that rule in a case such as this one, where it is alleged that defendants have violated the antitrust laws by charging prices that are too low. Application of the *Cities Service* principle in such circumstances avoids the imposition of penalties on independent, unilateral conduct that is reducing prices, increasing competition, and thereby directly benefiting consumers.

Here, respondents alleged that petitioners engaged in a broad conspiracy to maintain high prices for television sets sold in Japan and low prices for sets exported to the United States. The district court applied the *Cities Service* standard to evidence of petitioners' parallel conduct (Pet. App. 346a-375a) and concluded that their actions—involving alleged dumping prices and secret rebates—were more reasonably explained as independent competitive behavior than as collusion (*id.* at 494a-502a). The court of appeals implicitly acknowledged the general validity of the *Cities Service* standard.[9] It concluded, however, that the standard was inapplicable here because respondents had adduced not merely evidence of parallel conduct, but also "direct" evidence that petitioners colluded by entering into a resale price maintenance agreement concerning sales in Japan, and by adhering to the check price agreement and the five-company rule in exporting televisions to the United States (Pet. App. 164a-166a). In evaluating the evidence of parallel conduct, the court of appeals accordingly focused only on whether the alleged conspiracy was a plausible explanation for petitioners' conduct, not on whether a fact-finder reasonably could find it to be the more probable explanation.

The existence of the "direct" evidence cited by the court of appeals does not justify a departure from the *Cities Service* standard. That evidence was "direct" only with respect to agreements concerning resale prices in Japan and the use of check prices (that is, minimum prices) and the five-company rule for exports to the United States; at best, the existence of those agreements points up the opportunity for collusive activity, and thus constitutes circumstantial evidence of the existence of the alleged predatory pricing agreement. But that evidence did not have any necessary tendency to establish the existence of the alleged agreement to charge predatory prices in the United States, which the court of appeals found respondents were required to prove to establish antitrust injury (see Pet. App. 167a-168a, 178a).[10] The

behavior was consistent with individual self-interest. In cases in which this Court has approved the drawing of an inference of a conspiracy from parallel behavior, that behavior was inconsistent with the hypothesis that each defendant made an independent business decision to act as it did. See, *e.g.*, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 800-808 (1946); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 222-225 (1939).

[9] See Pet. App. 164a. Although the court of appeals did not mention *Cities Service*, it cited several Third Circuit decisions that applied the *Cities Service* principle.

[10] As the court of appeals itself stated, private antitrust damage suits can be sustained only where the violations alleged are ones that cause competitive injury to the plaintiff (Pet. App. 167a-168a, 187a-188a). Anticompetitive acts are relevant to a private antitrust action only to the extent that they support claims of competitive injury; they are irrelevant if they suggest harm only to the business or property of some other class of persons. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484-489 (1977). For example, the court of appeals recognized that an agreement among petitioners that fixed minimum prices for the United States market would tend to keep prices up and would "in isolation protect * * * competitors like [respondents] from competition," so that respondents could not, in the absence of other circumstances, maintain this lawsuit "because they could not show the requisite injury to

"direct" evidence cited by the court of appeals therefore does not obviate the central inquiry required by *Cities Service*—whether the parallel low pricing behavior the court viewed as the crucial element of the alleged conspiracy (see Pet. App. 177a-179a) was more reasonably viewed as the result of independent business decisions by petitioners than as the result of collusion.[11]

Had the court of appeals correctly focused on the *Cities Service* inquiry, it should have concluded that petitioners' parallel pricing conduct was at least as consistent with independent conduct as with the alleged conspiracy. As the district court found (Pet. App. 473a-503a)—in a conclusion that the court of appeals did not reject—the alleged secret rebates and sales at dumping prices were fully consistent with independent efforts by petitioners to penetrate a new market by offering low prices that evaded regulatory constraints imposed by Japan and the United States (that is, Japanese check prices and American antidumping laws). It was not inconsistent with petitioners' independent self interest for them to keep their own rebates secret or to fail to

---

their business or property." Pet. App. 178a. To prove antitrust injury under their theory, respondents were required to prove that petitioners agreed to set predatory prices. See *id.* at 177a-179a.

[11] We agree with the court of appeals that "direct evidence of some kinds of concert of action like price fixing in Japan may be circumstantial evidence of a broader conspiracy" (Pet. App. 165a). The issue here, however, is not whether the existence of such evidence bears circumstantially on respondents' charge; instead, it is whether introduction of that sort of circumstantial evidence changes the standard under which otherwise ambiguous parallel conduct is evaluated on motions for summary judgment. To be sure, evidence of conspiracy must be considered as a whole. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). But the teaching of *Cities Service* would be in large part nullified if plaintiffs could find direct evidence of concerted action in one area, hypothesize the existence of a broader conspiracy of which that concerted action may be a part, and then use that evidence as direct proof of the existence of the hypothetical broader conspiracy.

report the secret rebates given by their Japanese rivals, since detection of the rebates could have exposed each petitioner to liability for violations of antidumping laws. Such independent conduct is insufficient to support a finding of conspiracy to violate the antitrust laws under the *Cities Service* standard.

Conversely, the court of appeals' failure to apply the *Cities Service* standard led it to disregard the simple economic illogic of respondents' allegations—a factor tending to suggest that petitioners did not engage in concerted predatory conduct. Respondents' antitrust conspiracy theory turns on the claim that petitioners agreed to charge low prices in the United States market in an effort to drive United States manufacturers out of business. Unless the evidence suggested that petitioners charged unprofitably low prices in the United States market in the short run in hope that long-run sales at monopoly prices would make their strategy profitable overall, a conspiracy would not be the most probable explanation of the evidence and an award of summary judgment would be appropriate.[12] On the other hand, if petitioners sold at prices that were below respondents' costs but nonetheless still were profitable, then petitioners'

---

[12] In determining whether there was any evidence to support respondents' predation theory, the court of appeals also should have considered factors other than price. In particular, the court should have examined the structural conditions in the industry to determine whether they made a predatory strategy plausible. In other words, the court should have considered the probable effect on such a strategy of respondent Zenith's large market share, of the presence or absence of barriers to entry and the like. See, *e.g.*, Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979); Telser, *Cutthroat Competition and the Long Purse*, 9 J. Law & Econ. 259 (1966). The court of appeals entirely failed to consider these matters, however. See generally Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 26-27 (1984) ("The predation-recoupment story [in this case] * * * does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition."); see also Pet. App. 484a.

behavior would be perfectly consistent with their independent self-interest and, indeed, would represent desirable competition.[13] The court of appeals, however, pointed to nothing in either the market structure or respondents' evidence of below-cost pricing (which consisted almost entirely of expert testimony based on assumptions about petitioners' costs, see Pet. App. 473a, 1056a-1077a) that tended to establish that the evidence of parallel pricing behavior supported a realistic theory of anticompetitive collusion.[14]

---

[13] Such considerations have led the courts of appeals to conclude that strong evidence of below-cost pricing is vital to a determination that a low-price strategy amounts to unlawful predation that violates Section 2 of the Sherman Act. See, *e.g.*, *Southern Pacific Communications Co.* v. *American Telephone & Telegraph Co.*, 740 F.2d 980, 1002-1007 (D.C. Cir. 1984), cert. denied, No. 84-1080 (Feb. 25, 1985); *Adjusters Replace-A-Car, Inc.* v. *Agency Rent-A-Car, Inc.*, 735 F.2d 884, 888-891 (5th Cir. 1984), cert. denied, No. 84-793 (Jan. 14, 1985); *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050, 1056-1058 (6th Cir. 1984), cert. denied, No. 84-493 (Nov. 26, 1984); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1031-1039 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982); *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76, 86-88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982). The Federal Trade Commission has reached a similar conclusion. See, *e.g.*, *International Telephone & Telegraph Co.*, 3 Trade Reg. Rep. (CCH) ¶ 22,188, at 23,081-23,085 (July 25, 1984); *General Foods Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,142, at 22,974-22,976 (Apr. 6, 1984).

[14] Indeed, the court of appeals never considered whether respondents had adduced any evidence that petitioners' prices were below any measure of cost. Rather, the court merely characterized respondents' evidence as indicating that petitioners sold "at prices * * * below the prices at which [respondents] could successfully compete," a course that "produced losses" for petitioners. Pet. App. 167a, 179a.

The district court's opinions indicate that respondents' evidence of "below cost" sales consisted solely of the testimony of their chief expert, Dr. DePodwin, that four petitioners sometimes sold their products in the United States at prices below some measure of their costs. Pet. App. 473a, 1065a. Dr. DePodwin's testimony, in turn, was merely "a mathematical construction" based on certain assump-

Cities Service teaches that even the most complicated antitrust cases may be—and should be—resolved on summary judgment when the plaintiff has failed to adduce sufficient evidence of an anticompetitive conspiracy. The district court here devoted extraordinary efforts to devising an innovative and efficient method that would allow a responsible resolution of this massive case without the delay and expense of a trial. The court of appeals' approach, in contrast, makes it considerably more difficult to resolve complex antitrust litigation on motions for summary judgment, thus reducing the opportunities for efficient handling of such litigation. And by raising barriers to the efficient disposition of unmeritorious claims against lawful competitors, that approach would, to a significant extent, undermine the principle of *Cities Service*.

This danger is plainly visible here. The court of appeals' decision has aroused deep concern among our trading partners that foreign manufacturers attempting to penetrate the United States market will be subject to burdensome litigation and the possibility of an award of treble damages if they engage in vigorous price competition. See note 18, *infra*. We agree that the court of appeals' holding would tend to encourage United States companies to use the antitrust laws as a weapon to deter lawful price competition by foreign companies. It is, accordingly, at odds with the basic purpose of the antitrust laws—enhancement of consumer welfare through preservation of a competitive economic system.

B. The Court Of Appeals Erred In Rejecting Petitioners' Foreign Sovereign Compulsion Defense

The court of appeals assumed that key aspects of petitioners' conduct could not have served as a predicate for antitrust liability had that conduct been compelled by

---

tions about petitioners' costs (*ibid.*), even though—as the district court noted—"far more reliable evidence of [petitioners'] costs was available to [respondents] in discovery * * *" (*id.* at 473a n.200; see *id.* at 1065a-1069a).

the Japanese government, but the court held that such compulsion had not been demonstrated in this case. The court's assumption—that anticompetitive private conduct should not lead to liability in a private antitrust suit when that conduct is directed by a foreign sovereign—is in accord with suggestions by this [15] and other courts,[16] and was, we submit, correct. The court of appeals erred, however, in holding that petitioners were not entitled to assert the defense here.

1. a. Implied defenses to the antitrust laws are strongly disfavored. See, *e.g.*, *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378 (1981). But when Congress enacted the Sherman Act in 1890, it was legislating against the background of general principles that traditionally have influenced the judicial resolution of claims involving the interests of foreign governments. American courts long have recognized that considerations of comity among sovereign nations—the idea that foreign nations are due deference when acting within their legitimate spheres of authority—play a role in determining

[15] In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-707 (1962), antitrust defendants contended that the Canadian government had compelled them to engage in the anticompetitive acts there at issue. This Court concluded, however, that the defense was not available because there was "no indication that [any] official within the * * * Canadian Government approved or would have approved of" the anticompetitive conduct, or that any Canadian law otherwise compelled the conduct. The Court had no occasion to discuss a situation in which, as here, the record includes a statement by a foreign government that it *has* compelled some or all of the allegedly anticompetitive conduct at issue.

[16] See *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 606-607 (9th Cir. 1976); *Linseman* v. *World Hockey Ass'n*, 439 F. Supp. 1315, 1324 (D. Conn. 1977); *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1297-1298 (D. Del. 1970); *United States* v. *Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,456-77,457 (S.D.N.Y. 1962). *Texaco Maracaibo* is the only case in which the defense has been raised successfully.

"the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). See generally *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953); *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). And limits on the judiciary's role in resolving disputes with foreign overtones have been inspired by the relative "competence and function[s] of the Judiciary and the National Executive in ordering our relationships with other members of the international community." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964). See *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). In combination, these two notions—"comity among nations and among the respective branches of the Federal Government" (*First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality opinion)) —have led to the creation of the act of state doctrine as a principle of judicial abstention in resolving disputes concerning the validity of foreign sovereign acts. See *Sabbatino*, 376 U.S. at 423; *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 705-706 n.18 (1976) (opinion of White, J.); *id.* at 726-728 (Marshall, J., dissenting).

Nothing in the text or legislative history of the antitrust laws expressly creates a defense based on, or otherwise in terms discusses, considerations of comity or act of state. But those principles were uniformly recognized as a prominent part of the "contemporary legal context in which Congress acted" when it adopted the Sherman Act. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 532 (1983). See *Sabbatino*, 376 U.S. at 416; *Hilton*, 159 U.S. at 163-165. Indeed, the concerns that underlie those principles—in particular, the "strong sense" repeatedly expressed by the judiciary that its involvement in the resolution of questions directly touching on the interests of other nations may in some circumstances "hinder

rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere" (*Sabbatino*, 376 U.S. at 423) —traditionally have been regarded as central features of American jurisprudence. In light of these considerations, the compulsion by a foreign sovereign of private anticompetitive conduct such as that at issue here presents one of the rare instances in which it is proper to read an implied (and thus necessarily limited) defense into the American antitrust laws. Cf. *Sociedad Nacional*, 372 U.S. at 21, citing *The Charming Betsy*, 6 U.S. (2 Cranch) at 118.

b. That the theoretical principles justifying a defense based on foreign sovereign compulsion serve very real ends is demonstrated by the practicalities of international commerce. It is, of course, settled law that the Sherman Act can reach even those anticompetitive restraints that occur wholly overseas but have a direct, substantial and reasonably foreseeable effect on American commerce. See Foreign Trade Antitrust Improvements Act of 1982, § 402, 15 U.S.C. 6a; *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States* v. *Alcoa*, 148 F.2d 416 (2d Cir. 1945). This potentially brings within the reach of the antitrust laws an enormous and growing body of commerce. In 1980, the United States' trade with some 150 foreign nations involved exports and imports valued at more than $606 billion. 2 OECD, *National Accounts 1964-1981*, at Table 15 (1983). In just the last two decades, the value of the goods and services imported by the United States has increased from $27 billion in 1964 to more than $365 billion in 1983. *Ibid.*; *Statistical Abstract of the United States* 800 (1985).

Not surprisingly, the United States' trading partners often manage their domestic economic systems and international affairs in ways that differ from ours. For political or other reasons, foreign nations sometimes cartelize important segments of their economies, and the compelled anticompetitive conduct may well affect our commerce.

And some of our most significant trading partners—including, very notably, Japan (see Pet. App. 25a-26a)—occasionally compel anticompetitive conduct expressly to accommodate the desires of the United States; to give just one example, Australia very recently effectuated a trade agreement with the United States by directing its steel makers to limit their exports to this country. See Letter from Assistant Attorney General J. Paul McGrath to Australia Charge d'Affaires Kenneth McDonald (Jan. 18, 1985) (a copy of which has been lodged with the Court by petitioners).[17]

This highly complex pattern of American trade suggests that an unlimited application of the antitrust laws in the international context would have far-reaching and potentially destructive results. It plainly would "touch * * * sharply on national nerves" (*Sabbatino*, 376 U.S. at 428) were American courts to hold foreign firms liable for engaging in conduct that is compelled by their home nations, a development that "would inevitably lead to embarrassment in foreign affairs." *Sociedad Nacional*, 372 U.S. at 19.[18] In a system of international trade where the United States can be found negotiating *for* certain export restraints, failure to recognize a limited sovereign compulsion exception to the Sherman Act necessarily would "interfere with delicate foreign relations conducted by the political branches." *City Bank*, 406 U.S. at 775-776 (Powell, J., concurring). Conversely, the litigation of private antitrust actions could well im-

---

[17] In establishing national policy for the steel industry, President Reagan has directed the United States Trade Representative to negotiate restraint agreements with a number of exporting countries. 49 Fed. Reg. 36813 (1984).

[18] The Governments of Australia, Canada, France, Japan, the Republic of Korea, Spain, and the United Kingdom have formally advised the Department of State of their concerns about the potential impact of the court of appeals' decision. Copies of these communications have been lodged with the Clerk of the Court and provided to counsel.

pede diplomatic efforts to undo foreign compulsion of anticompetitive conduct. In these circumstances, it is evident that the problems posed by compelled anticompetitive activity can, as a general matter, better be addressed through the exercise of executive discretion than by means of the "'[p]iecemeal dispositions' that courts could make" in the course of private litigation. *Id.* at 786 (Brennan, J., dissenting) (citation omitted), quoting *Sabbatino*, 376 U.S. at 432. See *City Bank*, 406 U.S. at 769-770 (plurality opinion); *Sabbatino*, 376 U.S. at 431-433; *International Ass'n of Machinists* v. *OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 675-688 (1981).[19]

2. a. The considerations that underlie the foreign compulsion defense help to shape its appropriate scope. As this Court's treatment of the question in *Continental Ore* (see note 15, *supra*) and the uniform analysis of the lower courts (see cases cited at note 16, *supra*) suggest, the defense is applicable when the conduct at issue was in fact compelled by a foreign sovereign. In such cases the use of the challenged conduct as a predicate for the imposition of liability by American courts is likely to touch most sharply on foreign concerns and pose the greatest difficulties for the conduct of our foreign relations. Cf. *Sociedad Nacional*, 372 U.S. at 21.

These same considerations, moreover, distinguish sovereign compulsion from the state action doctrine, which provides a defense in antitrust challenges to conduct that is authorized and actively supervised by a state. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, No. 82-1922 (Mar. 27, 1985), slip op. 8-9. The state action defense is grounded on principles of federalism, in particular on the notion that Congress should

[19] We do not mean to suggest, however, that the sovereign compulsion defense should apply if deference to the foreign state's action clearly is unwarranted under recognized principles of international comity.

not be presumed to have interfered with state authority to regulate commerce. *Id.* at 12; *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). Because the federal structure is designed to secure to the states the greatest possible "range of regulatory alternatives" (*Southern Motor Carriers*, slip op. 12), the Court has held that a requirement of state compulsion is too strict a standard for general use in state action cases—with the federal government, as a safeguard, always retaining authority under the Supremacy Clause to void any obnoxious state cartel program that has an effect on interstate commerce. Cf. *Parker*, 317 U.S. at 350; *Southern Motor Carriers*, slip op. 2 (Stevens, J., dissenting). In contrast, the sovereign compulsion defense serves the quite different purpose of forestalling direct clashes with the most significant interests of other sovereigns. This purpose is advanced most directly by bringing the defense into play only when the foreign government has compelled the challenged activity.

In addition, several quite significant practical considerations suggest that the state action standard is not easily transferred to the foreign context. The complexity and novelty of foreign legal systems—and the concomitant difficulty faced by domestic courts in precisely determining their requirements—would present private firms with innumerable opportunities for evasion of antitrust requirements were any arguable "authorization" of the challenged conduct sufficient to give rise to the defense. Similarly, the use of an active supervision standard of the sort applied in state action cases would require domestic courts to conduct difficult and troubling inquiries into the foreign sovereign's conduct of its own affairs. Cf. *Sabbatino*, 376 U.S. at 415; *Sociedad Nacional*, 372 U.S. at 19.

We are not prepared at this time to suggest that there is any application of the sovereign compulsion defense that would be appropriate in the absence of actual compulsion by the foreign government. Surely the mere fact that a trade restraint is consistent with the law of a for-

eign national's home state is not in itself a defense to an antitrust violation. Nor should it lightly be inferred that Congress intended to defer to foreign sovereigns to prescribe the norms for the volitional conduct of private persons concerning trade restraints directly affecting competition in the United States. This question, of course, need not be addressed by the Court until it is squarely presented in a particular factual setting.

b. The interests underlying the defense also shed light on the manner in which claims of sovereign compulsion should be presented to a United States court. The defendant, of course, bears the burden of raising and proving such an affirmative defense. See Fed. R. Civ. P. 12(b). And because the defense is designed to forestall interference with foreign sovereign action and concomitant embarrassment in our dealings with foreign governments, claims of compulsion are most appropriately entertained when the foreign government, either directly or through the State Department, informs the court that the conduct at issue was in fact compelled.[20] It is in such instances that the depth of the foreign government's concern and the possibility of diplomatic friction following from further court proceedings will be most clearly expressed. Cf. *Dunhill*, 425 U.S. at 695. In the absence of such communication, the particular interests served by the defense—as well as the narrow reading given to all implied defenses to antitrust liability—require that any claimed compulsion be demonstrated with clarity.[21]

[20] This Court has approved a procedure under which a foreign government may convey its views to the Court directly in cases in which it has an interest by the filing of a brief amicus curiae. See 73 Am. J. Int'l L. 124 (1979). The State Department has encouraged foreign governments to communicate their views directly to United States courts. See *ibid.*; *id.* at 678-679.

[21] In the circumstances of this case (see pages 24-26, *infra*), there is no need for the Court to decide whether a compulsion defense may succeed in the absence of a direct communication from the foreign government. Cf. *Texaco Maracaibo*, 307 F. Supp. at 1299-1301.

Once a foreign government presents a statement dealing with subjects within its area of sovereign authority, however, American courts are obligated to accept that statement at face value; the government's assertions concerning the existence and meaning of its domestic law generally should be deemed "conclusive." *United States* v. *Pink*, 315 U.S. 203, 220 (1942). For such deference to be appropriate, of course, the statement must be clear and intelligible. Plainly ambiguous or internally inconsistent statements need not be treated as dispositive. See *United Nuclear Corp.* v. *General Atomic Co.*, 96 N. Mex. 155 (1980), appeal dismissed, 451 U.S. 901 (1981). And in extraordinary circumstances, concern for the integrity of the judicial process may obligate a court to inquire into the underlying circumstances if it believes that it has been presented with a statement that is incredible on its face. Cf. *Texaco Maracaibo*, 307 F. Supp. at 1300.

c. Finally, we note that, in our view, the principles giving rise to the defense indicate that the sovereign compulsion doctrine should not apply in antitrust suits brought by the United States.[22] In such cases, the "governmental enforcement [decision] represents a judgment on the wisdom of bringing a proceeding, in light of the exigencies of foreign affairs." *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 409 (9th Cir. 1983), cert. denied, No. 83-546 (Jan. 9, 1984). A decision to bring suit thus amounts to a determination by the executive branch that the challenged conduct is more harmful to the United States than is any potential injury to our foreign relationships that will follow from the antitrust action.[23] Because separation of

[22] To the best of our knowledge, foreign sovereign compulsion has not been found in any case heretofore brought by the United States and is not involved in any pending case.

[23] There may, of course, be circumstances in which the United States would deem it more appropriate to engage in diplomatic efforts to persuade the foreign sovereign to cease compelling the conduct (or to take no action at all) rather than to bring suit.

powers concerns infuse the compulsion defense, the conclusion that the defense is inapplicable in suits by the United States can be regarded as merely "an application of the classical common-law maxim that '[t]he reason of the law ceasing, the law itself also ceases.'" *City Bank*, 406 U.S. at 768 (plurality opinion), quoting *Black's Law Dictionary* 288 (4th ed. 1951). For this reason, the courts in related contexts have found deference to the executive branch appropriate. See, *e.g.*, *Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945) (deferring to executive decisions relating to foreign sovereign immunity); *National Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955) (deferring to executive decisions relating to diplomatic relations); *City Bank*, 406 U.S. at 768-770 (plurality opinion) (deferring to executive decisions relating to applicability of the act of state doctrine).[24]

3. Application of the principles discussed above to the facts of this case demonstrates the court of appeals' error. Respondents identified the check price agreements and the five-company rule as integral parts of petitioners' alleged conspiracy. Petitioners responded that those agreements had been compelled by the Government of Japan, and therefore could not serve as a basis for the imposition of antitrust liability. In support of this defense, petitioners relied on MITI's 1975 statement to the district court. That document affirmed that both the check price agreements and certain regulations of the Japan Machinery Exporters Association (which included the five-company rule) "have come into existence pursuant to the direction of MITI" (Pet. App. 8a). After a detailed discussion of MITI's powers and of its involvement in the creation and

[24] Indeed, the same result would follow in virtually every case from either our contention that the defense is wholly inapplicable in suits by the United States, or from an alternative theory that the defense presumptively should be unavailing in such cases because the judgment implicit in the executive's decision to bring suit—that the legitimate interests of the United States in proceeding outweigh those of the other concerned government—is entitled to great deference.

implementation of the agreements and regulations at issue, the statement then added (*id.* at 12a) that when MITI

> directed [petitioners] to conclude * * * such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, [petitioners] had no alternative but to establish the agreement and regulation in compliance with said direction.

MITI also declared that it had exercised "direction and supervision concerning minimum prices at which televisions could be sold for exportation to the United States * * * continuously from 1963 until February 28, 1973" (*id.* at 11a).

This detailed MITI statement clearly establishes that the Japanese government both compelled petitioners to agree on minimum export prices for televisions and supervised implementation of those check price agreements. The statement therefore should have precluded respondents from relying on the agreements as a basis for the alleged antitrust violation. In rejecting petitioners' defense, however, the court of appeals never referred explicitly to the MITI statement and largely disregarded its content. Instead, the court asserted that "[i]t is possible to conclude that the [Japanese] government merely provided an umbrella under which [petitioners] gained an exemption from Japanese antitrust law, and fixed their own export prices" (Pet. App. 189a), adding that it found "abundant evidence suggesting that many [petitioners] departed from the agreed-upon minimums and took steps to conceal their departure from MITI" (*ibid.*).

This analysis misstates both the nature of the sovereign compulsion defense and the substance of the MITI statement.[25] If the court meant to suggest that the check prices

[25] Respondents have contended (Br. in Opp. 22-23) that petitioners failed to preserve their argument concerning sovereign compulsion. The pleadings make it plain, however, that petitioners

charged by petitioners were not in fact compelled, its holding unjustifiably disregarded a clear and dispositive statement to the contrary by the Japanese government. Nor is there merit to the court's suggestion that it was free to ignore the compelled nature of the check price agreements because petitioners allegedly used those agreements as a cloak for their efforts to fix prices at lower levels, in violation of both American and Japanese law. While it is true that sovereign compulsion does not shield conduct violative of foreign as well as American law, here the court of appeals treated the compelled check price agreements *themselves* as evidence supporting "an inference of collective predatory intention" (Pet. App. 179a).[26] The court of appeals thus erred in rejecting out-of-hand petitioners' sovereign compulsion defense.

That defense, of course, means only that compelled conduct may not serve as a predicate for antitrust liability. Even in cases involving such activity, plaintiffs may sustain a claim by adducing sufficient independent evidence

---

did raise the argument in the court of appeals (see petitioners' brief (at 37-44 & n.34) filed in the court of appeals) and that respondents disputed the point at length (see respondents' reply brief (at 79-88) filed in the court of appeals). The district court did not decide the foreign compulsion issue because it ruled for petitioners on other grounds (see Pet. App. 255a n.19, 387a-394a).

[26] The court of appeals also asserted that there is "no record evidence suggesting that the five-company rule originated with the Japanese Government" (Pet. App. 189a). While this conclusion may be overly technical—the MITI statement referred to the regulations of the Japan Machinery Exporters Association rather than to the rule itself—we do not at this point dispute the court's conclusion that the Government of Japan failed to spell out its role in the creation of the rule with sufficient clarity. After the filing of the petition for certiorari in this case, however, the Japanese government transmitted a Note Verbale to the State Department, in which it stated unequivocally that it had compelled adoption of the five-company rule. See Br. of Government of Japan App. 2a. In the unusual circumstances of this case, the Court may appropriately choose to treat this clear, definitive statement of the Japanese government as dispositive on this point.

of anticompetitive activities. As we have shown at pages 9-15, *supra*, however, respondents failed to offer such evidence in support of their theory. The insufficiency of respondents' evidence is exacerbated by the removal of the check price agreements as a basis for the imposition of treble damages liability on petitioners.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General *

CHARLES F. RULE
Acting Assistant Attorney General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

CHARLES S. STARK
ROBERT B. NICHOLSON
EDWARD T. HAND
RICHARD P. LARM
ROSEMARY T. RAKAS
Attorneys

ABRAHAM D. SOFAER
Legal Adviser

DAVID H. SMALL
Assistant Legal Adviser

ELIZABETH M. TEEL
Attorney-Adviser
Department of State

JUNE 1985

---

* Acting Solicitor General Fried is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10243

19

No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTIC INDUSTRIAL CO. LTD., *et al.*
PETITIONERS
v.
ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE SEMICONDUCTOR INDUSTRY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Joseph R. Creighton
Chairman, Law Committee
Semiconductor Industry Association
Counsel of Record
1601 S. Miramar Avenue
Indialantic, Florida 32903
(305) 727-9137

William G. Dana
F. Thomas Dunlap, Jr.
Counsel for Semiconductor Industry Association

Of Counsel
David E. Sanders

September 6, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

25 PP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO. LTD., *et al*, PETITIONERS

v.

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE SEMICONDUCTOR INDUSTRY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The Semiconductor Industry Association Submits This Brief As Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

The Semiconductor Industry Association ("SIA") is a non-profit association which represents over fifty manufacturers of semiconductor devices, accounting for over 95% of all semiconductors fabricated in the United States. Revenues of the U.S. based industry reached $14 billion in 1984.

These microelectronic devices are not only the heart of many emerging industries, such as telecommunications and personal computers, but also the key to the competitiveness of many traditional industries, such as automobiles and appliances.

SIA and its member companies are dedicated to the principles of free and fair trade throughout the world. For example, in 1984 SIA spearheaded an effort for legislation which has resulted in elimination of all tariffs for semiconductor products in both the United States and Japan. Also, the Association is currently engaged in broad scale efforts to open Japanese semiconductor markets to American producers. SIA is firmly committed to the American competitive system and the antitrust laws and believes they should be enforced fairly and uniformly, both for the benefit of consumers and also to keep the United States domestic market open fairly and equally to all competition, whether from domestic or foreign entities.

Neither SIA nor any member company has a direct interest in the outcome of this litigation.[1] However, SIA believes a decision in this case may constitute a precedent, or establish a rule of law, which may have serious effects upon competition in domestic markets and freedom of trade.

SIA takes no position as to the merits of respondent's case, or whether the petitioners violated the antitrust laws. However, SIA submits that respondent is entitled to a trial and that summary judgment was not appropriate. This brief

[1]This brief is submitted by the Association and does not necessarily state fully the views of every member. Motorola, Inc., a member of SIA, was initially a defendant in these proceedings, but the case against it was dismissed by the District Court. Motorola has not participated in or provided any financial support, directly or indirectly, towards this motion and brief.

treats only the "sovereign compulsion" issue raised by petitioners and the government amici curiae. It is submitted that, to the extent that any participant in domestic markets is permitted to engage in anticompetitive activities of a type forbidden by United States antitrust laws, to that extent both free competition and free trade will be impaired. That result would be unfortunate, whatever the claimed justification.

Amicus is seriously concerned with possible effects of a decision here upon competition and trade in other industries, such as semiconductors. It is imperative to appraise such effects in the light of the ever-growing intervention of foreign governments in trade matters, not limited to protection of their own markets from foreign competition, but in promotion and subsidization of exports. Where governments intervene in commercial activities, they become interested parties whose stated interest in specific litigation goes beyond a normal governmental role. Automatic application of concepts, such as "Act of State" or "sovereign compulsion" would create a *per se* defense to antitrust enforcement which would impinge directly upon all competition in all industries.

SUMMARY OF ARGUMENT

Amicus urges the Court to affirm the decision of the Court of Appeals which reversed the summary judgment granted by the District Court. The Court of Appeals properly considered the representations of the Government of Japan, and specifically the 1975 MITI statement. Although recognizing that "sovereign compulsion" could be a defense in a proper case, the Court of Appeals correctly decided that neither the alleged governmental compulsion nor the governmental representations concerning it were conclusive in this case.

Although "sovereign compulsion" has been discussed by several courts and commentators, most courts have not actually applied it as a defense in the case before them. The concept is not well established and as universally applied as the "Act of State" doctrine, which is not applicable in this case because the validity of governmental acts is not at issue.

Even if "sovereign compulsion" is accepted as a potential defense, respondents have offered evidence that petitioners did not comply with the government mandate and therefore were not subject to such compulsion. Also, their acts went beyond that which the government states was mandated by it. A representation of a foreign government made after the alleged activities of petitioners, stating, in effect, that whatever they did was mandated by the government cannot be conclusive on the courts to exempt them from U.S. antitrust laws which would otherwise make such activities illegal. "Sovereign compulsion" does not provide a *per se* defense, and the court is not precluded from evaluating the facts. This is best done upon a full record after trial. The antitrust laws of the United States and the right of enforcement by injured private plaintiffs is mandated by the Congress. These important objectives cannot be subrogated to principles as poorly defined and established as the concept of foreign "sovereign compulsion." American markets are the largest in the world, and the antitrust laws are designed to provide free competition in these markets for both domestic and foreign competitors. No exemptions from the principles of free competition should be granted lightly, and there is no basis in the record of this case to grant such an exemption.

The "sovereign compulsion" concept has limited international acceptance. Neither petitioners nor amici curiae supporting petitioners have demonstrated such international

acceptance, or even acceptance in their own nations. Also, the principles which these amici urge upon the court, such as comity, would appear to apply equally to restrict any attempt by a foreign government to authorize or direct activity by that government's nationals, which is specifically targeted towards U.S. commerce, and which would constitute a violation of U.S. antitrust laws.

The voluntary restraint programs between the United States and other nations are not an issue in this case, and no decision of this court affirming the decision of the Court of Appeals would cast any doubt upon such programs. Foreign governmental export restraints need not delegate to private companies the right to reach agreements as to prices and allocation of customers which would be in violation of U.S. antitrust laws.

The United States Government has advanced a novel argument that "sovereign compulsion" is a *per se* defense in private antitrust litigation, whereas Government enforcement authorities should not be barred by any such concept. Not only does this argument indicate the fallacies in conclusive *per se* application of "sovereign compulsion" as a defense, but the suggested distinction has no basis in law and is contrary to the Congressional mandate for "private attorneys general."

"Sovereign compulsion" is not a well-defined doctrine and should be sparingly applied, particularly to provide exemption from the antitrust laws. Distinctions must be made between governmental activities promoting business and normal governmental decrees relating to a nation's internal affairs. The "Act of State" doctrine has been held not to apply to commercial activities. Analogously, "sovereign compulsion" may be limited when the mandated activity is of a commercial nature.

ARGUMENT

A. The Court of Appeals Was Correct in Deciding that Recognition of the MITI "Sovereign Compulsion" Statement Would Not Thereby Preclude a Trial on the Merits.

The issue before this court is not whether a "sovereign compulsion" doctrine exists. Neither is it whether the Court of Appeals considered the Japanese government representations or the role of MITI. The Court of Appeals expressly noted the MITI statement and assumed application of a "sovereign compulsion" doctrine in its discussion of the issue.[2] There was no need to mention the 1975 Statement of the Government of Japan because the case presented issues for trial, such as whether the Japanese companies (petitioners here) in fact complied with governmental decrees and whether they went beyond any protection these decrees could give them. It is an issue of fact whether the MITI decrees and compulsion covered the actions which were actually taken by petitioners.

It is a novel concept to suggest that when the evidence in a case indicates that the action in question was different from that which was ordered, the Court cannot allow a trial to determine if what was done was that which the government ordered to be done. If there was no actual "compulsion" of petitioners, the "sovereign compulsion" doctrine cannot apply. If, as respondents' offered evidence indicates, petitioners first reached an agreement as to minimum prices in accordance with MITI's "compulsion" and then, with each other's knowledge, sold at secret prices which were below the so-called minimum prices, and this was not disclosed to MITI, and certainly not compelled by MITI, and if the petitioners did so under circumstances where their agreed-upon limit of five customers each curtailed competition between them in the United States market, it is submitted that no "sovereign compulsion" doctrine should protect them. That issue should be tried.

[2]Pet. App. 188a-189a. Petitioners' brief at page 36 cites the Court of Appeals' discussion but disagrees with the Court's conclusions. If respondents' evidence is accepted that each of the petitioners had a right of appeal from MITI directives and could withdraw at any time, this alone would negate compulsion and justify the conclusions of the Court of Appeals.

The Japanese letters to the Court did not state that MITI investigated the issue of compliance, or ever evaluated respondent's evidence on those issues. The 1975 statement preceded discovery in the case. If governmental representations such as this are to be treated as *per se* defenses to antitrust suits, that is tantamount to deciding that the fact of "compulsion", the scope of governmental decrees, and compliance with them, can never be made an issue by a U.S. antitrust plaintiff.

Petitioners' brief and those of the amici governments may not on their face appear to seek such a *per se* effect for all foreign government claims of compulsion. Petitioners' statement is that government-mandated acts "cannot constitute a *feature* of an antitrust violation." (P.Br.p.36) (emphasis added). However, as the subsequent argument makes clear, they mean that in any case in which a government states that it compelled parties to enter into an agreement limiting competition among themselves, a conclusive defense under U.S. antitrust laws is created, even if those parties build on that base and engage in both additional activities and activities which violate the government mandate. We submit that this Court should not permit such a blanket statement by the foreign government (e.g., MITI in 1975) to constitute such a *per se* defense.

B. Anticompetitive Practices Directed at U.S. Markets Should Be Excused Only for Compelling Reasons.

If the Court determines that "sovereign compulsion" is an issue here, both the policy imbedded in our antitrust laws

and actual international trade conditions should receive careful consideration. There simply will be no American antitrust laws for protection of American consumers or to insure free competition for American industries if major foreign companies, some of the dominant players on the playing field, can thus be exempted from our current principles of competition.

Foreign relations, sovereign actions and comity must be considered. They cannot be conclusive, however. After litigation has commenced, no foreign sovereign statement can be permitted to usurp all decision-making on all issues presented to the courts. The antitrust laws and congressional mandates for their enforcement are entitled to equal, if not greater, force. The impact on American industry could be tremendous if any exemption to our principles of free competition is granted with respect to activities within the United States domestic market, whatever be the claimed benefits of so doing.

This case does not appear to justify such a sacrifice of the principles of the antitrust laws. The issues here do not involve foreign governmental activity related primarily to the internal affairs of the foreign government. Neither do they involve international transportation or communication which necessarily requires accommodation between the legal systems and regulations of governments on each end of the transaction. No effect on Japanese domestic markets or the activities of its nationals there was intended by MITI. As is clear from the statements of MITI itself, as well as by much evidece in the record, the entire subject matter of this case and the directives described by MITI were sales of

products into United States markets.[3] This is the largest market in the world by far, and it is a market which is fully open to foreign manufacturers. The antitrust laws preserve competition here, and foreign firms receive all the benefits of this free competition. Many major foreign companies now sell more in America than in their home markets. They have full support from their governments, often including subsidized research and development expense, loans and tax benefits for exports.

Some traditional concepts concerning sovereignty may need adaptation to this situation. Where a foreign government adopts policies or mandates actions aimed at this large American market and those activities impinge on our antitrust laws, no *per se* exemption from those laws is appropriate. At least, any such exemption should be accorded only in a very clear case—such as conflict with important policies of the foreign government relating to its internal affairs.

C. Neither the Act of State or Sovereign Immunity Doctrines Are Relevant to This Case.

Petitioners and several amici curiae discuss the Act of State and sovereign immunity doctrines as if they were apposite here. Much judicial support is available for these doctrines, but these are not relevant to this case, other than for general principles such as comity and respect for foreign sovereignty.

---

[3]The 1975 MITI statement expressly recognized "the importance of televisions as one of Japan's export products" (Pet. App. 13a) and states that it directed Japanese television companies to enter an agreement "with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States . . ." and "minimum prices at which televisions could be sold for exportation to the United States . . . ." (Pet. App. 13a).

Unlike the "Act of State" cases, such as *Banco Nacional de Cuba v. Sabbatino*,[4] the Court can consider the "sovereign compulsion" issues in this case without sitting in judgment on the acts of another government done within its own territory, nor need it pass on the validity of foreign acts of state so as to hinder foreign policy. Even if the court in this case reviews MITI's directives, that would not constitute an attack on the validity of the decrees or a challenge of MITI's interpretation of them. Certainly Japan's "sovereign immunity" is not an issue here.

Even if the principles underlying the Act of State doctrine are considered as relevant, as noted in *Sabbatino*, application of the doctrine is not required by international law[5], and is not a constitutional issue.[6] Most countries do not apply it rigidly and civil law nations make exceptions for acts contrary to their sense of public order[7]. Justice White's dissent in *Sabbatino* notes that courts of Japan, England and France have examined a fully executed foreign "Act of State" expropriating property[8]. Thus, even if MITI's directive was analogized to an "Act of State," it would not constitute a *per se* defense.

D. The Sovereign Compulsion Concept has Limited International Acceptance.

A "sovereign compulsion" concept has not yet been given much credence by the courts. Petitioners' brief cites the relevant authorities at pages 36-46. They are all American cases. The Semiconductor Industry Association notes the

[4]376 U.S. 398 (1964)

[5]Id. at 421

[6]Id. at 423

[7]Id. at 421 n.21

[8]Id. at 440 n.1

complete absence of anything in the brief of the amici governments as to the extent of international acceptance of the "sovereign compulsion" concept. Just when and to what extent is it now applied internationally? Semiconductor Industry Association members compete worldwide against both the petitioners and major companies from the nations speaking here as amici curiae. To our knowledge, never have we met the doctrine overseas.

Sovereign immunity and Act of State doctrines have international acceptance, although the extent of the application of these doctrines varies by country. However, as to "sovereign compulsion" we note that the citations in the amici brief are limited to U.S. cases, and there are but few of these. There are no claims that their nation's courts have adopted, or even favorably commented upon, a policy for them to immunize foreign companies from compliance with their laws, based solely upon the foreign government's representation that it compelled the violating action. We do not urge that strict reciprocity is required in applying comity and similar concepts,[9] but the extent of a doctrine's recognition by foreign governments sheds much light on whether it is a concept where foreign relations issues are truly present in the case.

There is little evidence that the United States Government has sought such an exemption from foreign laws for American companies operating within foreign nations, and it certainly has not done so as to commercial activities overseas. Laws which have exempted certain activities from application of U.S. antitrust laws do not purport to grant American companies the right to violate foreign laws.

[9]*Sabbatino*, id at 411-2, holds that reciprocity is not a requirement for an Act of State defense but notes that it does apply to recognition of foreign judgments.

It may also be relevant to consider whether the MITI directives and compulsion here in issue gave appropriate consideration to United States laws and policies in the first instance. Respondents offer to prove that petitioners' acts constituted antitrust violations, and the Court of Appeals held that was a tryable issue in this case. The Government of Japan says that petitioners must be exonerated because MITI told them to do it. MITI does not state whether or not it knew whether or not the acts it says it directed were violations of U.S. law, or whether it ever considered that possibility. Principles of comity might suggest that a foreign government might refrain from directing its nationals to engage in activities directed at U.S. domestic markets which are illegal here.

Surely MITI could not have expected that it could confer immunity from U.S. law if the activities it directed were to be performed within United States territory. The result should be no different if actions designed specifically to affect U.S. commerce were performed outside American territory. Principles of comity ought to cause a foreign sovereign to try to refrain from so acting. If it does not refrain but instead urges or compels its nationals to perform acts directly affecting U.S. commerce, it should not later be permitted to claim that its governmental compulsion will be a *per se* defense to enforcement here.

No charge is made in this brief that law violation was intended, or that the Court should inquire into the issue. Affirmance of the Court of Appeals decision would not require that. But the Court could note that petitioners were huge international companies with extensive operations in this country and worldwide and were not likely to be involved in these activities inadvertently. They had the best available legal advice from major American law firms. MITI states that it intended that the activities would involve

exports to the United States. Agreements as to prices are *per se* antitrust violations here. Agreements for allocation of customers always are suspect under the antitrust laws. It is difficult to believe that was not generally known in Japan. When activity is directed expressly towards sales in the United States, a government which expects its directives to be accepted ought first to insure that what it compels its nationals to do is not illegal here. Comity should work both ways. We refer the Court to J. Atwood and K. Brewster, *Antitrust and American Business Abroad*, 267 (2d Ed. 1981), stating:

> "Further, rules of comity impose limitations on the extraterritorial application of foreign government decrees . . . ."

E. The Validity of Voluntary Restraints Has No Relevancy to the Claim of "Sovereign Compulsion."

Both petitioner and amici curiae have referred to the benefits of voluntary export restraints of foreign governments. They point to United States Government assurances that our antitrust laws are not violated by them. That argument is little more than a red herring. Affirmance of the Court of Appeals decision would not cast any doubt on the validity of reasonable voluntary restraint programs.

Wholly aside from the real question of whether United States Government assurances of legality prevent a private antitrust suit,[10] it is not contended that foreign government export controls and mandated restraints on exports are a violation of U.S. antitrust laws. It is doubtful, however, if

[10]Contrast the position of domestic companies under Department of Justice Business Review procedures which are normally very limited and do not provide any immunity from suit either by private parties or by the government itself if it changes its mind. (28 C.F.R. § 50.6)

the voluntary restraint program of the United States ever did or should go so far as to immunize foreign companies—as distinct from the foreign government itself—from any prosecution for any agreements as to prices or allocation of customers. It is likely that such statements as our government has given to foreign governments on voluntary restraints can reasonably be interpreted as sound advice on the scope of our antitrust laws, not as an exemption from them.

In any event, all the benefits from voluntary restraints can be effectively achieved by a foreign government through governmentally administered export controls. There is no need for the foreign government to delegate to a group of its companies the right to reach agreements as to prices and customers to achieve those objectives, particularly if those agreements would constitute violations of U.S. law except for such foreign governmental directive. It may be proper for a foreign state to restrict exports, but it is an entirely different matter to suggest that it should have unquestioned freedom to assure orderly export markets.

Nevertheless, this case does not raise such issues. MITI's actions were not a part of any voluntary restraint program. Voluntary restraint simply is not involved here.

F. There is No Basis for A Distinction Between Private Enforcement and Governmental Enforcement of the Antitrust Laws.

The brief for the United States as amicus curiae supporting petitioners, beginning at page 20, expressly recognizes that there are issues of scope concerning the foreign compulsion defense. The complexity of the entire issue is well illustrated by this discussion. Foreign government compulsion simply cannot be a *per se* defense to U.S. law violation

based upon a foreign government's mere claim of that compulsion.

The United States Government agrees that the concept should not always be applied. At page 23 of its brief, the United States government seeks to reserve to itself the right to make that decision. A novel principle is announced which differentiates between private treble damage antitrust suits and antitrust actions brought by the United States Government. At least as to antitrust cases, that idea has no basis in law. Although the United States Government can and does exercise judgment on the wisdom of bringing particular antitrust enforcement actions, the antitrust laws as enacted by Congress do not give the government the sole right of enforcement. Citation of authority is not necessary for the proposition that private parties have an independent right of enforcement, which is encouraged by the treble damage policy. Nowhere does the statute provide for executive branch interference or limitation of the Congressional grant of this private enforcement right.

The courts in all cases may always be open to representations by the Government as to foreign policy considerations, international law, comity and deference to the legitimate acts of foreign governments. Appearance of the Solicitor General to state such views is commonly accepted. Also, where foreign policy is entrusted to the executive branch, its decisions may on occasion have binding effect. However, as to application of domestic antitrust laws for conduct directed at U.S. commerce, international considerations cannot be binding upon the courts in the absence of appropriate duly adopted treaties or executive agreements.

This is not merely a procedural issue. To adopt it would be equivalent to establishing a substantive rule of law which would exempt conduct from enforcement of the antitrust

laws in some circumstances, and not exempt the same conduct in other circumstances. That would be done solely upon the decisions of the antitrust enforcement authorities of the United States Government. Regardless of any merit to such a concept, that is not the Congressional mandate under the antitrust laws.

G. The Facts of This Case Are Not Appropriate for Applying A "Sovereign Compulsion" Concept.

If, in the opinion of this Court, some ruling on the issue of sovereign compulsion is necessary, we submit that this is not an appropriate case for recognizing it as a defense.

Although often discussed, the concept has been applied only once.[11] In *Interamerican Refining Corp.* v. *Texaco Maracaibo Inc.*, 307 F. Supp. 1291 (D. Del. 1970), political expatriates from Venezuela attempted to set up business in New York to resell oil purchased in Venezuela for bunker fuel and into international markets. They were *persona non grata* with the regime in power, which prohibited sales to them. The resulting refusals to sell by defendants were held not to justify the antitrust suit. The government's directives essentially involved internal Venezuela politics, and no imports into the United States were affected. The governmental interest in that case was "political" in nature.[12] The facts

[11]At least since the broad language in *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909) has been limited by this Court. See Fugate, *Foreign Commerce and the Antitrust* Laws 143 (3d. ed. 1982)

[12]See *J. Atwood and K. Brewster, Antitrust and American Business Abroad* 248 (2d ed 1981) discussing a foreign governmental role which was not decisive because "no special political factors" were involved, citing *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979).

of all the other cases so far have not fit into the rule.[13] Apparently, most courts faced with tangible facts have seen the potential pitfalls in a doctrine which exempts private activities from compliance with otherwise applicable U.S. laws merely because a foreign sovereign claims it legitimized those activities. Any dicta stating that actual compulsion would be binding is not very persuasive for that reason, and at least one court has questioned such broad statements.[14]

Before this Court further sanctions the concept on a summary judgment record, some principles and distinctions require consideration. The briefs of amici governments attempt to oversimplify the issue. The doctrine cannot really mean that a valid U.S. law cannot be enforced as to activities otherwise unlawful simply because a foreign government represents that it directed the violators to engage in the violating activity. For example, no one would seriously contend that a foreign directive would legitimize an agreement reached on foreign soil to commit a felony involving murder or deadly injury committed in the United States. If the intended purpose of the mandated agreement

[13]See *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690 (1962); *Mannington Mills, Inc. v. Congoleum Corp.* 595 F.2d 1287 (3d Cir. 1979); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Dei. 1978); *Linseman v. World Hockey Ass'n.*, 439 F. Supp. 1315 (D. Conn. 1977).

[14]See comment in *Atwood and Brewster, supra*, note 12 at 264 recognizing such authority but stating that there is little precedent and noting (n.143) *Sabre Shipping Corp. v. American President Lines*, 285 F.Supp. 949, 954 (S.D. N.Y. 1968), *cert. denied*, 407 F.2d 173 (2d Cir. 1969), *cert. denied, sub nom Japan Line, Ltd. v. Sabre Shipping Corp.*, 395 U.S. 922 (1969). (A directive of the Japanese government, if proven, "would not necessarily immunize [Japanese firms] from prosecution or civil responsibility for acts done in United States commerce").

was legal, but the participants went beyond the mandate, their acts would not be legitimized.

Prior cases have recognized implicitly that the concept cannot be so applied—that it has some limits. The Japanese Government's position in this case seems to reflect an attempt to respond to these limits. For example, the clear compulsion which was held to be absent in the *Swiss Watch* case[15] is claimed here. The amici brief of the Government of Japan at page 5 goes further and affirms that whatever was done by petitioner was mandated. No evidence of any compulsion contemporaneous with the activities in question (the 1960's) has been offered. The first representation of the existence of compulsion apparently came in MITI's 1975 statement, five years after the NUE complaint was filed. In light of this broadening of the governmental representations and this sequence of events, we question whether a federal court should eschew some independent look at the timing and extent of the claimed compulsion.

SIA does not suggest any need to examine into the validity or scope of MITI decrees in this case, but it may be helpful to suggest some possible limits which the courts might apply to extraterritorial effects of foreign government directives as applied to U.S. commerce. First, it should be noted that courts have reviewed governmental actions and recognized limits, as is evidenced by the court's decision in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) *cert. denied*, No. 84-1761 (June 1985). Criteria to be applied stated in generalities are not particularly helpful, except as a starting point. They seem rooted in the past where little recognition seemingly was given to the present day fact of actual participation by foreign governments in promotion of exports, limitation of imports and support for commercial activities for their nationals. In any event, it is doubtful if the facts of this case bring it within the four criteria listed by *Atwood & Brewster*.[16]

[15] *United States v. Watchmakers of Switzerland Info. Center*, 1963 Trade Cas. ¶ 70-600 (S.D. N.Y. 1962).

Amicus submits that before a foreign government's policies or directives are given external or extraterritorial effect, that effect should be incidental to a basic internal government interest. Extraterritorial effect should normally not be the primary objective of the decree. Except in rare cases, such as *Interamerican Refining Corp. v. Texaco Maracaibo, supra*, any government directive targeted towards commerce in another designated nation (as distinct from directives generally applicable to international relations) should not fall within the doctrine. That is probably the real basis for the holding in the *Swiss Watch* case, *supra*. Government directives designed to achieve commercial objectives should rarely be entitled to deference. This comports with principles applicable to sovereign immunity and the Act of State doctrines.[17] The more specifically the commercial motive of a decree relates to a single industry, the less likely it is that the decree should be provided recognition.

In a case where a governmental directive relates to commercial activities, if it is designed to apply to a specific industry (e.g., television), if it is directed toward trade with a specific other nation (e.g., the United States) and par-

[16] *Supra*, note 12 at 268.

[17] See *Atwood and Brewster, supra*, note 12 at 250 as to Acts of State and 769 as to sovereign compulsion, citing Justice Department opposition to sovereign compulsion as a defense where the foreign government was acting in a commercial rather than governmental capacity.

ticularly if it delegates the implementation of the policy to the countries' private companies so that rules and details of the program and its enforcement are essentially delegated to those private companies,[18] then we can see few justifications for giving it any deference. The motives of the foreign government may be pure, such as to preserve good international trade, but the motive could also be to advance the commercial and international trade interests of the promulgating government at the expense of companies of the targeted nation. No United States Court should try to decide which of these may have been the true motive, or which was the dominant one, since the decree should have no conclusive effect in either event as applied to U.S. commerce.

Amicus SIA does not underestimate the importance of the principles which lie behind the urgings of the amici governments. However, SIA urges a balancing of these principles against the objectives of our antitrust and other applicable laws. In doing so, abstract principles may need to give way to realities of international commerce. Unlike our government, governments of many other nations actively participate in their companies' business endeavors. Facts relevant to such participation are not readily available to this Court, except in a trial record. Such facts may affect a decision on issues such as alleged "sovereign compulsion."

CONCLUSION

The "sovereign compulsion" doctrine so far is little more than an academic concept, which has been enunciated primarily in cases where it was not applied and in situations where the recognized doctrines of sovereign immunity and

[18]See *Continental Ore*, *supra*, note 13; *Atwood and Brewster, supra*, note 12 at Sec. 8.16 questioning application to delegated activities.

Act of State were not appropriate. Before more life is breathed into it, its implications must be fully explored. SIA does not claim competence to comment on all aspects of the concept, but as related to commercial activity, fair antitrust enforcement and international trade, SIA has a strong interest. We point to the *Swiss Watch* case[19] which involved comprehensive foreign government promotion of a national industry, and where the "sovereign compulsion" concept was nevertheless found not to apply. The only appropriate conclusion for this Court in this case on this issue is that no "sovereign compulsion" doctrine can reasonably be recognized on this record without a full trial.

If the concept is to be reviewed by the Court, we submit that the concept cannot be recognized where, as here, the foreign governmental directives related to promotion of the commercial interests of the foreign nation applicable to a specific industry, directed against the United States and having no applicability or intended effect upon the internal affairs of Japan.

It is not an unfriendly act to recognize limits to the concept. No argument has been made that it has international acceptance, or has been applied by courts of the amici nations, including Japan.

[19]*United States v. Watchmakers of Switzerland Info. Center, supra.*

Where the concept impinges on American principles as vital as antitrust, the courts must resolve the conflict. No *per se* defense is appropriate.

Respectfully submitted,

Joseph R. Creighton
Counsel of Record
1601 S. Miramar Avenue
Indialantic, Florida 32903
(305) 727-9137

Counsel for Semiconductor Industry Association

September 6, 1985